

# *Fordham International Law Journal*

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*Volume 16, Issue 4*

1992

*Article 9*

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## The United States Should Prosecute Those Who Conspired to Assassinate Former President Bush in Kuwait

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# The United States Should Prosecute Those Who Conspired to Assassinate Former President Bush in Kuwait

John G. McCarthy

## **Abstract**

This article briefly explores the implications of criminal acts directed against U.S. citizens when traveling abroad. It reviews the basis for providing legal protection to U.S. citizens under both international criminal law and U.S. law. It argues that the U.S. government should aggressively seek the extradition of the conspirators involved in the assassination plot against Mr. Bush. The Kuwaiti government arrested sixteen individuals for conspiring to assassinate Mr. Bush during a visit to Kuwait.

## RECENT DEVELOPMENT

# THE UNITED STATES SHOULD PROSECUTE THOSE WHO CONSPIRED TO ASSASSINATE FORMER PRESIDENT BUSH IN KUWAIT

*John G. McCarthy\**

### INTRODUCTION

In April 1993, the Kuwaiti government arrested sixteen individuals for conspiring to assassinate former U.S. President George Bush during a visit to Kuwait. Mr. Bush had been invited to Kuwait following his term in office to commemorate the victory of the coalition forces over Iraq during the Persian Gulf War.<sup>1</sup> This latest terrorist plot against a U.S. citizen abroad underscores the need of the U.S. government to take a stronger stance in protecting its nationals beyond U.S. borders. Additionally, the United States must also punish the individuals involved in these heinous crimes.

This article will briefly explore the implications of criminal acts directed against U.S. citizens when travelling abroad. It will review the basis for providing legal protection to U.S. citizens under both international criminal law and U.S. law. It argues that the U.S. government should aggressively seek the extradition of the conspirators involved in the assassination plot against Mr. Bush, asserting jurisdiction under the passive personality principle.

### I. *THE CONSPIRACY TO ASSASSINATE FORMER PRESIDENT BUSH*

On August 2, 1990, 120,000 troops from Iraq invaded Kuwait.<sup>2</sup> Several days later, former President Bush, with the sup-

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1. *Paper Reports Plot to Assassinate Bush*, HOUS. CHRON., Apr. 26, 1993, at A1.

2. R.W. Apple, Jr., *Invading Iraqis Seize Kuwait And Its Oil, U.S. Condemns Attack*,

port of the U.S. Congress, authorized the deployment of U.S. troops into Saudi Arabia to prevent further aggression by Iraq.<sup>3</sup> The United Nations ("U.N.") immediately condemned the Iraqi invasion and, in a resolution, demanded the immediate and unconditional withdrawal of Iraqi forces from Kuwait.<sup>4</sup> On November 29, 1990, following Iraq's refusal to withdraw, the U.N. Security Council authorized U.N. member states "to use all necessary means to uphold and implement" this resolution should Iraq fail to pull back from Kuwait by January 15, 1991.<sup>5</sup> Iraq again refused to withdraw its forces.<sup>6</sup> On January 16, 1991, former President Bush authorized the use of U.S. military force in air raids on targets in Kuwait and Iraq, including the Iraqi capital of Baghdad.<sup>7</sup> After bombarding Iraq for

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*Urges United Action*, N.Y. TIMES, Aug. 3, 1990, at A1, col. 6; see Alissa Pyrich, Recent Development, *United Nations: Authorizations of Use of Force*, 32 HARV. INT'L L.J. 265 (1991). Iraq sought to resolve disputes it had with Kuwait concerning Iraqi interest in Kuwaiti territory and in disputed oil near the border shared by the two countries. See Rex J. Zedalis, *Burning of the Kuwaiti Oilfields and the Laws of War*, 24 VAND. J. TRANS. L. 711, 712 n.2 (1991). A few days after the invasion, Iraq announced that it had annexed Kuwait as one of its provinces. R.W. Apple, Jr., *U.S. May Send Saudis A Force of 50,000; Iraq Proclaims Kuwait's Annexation*, N.Y. TIMES, Aug. 9, 1990, at A1, col. 6. Iraq's claim to the land of Kuwait dates back almost a century to when Great Britain carved Kuwait out of the Iraqi province of Basra. See Shaw J. Dallal, *International Law and the United Nations' Role in the Gulf Crisis*, 18 SYRACUSE J. INT'L L. & COM. 111, 115-16 (1992) (discussing historical background to Iraq's invasion of Kuwait).

3. Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1. The government of Saudi Arabia had requested U.S. assistance in this matter. *Id.* Operation Desert Shield included military forces from a dozen countries and ships from fourteen countries, including Great Britain, France and the U.S.S.R.. James LeMoyne, *The World*, N.Y. TIMES, Oct. 21, 1990, § 4, at 2; see Dallal, *supra* note 2, at 112.

4. U.N. Security Council Res. 660 (Aug. 2, 1990), reprinted in 29 I.L.M. 1325 (1990).

5. U.N. Security Council Res. 678 (Nov. 29, 1990), reprinted in 29 I.L.M. 1565 (1990). The United States played a large role in persuading other members of the U.N. to vote for Resolution 678. See W. Michael Reisman, Comment, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203, 205-06 (1991). Mr. Reisman noted that the United Nations strong stance in this case was due to "United States initiatives and a commitment by President Bush to use the United Nations. . . ." *Id.* at 206.

6. Maureen Dowd, *U.S. Weighs Timing Of Attack Against Iraq As Deadline Passes And Diplomacy Fails*, N.Y. TIMES, Jan. 16, 1991, at A1, col. 1.

7. Michael R. Gordon, *War in the Gulf*, N.Y. TIMES, Jan. 18, 1991, at A1; Andrew Rosenthal, *U.S. And Allies Open Air War On Iraq; Bomb Baghdad And Kuwaiti Targets; 'No Choice' But Force, Bush Declares*, N.Y. TIMES, Jan. 17, 1991, at A1, col. 5. In the days prior to the first air strikes, Congress had taken measures to authorize the offensive use of U.S. forces in the Persian Gulf. See Adam Clymer, *Congress Acts to Authorize War in Gulf*, N.Y. TIMES, Jan. 13, 1991, § 1, at 2.

over a month with air attacks, the U.S.-led coalition ground forces entered Kuwait to expel the Iraqi forces.<sup>8</sup> On February 27, 1991, President Bush announced that Kuwait had been liberated.<sup>9</sup>

To commemorate the U.S. effort in the war, and to honor President Bush with an award for his leadership during the crisis, Sheik Jaber al-Ahmed al-Sabah, the Emir of Kuwait, invited Mr. Bush, his former advisors, and his family to Kuwait.<sup>10</sup> Mr. Bush was in Kuwait from April 14 to April 16, 1993.<sup>11</sup> During his visit, Kuwaiti officials arrested sixteen individuals for conspiring to assassinate the former U.S. president.<sup>12</sup> One other suspect remains at large.<sup>13</sup> Twelve of the seventeen individuals implicated in the assassination conspiracy are Iraqi nationals.<sup>14</sup> The suspects confessed that they intended to use a car bomb and other explosives to assassinate Mr. Bush.<sup>15</sup> U.S. officials have determined that crucial components of the car bomb were designed by Iraqi intelligence.<sup>16</sup> Furthermore, some of the suspects have indicated that they received assistance from the Iraqi government in attempting to carry out their plan.<sup>17</sup>

As news of these events became available in the United States, high ranking officials in the Clinton Administration considered possible U.S. responses. They discussed whether the current Administration should seek to have the suspects extradited from Kuwait, and force them to stand trial in the

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8. R.W. Apple, Jr., *Allied Forces Storm Iraq And Kuwait After Hussein Ignores U.S. Deadline; Bush Sees A Swift, Decisive Victory*, N.Y. TIMES, Feb. 24, 1991, § 1, at 1.

9. Andrew Rosenthal, *Bush Halts Offensive Combat; Kuwait Freed, Iraqis Crushed*, N.Y. TIMES, Feb. 28, 1991, at A1, col. 1.

10. Nadine Brozan, *Chronicle*, N.Y. TIMES, Apr. 13, 1993, at B5.

11. *Id.*

12. *Paper Reports Plot to Assassinate Bush*, HOUS. CHRON., Apr. 26, 1993, at A1.

13. Douglas Jehl, *Iraqi Tells F.B.I. He Led Attempt to Kill Bush, U.S. Officials Say*, N.Y. TIMES, May 20, 1993, at A1.

14. *Id.*

15. Douglas Jehl, *Car Bomb Found Near Bush Said to Suggest Hand of Iraq*, N.Y. TIMES, May 11, 1993, at A1.

16. *Id.*

17. Douglas Jehl, *Iraqi Tells F.B.I. He Led Attempt to Kill Bush, U.S. Officials Say*, N.Y. TIMES, May 20, 1993, at A1. Following the expulsion of Iraqi forces from Kuwait, Iraq threatened to make use of terrorism against targets outside Iraq. See U.N. Security Council Res. 687 (Apr. 8, 1991), reprinted in 30 I.L.M. 847, 849 (1991).

United States.<sup>18</sup> As the investigation progressed, however, the Kuwait government announced that it would try the suspects in Kuwait rather than extradite them to the United States.<sup>19</sup>

The suspects' trial began in Kuwait on June 5, 1993.<sup>20</sup> On the first day of the trial for fourteen of the sixteen arrested suspects, two of the group's leaders pleaded guilty and testified to the conspiracy.<sup>21</sup> These two defendants confessed that they were recruited by Iraqi intelligence agents to travel to Kuwait with a Toyota Land Cruiser packed with explosives; they were to park the vehicle near Kuwait University where Mr. Bush was to receive an honorary degree.<sup>22</sup> The trial was adjourned until June 26, 1993.<sup>23</sup>

Another possible response to the conspiracy discussed by White House officials was direct retribution against the government of Iraq.<sup>24</sup> The Central Intelligence Agency ("C.I.A.") and the Pentagon were early proponents of punishing Iraq for ordering this assassination attempt on a former U.S. president.<sup>25</sup> As the trial of the alleged conspirators began, U.S.

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18. Douglas Jehl, *U.S. Cites Evidence in a Plot on Bush*, N.Y. TIMES, May 9, 1993, § 1, at 9.

19. Douglas Jehl, *Car Bomb Found Near Bush Said to Suggest Hand of Iraq*, N.Y. TIMES, May 11, 1993, at A1. The reporter indicated that this decision "remove[d] an option that had been under early consideration by the Clinton Administration." *Id.*

20. Jonathan C. Randal, *Iraqi Testifies He Was Hired To Kill Bush; Trial in Kuwait Begins For 14 Alleged Plotters*, WASH. POST, June 6, 1993, at A29. Some of the suspects could face the death penalty for their role in plotting to assassinate Mr. Bush. *Kuwait Says 12 Face Death in Reported Plot to Kill Bush*, N.Y. TIMES, May 17, 1993, at A11.

21. Youssef M. Ibrahim, *Suspects' Haste a Puzzle in Kuwait Trial*, N.Y. TIMES, June 13, 1991, § 1, at 22. The other twelve defendants pleaded not guilty. Douglas Jehl, *U.S. Defers Response to Iraqis' Plot Against Bush*, N.Y. TIMES, June 8, 1993, at A13.

22. Youssef M. Ibrahim, *Suspects' Haste a Puzzle in Kuwait Trial*, N.Y. TIMES, June 13, 1991, § 1, at 22.

23. *Id.* One of the defense lawyers, Najeeb al-Waqayan, said the postponement was due to a defense request "to have more time to look at the evidence." *Id.* As of the publication of this article, the trial of the conspirators was proceeding in the Kuwaiti court. See Douglas Jehl, *U.S. Says It Waited For Certain Proof Before Iraq Raid*, N.Y. TIMES, June 29, 1993, at A1.

24. Douglas Jehl, *U.S. Cites Evidence in a Plot on Bush*, N.Y. TIMES, May 9, 1993, § 1, at 9.

25. *Id.* President Clinton's advisers said that "top officials at the Central Intelligence Agency and the Pentagon had argued that a state-ordered conspiracy against a former President's life requires punishment of the Government responsible." *Id.* Members of the news media also argued that strong U.S. action was called for in response to Iraq's participation in the conspiracy. See Jim Hoagland, *Punishing Foreign Thugs; Bush took the Soft Approach against Libya for Pan Am 103; now Saddam Stalks Bush*, WASH. POST, May 24, 1993, at A19.

newspapers reported that the Clinton Administration had decided to await the conclusion of the trial before taking retaliatory action against Iraq.<sup>26</sup>

On Friday, June 25, 1993, however, President Clinton ordered a missile strike on the headquarters of Mukhabarat, the Iraqi intelligence service in Baghdad.<sup>27</sup> In the early morning hours of Sunday, June 27, U.S. warships in the Red Sea and the Persian Gulf fired Tomahawk cruise missiles at the intelligence headquarters.<sup>28</sup> The missiles destroyed a wing of the intelligence agency's office and other buildings within the compound that housed computers and communications equipment.<sup>29</sup> Following the missile attack, the United States presented evidence to the U.N. justifying the strike.<sup>30</sup> The U.S. delegation

26. Douglas Jehl, *U.S. Defers Response to Iraqi's Plot Against Bush*, N.Y. TIMES, June 8, 1993, at A13. These reports, which were attributed to unidentified U.S. officials, were incorrect. Douglas Jehl, *Administration Finds Just Keeping a Secret Can Be a Triumph*, N.Y. TIMES, June 28, 1993, at A6. Senior White House officials insisted, however, that there was no deliberate effort to mislead the press and that the sources relied upon must not have had full knowledge of the Administration's planning. *Id.*

27. Eric Schmitt, *U.S. Says Strike Crippled Iraq's Capacity for Terror*, N.Y. TIMES, June 28, 1993, at A6, col. 1. President Clinton received the final investigative report on the assassination plot from the C.I.A. and the Federal Bureau of Investigation ("F.B.I.") on Wednesday, June 23 and he read it on Thursday, June 24. Douglas Jehl, *Administration Finds Just Keeping a Secret Can Be a Triumph*, N.Y. TIMES, June 28, 1993, at A6. President Clinton settled on the military response on Thursday evening. *Id.* He formally ordered the strike on Friday, June 25, but the United States delayed the strike by a day so that it would not fall on the Muslim sabbath. Eric Schmitt, *U.S. Says Strike Crippled Iraq's Capacity for Terror*, N.Y. TIMES, June 28, 1993, at A6, col. 1.

28. Eric Schmitt, *U.S. Says Strike Crippled Iraq's Capacity for Terror*, N.Y. TIMES, June 28, 1993, at A6, col. 1. The missiles were fired from the U.S. destroyer *Peterson* in the northern Red Sea and the U.S. cruiser *Chancellorsville* in the northern Persian Gulf at 12:22 a.m. (Baghdad time) on Sunday, June 27. *Id.* The ships fired twenty-three missiles at the target. *Id.* One additional missile misfired. *Id.*

29. *Id.* Twenty of the twenty-three missiles fired landed in the Iraqi intelligence compound between 2:00 a.m. and 2:05 a.m. (Baghdad time); sixteen of those hit their targets. *Id.* There were three errant missiles which landed 100 to 600 yards off target and hit residential buildings, reportedly causing civilian casualties. *Id.*

30. Richard Bernstein, *U.S. Presents Evidence to U.N. Justifying Its Missile Attack on Iraq*, N.Y. TIMES, June 28, 1993, at A7. The U.S. delegate to the United Nations, Madeleine K. Albright, reviewed the events of the prior two months, showed evidence linking key components of the car bomb to Iraqi intelligence and explaining the U.S. position that its actions were consistent with Article 51 of the U.N. Charter. *Id.* Ms. Albright noted that "[d]uring and immediately after the Persian Gulf war, the Saddam Hussein Government, through its controlled media, indicated that Iraq would hunt down and punish President Bush even after he left office." *Excerpts from U.N. Speech: The Case for Clinton's Strike*, N.Y. TIMES, June 28, 1993 (statement by Madeleine K. Albright, U.S. delegate to United Nations). She argued that the U.S. "re-

to the U.N. did not ask for a resolution or statement approving its actions; rather, the U.S. simply wished to inform the world of the reasons for its actions.<sup>31</sup>

The U.S. military response to Iraq's terrorist activities is an important step in deterring state sponsored terrorism. The United States, however, must follow the strong military measures taken against Iraq with strong judicial action taken against the individuals involved in the assassination plot. The United States has the authority to apply its laws to these terrorists under international criminal law. An analysis of international criminal jurisdiction will assist in understanding how the United States can prosecute these conspirators.

## II. CRIMINAL JURISDICTION IN INTERNATIONAL LAW

### A. General Principles of Criminal Jurisdiction

In the 1930s, researchers from Harvard Law School undertook a study of international criminal law in order to draft an international convention on criminal jurisdiction. In 1935, the results of the study were published by the faculty of Harvard Law School (the "Harvard Research Project").<sup>32</sup> The researchers analyzed how the countries of the international community asserted jurisdiction<sup>33</sup> in their criminal statutes. The Harvard Research Project noted that countries utilized five bases of jurisdiction in criminal cases: territoriality, na-

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sponded directly, as we are entitled to do, under Article 51 of the United Nations Charter, which provides for the exercise of self defense in such cases. . . . [O]ur response has been proportional and aimed at a target directly linked to the operation against President Bush." *Id.* Article 51 of the U.N. Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations." U.N. CHARTER art. 51.

31. Richard Bernstein, *U.S. Presents Evidence to U.N. Justifying Its Missile Attack on Iraq*, N.Y. TIMES, June 28, 1993, at A7 ("One American official explained the move as 'the most efficient way of letting the world know our reasons for doing what we did.'").

32. *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. 443 (Supp. 1935) [hereinafter *Harvard Research Project*].

33. For purposes of this article, "[j]urisdiction over criminal offenses means the power of a given court to inquire into and determine whether or not an alleged offense has been committed by a designated accused person, and to apply the penalty for an offense so determined." Albert Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316, 319 (1925) (emphasis and footnote omitted).

tionality, protective, universality and passive personality.<sup>34</sup> Since the Harvard Research Project was published, numerous courts and scholars have accepted its identified bases for jurisdiction.<sup>35</sup>

Territoriality jurisdiction is based on the occurrence of the criminal act within the country seeking to exercise jurisdiction over it.<sup>36</sup> The nationality principle relies on the fact that the accused is a national of the prosecuting country, which has an interest in retaining control over the acts of its nationals wherever they may be.<sup>37</sup> The protective principle depends on the concept that a country should be able to protect certain of its interests against criminal acts.<sup>38</sup> The universality principle is based on the theory that certain crimes are so egregious that

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34. *Harvard Research Project*, *supra* note 32, at 445.

35. See *United States v. Yunis*, 681 F. Supp. 896, 900 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982), *cert. denied*, 449 U.S. 1110 (1983); *Richard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); WILLIAM BISHOP, *INTERNATIONAL LAW CASES AND MATERIALS* 440 (1962); BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD PUBLIC ORDER* 564 (1980).

36. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); *Harvard Research Project*, *supra* note 32, at 445; see also I M. TRAVERS, *LE DROIT PENAL INTERNATIONAL LAW* 73 (1920). Territoriality is the most widely accepted of the five principles of jurisdiction. Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 152 (1974).

37. See Restatement (Third), *supra* note 36, § 402(2); *Harvard Research Project*, *supra* note 32, at 445, 519; see I TRAVERS, *supra* note 36, at 73; Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 202-03 (1983); see also *In re Di Lisi*, 7 I.L.R. 193 (Italy Cass. 1934) (affirming conviction of Italian national for conspiring in United States to forge travelers checks); *X v. Public Prosecutor*, 19 I.L.R. 226 (Neth. H.R. 1952) (affirming conviction of Dutch national for crime committed outside territory of Netherlands); *United States v. Peralta*, 941 F.2d 1003, 1010 (9th Cir. 1991) (affirming application of U.S. criminal statute to U.S. national for taking Nicaraguan citizen hostage in Mexico).

38. See RESTATEMENT (THIRD), *supra* note 36, § 403(3); *Harvard Research Project*, *supra* note 32, at 445, 543; I TRAVERS, *supra* note 36, at 73. Under the protective principle, jurisdiction is used to protect a security interest or the operation of governmental functions. See *Nusselein v. Belgian State*, 17 I.L.R. 136 (Belg. Ct. Cass. 1950) (holding Belgian courts had jurisdiction to try case involving foreign soldier for acts committed against safety of Belgium); *Public Prosecutor v. L.*, 18 I.L.R. 206 (Neth. S. Ct. 1951) (affirming conviction of Belgian national as accessory to counterfeiting currency of Netherlands when acts occurred in Belgium); Paust, *supra* note 37, at 209.

all nations have an interest in combatting them.<sup>39</sup> Under the passive personality principle,<sup>40</sup> a country exercises jurisdiction over a crime committed by a non-national outside of its territory because the victim is one of that country's nationals.<sup>41</sup> In extraditing the conspirators, the U.S. government should assert jurisdiction under the passive personality principle.

### B. *The Passive Personality Principle*

The passive personality principle stems from the duty of a state to protect its nationals abroad.<sup>42</sup> The passive personality principle traditionally has been the most controversial of the five accepted bases of criminal jurisdiction in international law.<sup>43</sup> In its early history, the principle came under fire in two

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39. See RESTATEMENT (THIRD), *supra* note 36, § 404; *Harvard Research Project*, *supra* note 32, at 445; 1 TRAVERS, *supra* note 36, at 73. Piracy and aircraft hijacking are two prime examples of "universal" crimes. See Jeffrey Allan McCredie, *Contemporary Use of Force Against Terrorism: The United States Response to Achille Lauro — Questions of Jurisdiction and Its Exercise*, 16 GA. J. INT'L & COM. L. 435, 439 (1986). The universality theory holds that certain crimes are so heinous that they should be considered *hostis humani generis* and that any state has jurisdiction to try the alleged offender. Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad; Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51, 82 n.100 (1977). *Hostis humani generis* means "enemies of the human race." BLACK'S LAW DICTIONARY 738 (6th ed. 1990).

40. The passive personality principle is also known as the passive nationality principle. See 1 TRAVERS, *supra* note 36, at 73.

41. *Harvard Research Project*, *supra* note 32, at 445. For an in-depth discussion of the passive personality principle and its history, see John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT'L L.J. 298 (1989-1990).

For purposes of this article, nationality shall mean "that quality or character which arises from the fact of a person's [relation] to a nation or state. Nationality determines the political status of the individual, especially with reference to allegiance . . . ." BLACK'S LAW DICTIONARY 1025 (6th ed. 1990) (emphasis in original).

42. See *United States v. Yunis*, 681 F. Supp. 896, 901 (D.D.C. 1988) (noting passive personality principle "recognizes that each state has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries"), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991); *The Lotus Case* (Fr. v. Turk.), P.C.I.J. (ser. A) No. 10, at 55 (1923), 2 HUDSON WORLD COURT REPORTS 20, 60 (1929) (Lord Finlay, dissenting) (finding passive personality principle "is defended on the ground that [it is] necessary for the 'protection' of the national. Every country has the right and the duty to protect its nationals when out of their own country").

43. See *Yunis*, 681 F. Supp. at 901 (recognizing that "[passive personality] principle is the most controversial of the five sources of jurisdiction"); *Harvard Research Project*, *supra* note 32, at 578-79. The controversy arises from the fact that jurisdiction is based solely on the victim's nationality, D.W. GRIEG, INTERNATIONAL LAW 307 (1970) (noting that "it would seem illogical to make jurisdiction depend upon the purely fortuitous fact of the victim's nationality"), and also from a concern over the

different cases. The first, *Cutting's Case*,<sup>44</sup> occurred in 1886 when Mr. Cutting, a U.S. national, was arrested by Mexican officials for criminally libeling a Mexican citizen in a Texas newspaper.<sup>45</sup> The United States protested Mexico's assertion of passive personality jurisdiction over the act.<sup>46</sup> The validity of the principle was not decided, however, because Mexico released Mr. Cutting for diplomatic reasons and both countries dropped the issue.<sup>47</sup>

In 1926, the passive personality principle became a source of conflict again, this time between France and Turkey in *The Lotus Case*.<sup>48</sup> France objected when Turkey asserted passive personality jurisdiction over the watch officer of a French steamer, the S.S. *Lotus*, that collided on the high seas with a Turkish collier, the *Boz-Kourt*.<sup>49</sup> The *Boz-Kourt* sank and eight of its Turkish seamen perished.<sup>50</sup> Turkish officials investigating the collision arrested the French watch officer and the Turkish ship's first officer.<sup>51</sup> Both were convicted and sentenced for manslaughter.<sup>52</sup> France objected to Turkey's assertion of jurisdiction and the two countries agreed to submit the matter to the Permanent Court of International Justice for resolution.<sup>53</sup> The Court's majority refused to address the validity of the passive personality principle because it determined that Turkey had other valid grounds for jurisdiction.<sup>54</sup> Each of the six dissenting judges, however, addressed the issue separately and rejected the principle as failing to conform to international law.<sup>55</sup> They argued that under international law, a country

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sovereignty interests of the country with territoriality jurisdiction. See *The Lotus Case* (Fr. v. Turk.), P.C.I.J. (ser. A) No. 10 (1923), 2 HUDSON, WORLD COURT REPORTS 20 (1929).

44. U.S. DEP'T OF STATE, 1887 FOREIGN RELATIONS 751 (1888), 2 MOORE, INTERNATIONAL LAW DIGEST 228 (1906).

45. See 2 MOORE, INTERNATIONAL LAW DIGEST at 229.

46. *Id.*

47. GRIEG, *supra* note 43, at 307.

48. *The Lotus Case* (Fr. v. Turk.), P.C.I.J. (ser. A) No. 10 (1923), 2 HUDSON, WORLD COURT REPORTS 20 (1929).

49. *Id.* at 10, 2 HUDSON, WORLD COURT REPORTS at 28.

50. *Id.*

51. *Id.*

52. *Id.* at 11, 2 HUDSON, WORLD COURT REPORTS at 28-29.

53. *Id.* at 12, 2 HUDSON, WORLD COURT REPORTS at 29.

54. *Id.* at 22-23, 2 HUDSON, WORLD COURT REPORTS at 38.

55. *Id.* at 34, 44-45, 57-58, 64, 91, 102; 2 HUDSON, WORLD COURT REPORTS at 47, 53-54, 61-62, 65, 81, 83, 88 (dissenting opinions).

could not apply its laws to alleged offenses committed by foreigners outside its territory.<sup>56</sup>

Despite the controversy caused by asserting the passive personality principle in *Cutting's Case* and *The Lotus Case*, numerous countries at the time enacted penal statutes encompassing the principle. As of 1935, the Harvard Research Project identified several countries that had codified some form of the passive personality principle in their criminal statutes.<sup>57</sup>

In more recent times, the passive personality principle has become increasingly accepted by the international community.<sup>58</sup> While the *Restatement (Second) of the Foreign Relations Law of the United States* rejected the principle,<sup>59</sup> the *Restatement (Third) of the Foreign Relations Law of the United States* notes that it is valid when applied to acts of international terrorism, not ordinary torts and crimes.<sup>60</sup>

In the 1970s, more countries enacted criminal statutes

56. *Id.* at 34, 44-45, 57-58, 64, 91, 102; 2 HUDSON, WORLD COURT REPORTS at 47, 53-54, 61-62, 65, 81, 83, 88 (dissenting opinions). For example, one of the dissenting judges stated that "[t]he criminal law of a State . . . cannot extend to offences committed by a foreigner in a foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction." *Id.* at 35, 2 HUDSON, WORLD COURT REPORTS at 47 (Loder, J. dissenting) (emphasis in original).

57. *Harvard Research Project*, *supra* note 32, at 578 (noting that following countries had criminal statutes with some type of passive personality jurisdiction: Albania, Brazil, China, Cuba, Czechoslovakia, Estonia, Finland, Greece, Guatemala, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, Peru, Poland, Rumania, San Marino, the Soviet Union, Sweden, Switzerland, Turkey, Uruguay, Venezuela and Yugoslavia).

58. See RESTATEMENT (THIRD), *supra* note 36, § 402, cmt. g; *United States v. Yunis*, 681 F. Supp. 896, 901 (D.D.C. 1988) ("Although many international legal scholars agree that the principle is the most controversial of the five sources of jurisdiction, they also agree that the international community recognizes its legitimacy."), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991); Paust, *supra* note 37, at 203 ("[T]he extraterritorial reach of such a law [premised upon] . . . the [passive personality principle] would not be in doubt as a matter of international law.").

59. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30(2) (1965). The *Restatement (Second)* avers "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." *Id.* § 30(2), cmt. e.

60. RESTATEMENT (THIRD), *supra* note 36, § 402, cmt. g. The *Restatement (Third)* acknowledges that the principle has been "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." *Id.*; see Catherine Collier Fisher, Note, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?*, 18 VAND. J. TRANSNAT'L L. 915, 931 n.65 (1985) (discussing views of both Restatements with respect to passive personality principle).

codifying the passive personality principle. Israel amended its criminal laws in 1972 to provide its courts with passive personality jurisdiction.<sup>61</sup> This jurisdiction applies to people accused of committing crimes outside Israel that harm or are intended to harm Israeli nationals or residents.<sup>62</sup> Three years later, France amended its penal code to include passive personality jurisdiction over all crimes committed abroad by foreigners to the prejudice of French nationals.<sup>63</sup> France's adoption of the passive personality principle is particularly noteworthy in light of the objections France made to Turkey's assertion of passive personality jurisdiction in *The Lotus Case*.<sup>64</sup>

The United States, like France, has also developed a favorable position on the validity of the passive personality principle. The principle has gained acceptance from the legislative, judicial, and executive branches of the U.S. government. Over the past decade, the U.S. Congress has enacted legislation that relies on the passive personality principle for jurisdiction over certain crimes.

In 1984, Congress passed the Hostage Taking Act of 1984 (the "Hostage Taking Act"),<sup>65</sup> which grants jurisdiction over hostage takings committed by individuals outside the United States when the victims are U.S. nationals.<sup>66</sup> Two years later,

61. Penal Law Amendment (Offenses Committed Abroad) (Amendment No. 4) Law 5732, reprinted in 26 *LAWS OF THE STATE OF ISRAEL* (1971-72).

62. *Id.* The amendment provides:

The courts in Israel shall be competent to try in Israel under Israeli law a person who has committed abroad an act which would be an offence if it had been committed in Israel and which harmed or was intended to harm the life, person, health, freedom or property of a national or resident of Israel.

*Id.*

63. C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fr.). The French law states that "[a]ny foreigner, who beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national." Christopher L. Blakesley, *Jurisdiction As Legal Protection Against Terrorism*, 19 *CONN. L. REV.* 895, 938 n.140 (1987) (translating article 689, paragraph 1 of French Code of Criminal Procedure).

64. See *The Lotus Case*, (Fr. v. Turk.), P.C.I.J. (ser. A) no. 10, at 6 (1923), 2 *HUDSON, WORLD COURT REPORTS* 20, 24 (1929).

65. 18 U.S.C. § 1203 (1988).

66. *Id.* § 1203(b)(1)(A); see U.S. DEP'T OF JUSTICE, *HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS* 200 (1984) ("Congress chose to provide such protection for Americans by utilizing . . . the 'passive personality' (i.e., nationality of the victim) bases for extraterritorial jurisdiction under international law."). The Hostage Taking

Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (the "1986 ATA").<sup>67</sup> The 1986 ATA asserts passive personality jurisdiction over violent crimes committed abroad by foreigners that injure U.S. nationals.<sup>68</sup>

Finally, in October 1992, Congress amended the 1986 ATA as part of the Federal Courts Administration Act (the "1992 ATA").<sup>69</sup> Among the changes made by the 1992 ATA was the addition of a section defining key terms in the statute and another section providing victims passive personality jurisdiction in civil cases against the perpetrators of acts of "international terrorism."<sup>70</sup> The 1992 ATA defines international terrorism as involving activities that (1) are violent or danger-

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Act also provides jurisdiction when the accused is found in the United States or if the purpose of the hostage taking was to compel the U.S. government to act or abstain from acting as a condition of release. *Id.* § 1203(b)(1)(B) & (C).

67. 18 U.S.C. § 2331 (1988).

68. *Id.*

69. Pub. L. No. 102-572, § 103, 106 Stat. 4506, 4521-24 (1992).

These amendments had an interesting and arduous journey from proposed legislation to law. On April 19, 1990, Senator Charles E. Grassley of Iowa proposed the amendments as the Anti-Terrorism Act of 1990 (the "1990 ATA"). S. 2465, 101st Cong., 2d Sess. (1990); 136 CONG. REC. S4,567 (daily ed. Apr. 19, 1990). In October 1990, it was added as an amendment to the Military Construction Appropriations Act, 1991 (the "Appropriations Act"), but was later dropped by Senator Grassley due to a technical objection from the House of Representatives. 136 CONG. REC. S14,283-84 (daily ed. Oct. 1, 1990); *id.* at S17,704 (daily ed. Oct. 27, 1990) (statement by Sen. Grassley). Due to an enrolling error, however, the 1990 ATA was passed as part of the Appropriations Act and signed into law by President Bush on November 5, 1990. *See* Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250-53 (1990); *see also* 137 CONG. REC. S4,511 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley). The 1990 ATA was the law of the land for five months until it was repealed on April 10, 1991. *See* Pub. L. No. 102-27, § 402, 105 Stat. 130, 155 (1991). In the interim Senator Grassley once again introduced the amendments as a bill which was passed by the Senate on April 16, 1991. S. 740, 102nd Cong., 1st Sess. (1991); *see* 137 CONG. REC. S3,929 (daily ed. Mar. 21, 1991); *id.* S4,511-12 (daily ed. Apr. 16, 1991). The amendments finally became law on October 29, 1992. Pub. L. No. 102-572, § 103, 106 Stat. 4506, 4521-4524 (1992), 18 U.S.C.A. §§ 2331-2338 (West Supp. 1993).

70. Pub. L. No. 102-572, § 103, 106 Stat. 4506, 4521-4524 (1992), 18 U.S.C.A. §§ 2331-2338 (West Supp. 1993). Among some of the other amendments were to change the name of the chapter to "Terrorism" from "Extraterritorial Jurisdiction over Terrorist Acts Abroad Against United States Nationals", to provide for venue, to add a limitations period, and to provide federal courts with exclusive jurisdiction over cases brought under the act. 18 U.S.C.A. §§ 2334, 2335, 2337 (West Supp. 1993); *see* 18 U.S.C. ch. 113A (1988 & Supp. III 1991); 18 U.S.C.A. § 2333 (West Supp. 1993); *see also* 136 CONG. REC. S14,284 (daily ed. Oct. 1, 1990) (statement by Sen. Grassley) ("this amendment provides that any national of the United States, injured by an act of international terrorism . . . may sue in U.S. district court.").

ous to human life and violate U.S. or foreign criminal law; (2) appear to be intended to intimidate, coerce or influence civilians or a government; and (3) occur primarily outside U.S. territorial jurisdiction or transcend national boundaries.<sup>71</sup> Congress's continued statutory use of passive personality jurisdiction over the past decade evidences the United States' evolution from rejecting the principle to fully accepting its use in appropriate instances.

Similarly, the U.S. judiciary has accepted the passive personality principle. Numerous federal courts have relied on the principle in recent years. Since 1984, three U.S. courts of appeals have affirmed convictions relying on the principle for jurisdiction.

In *United States v. Benitez*,<sup>72</sup> the U.S. Court of Appeals for the Eleventh Circuit affirmed the conviction of a Colombian national for conspiring to murder U.S. Drug Enforcement Administration ("DEA") agents in Colombia.<sup>73</sup> The Eleventh Circuit held that the United States gained jurisdiction on the basis of both the passive personality and protective principles.<sup>74</sup> In 1991, the U.S. Court of Appeals for the District of Columbia Circuit also held that the passive personality principle was a valid basis of jurisdiction under U.S. and international law. In *United States v. Yunis*,<sup>75</sup> the court affirmed the conviction of a Lebanese national for hijacking a Jordanian airplane in the Mediterranean. U.S. nationals were aboard the plane during the hijacking. Asserting jurisdiction under the passive personality and universality principles, the U.S. government convicted Mr. Yunis.<sup>76</sup> Later that same year, the use

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71. 18 U.S.C.A. § 2331(1) (West Supp. 1993).

72. 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985).

73. *Id.* at 1313-15.

74. *Id.* at 1316. The court held that

jurisdiction exists in this case under [the protective and passive personality] principles. Under the protective principle, the crime certainly had a potentially adverse effect upon the security or governmental functions of the [United States]. Furthermore, the nationality of the victims, who are also United States government agents, clearly supports jurisdiction.

*Id.* (citations omitted).

75. 924 F.2d 1086 (D.C. Cir. 1991).

76. *Id.* at 1090-91. Mr. Yunis had argued that "the passive personality principle authorizes assertion of jurisdiction over alleged hostage takers only where the victims were seized because they were nationals of the prosecuting state." *Id.* at 1091. The appeals court noted, however, that "the statute in question reflects an unmistakable

of the passive personality jurisdiction was at issue in *United States v. Felix-Gutierrez*.<sup>77</sup> In that case, the U.S. Court of Appeals for the Ninth Circuit affirmed the conviction of a Mexican national for the murder of a DEA agent in Mexico.<sup>78</sup> The district court relied on passive personality, territoriality, and protective jurisdiction; the Ninth Circuit affirmed.<sup>79</sup>

The executive branch's acceptance of the passive personality principle is evidenced by an analysis of U.S. actions in the *Achille Lauro* affair.<sup>80</sup> In October 1985, members of the Palestine Liberation Front seized the *Achille Lauro*, an Italian cruise ship, and murdered one of the twenty-eight U.S. nationals on board.<sup>81</sup> To pacify the terrorists and encourage the release of the hostages, Egypt provided the hijackers with an aircraft.<sup>82</sup> Acting on President Reagan's orders, U.S. fighter pilots forced

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congressional intent . . . to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found." *Id.*

77. 940 F.2d 1200 (9th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3763 (May 17, 1993).

78. *Id.* at 1203.

79. *See id.* at 1204-05. The court noted that it "need not determine whether any of these . . . principles, standing alone would be sufficient" rather it held that cumulatively they provide jurisdiction in accord with international law. *Id.* at 1206.

The crime involved was the same one that the defendants in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), were convicted of participating in. *See* Mary Lynn Nicholas, Comment, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267 (1990-91) (analyzing Supreme Court's decision in *Verdugo-Urquidez* case).

80. *See* *United States v. Yunis*, 681 F. Supp. 896, 900-03 (D.D.C. 1988) (discussing U.S. assertion of passive personality jurisdiction in *Achille Lauro* affair), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991); Gerald P. McGinley, *The Achille Lauro Affair — Implications for International Law*, 52 TENN. L. REV. 691, 710-13 (1985). The U.S. executive branch has also shown its acceptance of the principle through the prosecutions of non-nationals by the U.S. Department of Justice, a part of the executive branch. *See, e.g.*, *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985).

81. *See Yunis*, 681 F. Supp. at 902-03; Judith Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 Are Safe; U.S. Assails Deal With Captors*, N.Y. TIMES, Oct. 10, 1985, at A1, col. 6.

82. Bernard Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy, Gunmen Face Trial In Slaying of Hostage*, N.Y. TIMES, Oct. 11, 1985, at A1, col. 6. The *Achille Lauro* was in the territorial waters of Egypt. Egypt allowed the Palestine Liberation Organization ("P.L.O.") to remove the hijackers from the ship and then allowed the hijackers to travel on an Egyptian commercial aircraft to Tunisia. Bernard Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy, Gunmen Face Trial In Slaying of Hostage*, N.Y. TIMES, Oct. 11, 1985, at A1, col. 6; Bernard Gwertzman, *State Dept Angry at Speedy Accord With Gunmen*, N.Y. TIMES, Oct. 10, 1985, at A1, col. 3; William E. Smith, *The Voyage of the Achille Lauro*, TIME, Oct. 21, 1985.

the hijackers' aircraft to land in Italy.<sup>83</sup> The United States, again relying on the passive personality principle, requested that Italy extradite the offenders to stand trial in the United States for the murder of the U.S. national.<sup>84</sup> Although Italy refused to extradite the offenders,<sup>85</sup> the actions of the U.S. executive branch illustrated U.S. recognition of the passive personality principle.<sup>86</sup>

While the passive personality principle continues to be a controversial basis of jurisdiction, its validity is no longer in question as a matter of international law. The principle has gained new acceptance by countries that formerly questioned its validity. During the past decade, the three branches of the U.S. government have accepted it as a basis of jurisdiction. The recent acceptance of the principle has resulted from many factors. Principal among these are advances in transportation and communications. Also, an increase of terrorist acts worldwide during the last decade, which often target victims of specific nationality, has led to acceptance of the principle.<sup>87</sup> These

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83. Bernard Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy, Gunmen Face Trial In Slaying of Hostage*, N.Y. TIMES, Oct. 11, 1985, at A1, col. 6.

84. *Id.*; see Briefing by National Security Advisor Robert McFarlane on the Apprehension of the Achille Lauro Hijackers, Oct. 11, 1985, reprinted in 24 I.L.M. 1516, 1517 (1985).

85. *The U.S.-Italian Quarrel*, N.Y. TIMES, Oct. 18, 1985, at A8, col. 5.

86. See *United States v. Yunis*, 681 F. Supp. at 903; McGinley, *supra* note 80, at 710-13.

The heirs of the U.S. national, Leon Klinghoffer, brought suit in U.S. district court in New York for damages arising from his murder on board the *Achille Lauro*. See *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991). The PLO were impleaded into the action by the defendants who sought indemnification or contribution. *Id.* at 47. The district court refused to dismiss the PLO from the action based on, *inter alia*, lack of personal and subject matter jurisdiction. *Id.* at 46. The Second Circuit vacated the district court's decision and remanded the case for further findings on the jurisdictional issues. *Id.* at 54.

Another failed U.S. extradition attempt involved the West German authorities' refusal to extradite Mohammed Hamadei, suspected leader of a 1987 Trans World Airlines hijacking in which U.S. Navy diver Robert Stethem was murdered. See Andrew M. Wolfenson, Note, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 745 n.248 (1989-90) (discussing events surrounding U.S. extradition request to West Germany). U.S. jurisdiction would have been based on the Hostage Taking Act. See 18 U.S.C. § 1203 (1988).

87. See Mastrangelo, *International Terrorism: A Regional and Global Overview, 1970-1986*, in THE ANNUAL ON TERRORISM — 1986, at 7 (Y. Alexander ed. 1987); Bell, Comment: *The Origins of Modern Terrorism* 9 TERRORISM 307, 307-09 (1987); see also A.M. Rosenthal, *Now the Hard Part*, N.Y. TIMES, June 29, 1993, at A15 (discussing need for new U.S. policy against terrorism).

developments necessitate added protection for nationals of all countries when they travel abroad and the passive personality principle provides this protection.

### III. U.S. PROSECUTION OF THE IRAQI CONSPIRATORS

The United States must analyze three factors to determine whether prosecution in the United States is appropriate for a criminal act that occurred extraterritorially.<sup>88</sup> Initially, it must be determined whether there is a valid basis under U.S. law to prosecute the individual accused of the act, including whether Congress intended extraterritorial application of the statute.<sup>89</sup> Next, it must be determined if the assertion of jurisdiction over the act is in accord with international law.<sup>90</sup> The final step requires a weighing of the policy reasons for and against U.S. involvement in the criminal prosecution.<sup>91</sup>

U.S. law does apply to cases such as the one involving the conspiracy to assassinate former President Bush. The criminal provisions of the 1986 ATA provide that it is a crime, punishable in the U.S. courts, for individuals to conspire to kill a U.S. national outside of the United States.<sup>92</sup> Thus the conspiracy to assassinate Mr. Bush is a crime under U.S. law. Second, the words of the 1986 ATA make it clear that Congress intended this act to apply extraterritorially. The statute is designed to apply to acts which "occur outside the United States."<sup>93</sup> Thus,

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88. See *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204-06 (9th Cir. 1991); see also Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (analyzing steps currently used in applying U.S. law extraterritorially).

89. See *Felix-Gutierrez*, 940 F.2d at 1204.

90. Brilmayer & Norchi, *supra* note 88, at 1221. This step is complicated by that fact that U.S. courts recognize international law only as an aid to interpreting U.S. law, and not as an overriding law. *Id.*

91. See *Felix-Gutierrez*, 940 F.2d at 1204.

92. 18 U.S.C.A. § 2331(b) (West Supp. 1993). The statute provides:

Whoever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States shall — . . .

in the case of a conspiracy by two or more persons to commit a killing that is a murder as defined in section 1111(a) of [18 U.S.C.], if one or more of such persons do any overt act to effect the object of the conspiracy, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.

*Id.* § 2331(b)(2).

93. *Id.* § 2332(b).

Congress has given the executive and judicial branches the authority to prosecute the Iraqi conspirators under U.S. law.

The next analysis is whether the assertion of jurisdiction over the terrorist acts complies with accepted principles of international law. The passive personality principle provides jurisdiction when the victim of the crime is a national of the prosecuting state. Mr. Bush is a citizen of the United States and he is also a former U.S. President. Jurisdiction over individuals engaged in a conspiracy to assassinate a former U.S. president is valid under the passive personality principle, which is now an accepted basis of international criminal jurisdiction.<sup>94</sup>

There are policy reasons on each side of the analysis of whether the United States should continue to press Kuwait to extradite the conspirators to the United States for trial. The United States, like all countries, has the right and duty to protect its nationals when they are outside its territory.<sup>95</sup> This interest is stronger when it comes to protecting its leaders beyond U.S. boundaries.<sup>96</sup>

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94. See *supra* notes 42-87 (enunciating elements of passive personality principle). While the U.S. claim for jurisdiction is strongest under the passive personality principle, the United States may also claim jurisdiction under the protective principle. *Id.* The protective principle provides jurisdiction when it is necessary to protect certain interests of the prosecuting state, such as protecting governmental functions from criminal acts. *Id.* In the case of these conspirators, the U.S. interest lies in protecting its leaders from the fear that non-nationals, and even other countries, who are displeased with their decisions while in power may seek to harm or even kill them after their term has been completed. *Id.* The United States presented evidence to the United Nations that (1) Saddam Hussein threatened to hunt down and punish former President Bush, even after he left office, and (2) Iraq ordered the assassination of the former president. See Richard Bernstein, *U.S. Presents Evidence to U.N. Justifying Its Missile Attack on Iraq*, N.Y. TIMES, June 28, 1993, at A7; *Excerpts for U.N. Speech: The Case for Clinton's Strike*, N.Y. TIMES, June 28, 1993, at A7 (statement of Madeleine K. Albright, U.S. delegate to United Nations).

95. See *supra* note 42 (discussing State's duty to protect nationals abroad).

96. See 22 U.S.C. §§ 4801-4862 (1988). In the legislation which initially contained the 1986 ATA, Congress also enacted laws concerning the protection of U.S. diplomatic personnel abroad. *Id.* Congress recognized its duty to protect these individuals and their families from attacks. See *id.* § 4801 (findings and purposes of act). The first section of the act states:

The Congress finds and declares that —

- (1) the United States has a crucial stake in the presence of United States Government personnel representing United States interests abroad;
- (2) conditions confronting United States Government personnel and missions abroad are fraught with security concerns which will continue for the foreseeable future; and
- (3) the resources now available to counter acts of terrorism and protect

Former President Bush served as the leader of the coalition forces that expelled the Iraqi forces from Kuwait. The conspirators, most of whom are Iraqi nationals, have admitted that they received assistance from Iraq in planning the assassination attempt. Further, U.S. intelligence officials have discovered that key components of the car bomb are similar to those used by the Iraqi military intelligence during the Persian Gulf War.<sup>97</sup> In light of these factors, it appears that the conspirators were seeking revenge for Iraq's defeat at the hands of the forces commanded by former President Bush.

Kuwait's interest in prosecuting the conspirators stems from the fact that they committed a crime within its territory.<sup>98</sup> The evidence, however, indicates that the conspirators' only concern was to assassinate former President Bush regardless of where their attack occurred. Kuwait's interest in deterring future crimes of this nature, thus, is not as significant as that of the United States because of the unique nature of this criminal act.

### CONCLUSION

The United States' interest in prosecuting the individuals who conspired to assassinate former President Bush outweighs Kuwait's interest in prosecuting them. International and U.S. law supports the U.S. jurisdictional claim under the passive personality principle. Accordingly, the Clinton Administration should use whatever diplomatic means are available to encourage Kuwait to extradite these conspirators to stand trial in the United States.

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and secure United States Government personnel and missions abroad, as well as foreign officials and missions in the United States, are inadequate to meet the mounting threat to such personnel and facilities.

*Id.* § 4801(a).

97. Douglas Jehl, *U.S. Says it Waited for Certain Proof Before Iraq Raid*, N.Y. TIMES, June 29, 1993, at A1; see Douglas Jehl, *Car Bomb Found Near Bush Said to Suggest Hand of Iraq*, N.Y. TIMES, May 11, 1993, at A1, col. 3.

98. See *supra* note 36. Kuwait's jurisdictional basis is the territorial principle, the most widely accepted of the five sources of jurisdiction. *Id.*



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