

**CERL Conference: Using Law to Fight Terror: Legal Approaches to Combatting Violent
Non-State Actors**

**Counting the Ripples: The Challenge of Extraterritorial Jurisdiction to
Prosecute Non-State Actors**

By

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In an inherently global economy, increasing virtual and physical attacks on the hubs of international trade and commerce raise questions of a state's jurisdiction to prosecute non-state actors when only the indirect impact of a terrorist attack has travelled across borders. Conveniently, non-state actors who seek engagement with foreign forces often conduct terrorist attacks in their own jurisdictions with the hope of implicating distant interests, such as the Islamic State of Iraq and Syria's attempts to lure American forces to the Middle East for the ultimate battle. While courts have rejected a principle of universal jurisdiction over terrorist acts, based largely upon ambiguities in definitions of terrorism,¹ American jurists have recognized and applied the protective (or "security") principle as a more viable customary international law of criminal jurisdiction.²

Articulated in Comment f of Section 402 of the *Restatement (Third) of Foreign Relations of the United States*, the Principle holds that a state may punish a "limited class of offenses committed outside its territory by persons who are not its nationals" when the crimes are "directed against the security of the state or other offenses threatening the integrity of governmental functions," and they "are generally recognized as crimes by developed legal systems."³ American courts have adopted this Principle when attacks "were intended to affect the United States and to alter its foreign policy."⁴ In applying this principle, however, the federal courts have refused to extend the principle to instances of international drug smuggling,⁵ and, consistent with due process protections and their equivalents, have demanded a more significant showing that the criminal actor had the aim of causing harm to the United States, much like the minimum contacts test for personal jurisdiction in civil procedure.⁶ Beyond a "sufficient nexus" requirement, United States courts also inquire whether the non-citizen had "fair warning" that the conduct would potentially expose him or her to prosecution.⁷

This paper builds on the 2003 opinion of *United States v. Yousef*, in which the Second Circuit Court of Appeals found the requisite contacts to prosecute a conspirator who used explosives on a Philippine plane in a drill to prepare for later attacks on United States airliners.⁸ The following sections explore the nuances of the Protective Principle as a means to assert or support the exercise

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¹ *United States v. Yousef*, 327 F.3d 56, 106 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003).

² *Id.* at 111.

³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. f. (1987) [hereinafter RESTATEMENT THIRD].

⁴ *Yousef*, 327 F.3d at 97.

⁵ *See, e.g.*, *United States v. Perlaza*, 439 F.3d 1149, 1162-63 (9th Cir. 2006).

⁶ *United States v. Klimavicious-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999). *See also* RESTATEMENT THIRD, *supra* note 3, § 402 cmt. d.

⁷ *United States v. Al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011).

⁸ *Yousef*, 327 F.3d at 111.

of jurisdiction over non-state actors who have committed terrorist acts that fall short of direct harm, but nonetheless have significant ripple effects. With concern for attacks on portals of international commerce and trade, including computer systems and infrastructure, this paper examines the manner in which courts have addressed different offenses and the nature of minimum contacts and corresponding warnings sufficient to meet the threshold requirements for the effective assertion of extraterritorial jurisdiction over non-state actors.