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CATCH THEM IF YOU CAN: COMPATIBILITY OF UNITED KINGDOM AND UNITED STATES LEGISLATION AGAINST FINANCING TERRORISM WITH PUBLIC INTERNATIONAL LAW RULES ON JURISDICTION

*Laura Halonen**

INTRODUCTION

The world changed on September 11, 2001. Led by a shocked but determined United States, the international community came together in order to take collective and individual action to eradicate terrorism. An important part of this campaign has been the fight against financing terrorism, seen as a key element of terrorism itself: “Today’s terrorist advances with an Armalite in one hand and a cashbox in the other At a basic level [money] is necessary to finance operations, but it is more than that. It can become part of the momentum of terrorism itself.”¹

The movement to supply the legislative tools necessary in the battle against terrorist financing gained particular momentum in the United Nations. The International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations General Assembly on December 9, 1999, (“Financing Convention”)² saw a surge of ratifications and accessions,³ and at the behest of the United States⁴ the Security Council passed several

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¹ 611 PARL. DEB., H.L. (5th ser.) (2000) 1435 (U.K.).

² International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Jan. 10, 2000, T.I.A.S. 13075, 2178 U.N.T.S. 38349 [hereinafter *Financing Convention*].

³ *Status of the International Convention for the Suppression of the Financing of Terrorism*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-11.en.pdf> (last visited Oct. 21, 2012) [hereinafter *Financing Convention Status*].

⁴ U.S., Rep., transmitted by letter dated Dec. 19, 2001 from the Chairman of the Security Council Comm. established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, Annex, at 4, U.N. Doc. S/2001/1220 (Dec. 21, 2001).

resolutions, including Security Council Resolution 1373 (“Resolution 1373”) imposing on states obligations to curtail the financing of terrorism.⁵

In this Article, I examine these and other recent developments to determine the present state of international law rules on jurisdiction—in particular, whether the financing of terrorism has attained the status of a crime of universal jurisdiction under customary law. This is considered in the first Part below.

As the United States has been at the forefront of the international developments in this area,⁶ it is interesting to compare its domestic legislation with the international rules the United States has been instrumental in constructing. A useful comparison is provided by the United Kingdom, another common law jurisdiction,⁷ which traditionally shared with the United States a belief in the principle of limited national prescriptive jurisdiction,⁸ but which enacted its legislative framework against financing terrorism prior to the events of September 11, 2001.⁹ Thus, after examining the present state of international law, the following two Parts of this Article will consider the laws against the financing of terrorism in the United Kingdom and the United States respectively, in order to determine whether they are compatible with international law rules on jurisdiction.

I conclude that, as there is presently no universal jurisdiction for the crime of financing terrorism under customary international law, the laws of the United States and the United Kingdom are not entirely compatible with international law.

⁵ Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation, U.N. Press Release SC/7158 (Sept. 28, 2001).

⁶ See generally U.N. S.C. Rep. of the Security Council, June 15, 2001–July 31, 2002, 263, U.N. Doc. A/57/2; GAOR 57th Sess., Supp. No. 2 (2002) (outlining the steps the United States has taken to combat the financing of terrorism).

⁷ CIA, THE WORLD FACTBOOK: UNITED KINGDOM 684 (2011).

⁸ Compare *MacLeod v. Attorney Gen. for NSW*, [1891] A.C. 455, 458–59 (P.C.) (U.K.) (appeal taken from NSW), and *Air-India v. Wiggins*, [1980] 2 All E.R. 593 (H.L.) at 596 (Eng.), with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1988) [hereinafter THIRD RESTATEMENT].

⁹ Terrorism Act, 2000, c. 11 (U.K.).

I. JURISDICTION FOR FINANCING TERRORISM UNDER PUBLIC INTERNATIONAL LAW

Laws preventing terrorism are at the cutting edge of developments in international law. This Part considers the present state of these developments in relation to the specific issue of jurisdiction for financing terrorism. To begin with, the text of the Financing Convention is considered to determine the extent to which it establishes a jurisdictional basis for state parties such as the United Kingdom and the United States to criminalize the financing of terrorism.¹⁰ The most detailed analysis is devoted to the question of determining whether there is universal jurisdiction for financing terrorism in customary law, either arising from the Financing Convention or other developments in state practice.¹¹ The Part concludes with a brief consideration of jurisdiction under the protective and passive personality principles.¹²

A. *Jurisdiction Established by the Financing Convention*

Prescriptive jurisdiction, like any other rule of international law, can be based on a treaty between states. However, treaties only affect the rights and obligations of the parties to them.¹³

The Financing Convention provides an international law basis for state parties to criminalize the financing of terrorism.¹⁴ Nevertheless, one must consider carefully the text of the Financing Convention to establish the perimeters of such jurisdiction. For present purposes, the most important provisions are Article 2 and Article 4, which deal with the scope of the Financing Convention; Article 7, which lays out the rules on jurisdiction; and Article 10 concerned with enforcement.¹⁵

Article 2.1 of the Financing Convention sets out the offence of financing terrorism in the following terms:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly,

¹⁰ See *infra* Part I.A.

¹¹ See *infra* Part I.B.

¹² See *infra* Part I.C.

¹³ Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, arts. 34–37. *But see id.* art. 38 (“Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law . . .”).

¹⁴ Financing Convention, *supra* note 2, art. 2, at 230, art. 7, at 232–33.

¹⁵ *Id.* arts. 2, 4, 7, 10, at 230–34.

unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.¹⁶

The annex mentioned in subparagraph (a) lists the nine global terrorism conventions (collectively the “Global Terrorism Conventions”).¹⁷

Relevant limitations in Article 2.1 for assessing the compatibility of domestic legislation with the Financing Convention include:

- (i) the requirement that the financing be meant for acts “intended to cause death or serious bodily injury”;
- (ii) the exclusion of those engaged in armed conflict from the ambit of the definition of victims of terrorism;
- (iii) the restriction of prohibited financing to the provision and collection of funds; and
- (iv) the absence of a specific prohibition against financing organizations that carry out terrorist activities.¹⁸

¹⁶ *Id.* art. 2, at 230.

¹⁷ *Id.* annex, at 241. These conventions are International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 37517; Protocol to the Convention of 10 March 1988 for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, March 10, 1988, 1678 U.N.T.S. 29004; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 1678 U.N.T.S. 29004; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 14118; Convention on the Physical Protection of Nuclear Material, March 3, 1980, 1456 U.N.T.S. 24631; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 21931; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1,975, 1035 U.N.T.S. 15420; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 14118; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1,641, 860 U.N.T.S. 12325.

¹⁸ Financing Convention, *supra* note 2, art. 2, at 230.

Article 4(a) obliges state parties to the Financing Convention to “establish as criminal offenses under [their] domestic law the offenses set forth in article 2.”¹⁹

Article 7 of the Financing Convention deals expressly with jurisdiction.²⁰ Article 7.1 sets out mandatory territorial (extending also to vessels and aircraft registered in the state) and nationality jurisdiction.²¹ Article 7.2 provides for optional jurisdiction when the offence has certain other links with the state in question, such as those covered by the protective and passive personality principles.²² Article 7.4 sets out the “extradite or prosecute” provision over offenders found in the territory of a state party:

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.²³

Article 10.1 reinforces this obligation in specifying conditions for enforcement, highlighting the need for cases brought pursuant to Article 7.4 to be treated similarly to domestic offences:

The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever . . . to submit the case without undue delay to its competent authorities for the purpose of prosecution Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.²⁴

The intention behind the jurisdictional and enforcement provisions of the Financing Convention is the elimination of safe havens for terrorist financiers. The “extradite or prosecute” provision in Article 7.4, together with Article 10.1, is aimed at ensuring that no offender goes unpunished by closing the gaps that may arise, for example, from a state’s previous classification of terrorism as political crime exempt from extradition or a state’s unwillingness to

¹⁹ *Id.* art. 4, at 231.

²⁰ *Id.* art. 7, at 232–33.

²¹ *Id.* art. 7.1, at 232.

²² *Id.* art. 7.2, at 232.

²³ *Id.* art. 7.4, at 233.

²⁴ *Id.* art. 10.1, at 234.

extradite a suspect that may face torture or other ill-treatment at the hands of the authorities requesting extradition.²⁵ Nevertheless, in accordance with the basic rules of treaty law and the specific reference in Article 7.4 to establishing jurisdiction over offenders, if a state party does not extradite “to any of the *States Parties* that have established their jurisdiction in accordance with paragraphs 1 or 2,”²⁶ these provisions do not apply. If no *state party* can establish jurisdiction under Articles 7.1 or 7.2, the obligation to prosecute in Article 7.4 never arises.²⁷ Thus, if a national of State A finances a terrorist attack in State B, but neither state is a party to the Financing Convention, it should follow that State C—the state that has custody of the offender and is a party to the Financing Convention—does not have the authority or the obligation to prosecute pursuant to the Convention.²⁸

Accordingly, the Financing Convention permits the extension of prescriptive jurisdiction even in the absence of any links between the state in question and the offence or the offender. However, this permission is limited to instances where the suspect is within the territory of the state exercising the jurisdiction, and only if a link exists between the offender or the offence and another state party to the Financing Convention. In the absence of these elements, a state cannot exercise jurisdiction.²⁹ Thus, the Financing Convention’s jurisdiction is not universal.³⁰

²⁵ See, e.g., Arrest Warrant of Apr. 11, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, paras. 7–8 (Feb. 14) (separate opinion of Pres. Guillaume); PETER J. VAN KRIEKEN, TERRORISM AND THE INTERNATIONAL LEGAL ORDER 37 (2002).

²⁶ Financing Convention, *supra* note 2, art. 7.4, at 233 (emphasis added).

²⁷ *Id.*

²⁸ See *United States v. Yousef*, 327 F.3d 56, 96 (2d Cir. 2003); Robert Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 272 (Andrea Bianchi ed., 2004); Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 348–49 (2001); cf. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 821–22 (1988).

²⁹ See Arrest Warrant of 11 Apr. 2000, 2002 I.C.J. 3, para. 9 (separate opinion of Pres. Guillaume) (arguing that the Financing Convention does not “contemplate[] establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question”).

³⁰ *Id.*

B. Is There Universal Jurisdiction for Financing Terrorism Under Customary International Law?

Universal jurisdiction requires no link to the state that assumes jurisdiction.³¹ Universal jurisdiction may be problematic, because it creates the potential for a person to be prosecuted and convicted in State A for an act committed in State B that was not punishable as a crime in State B. However, universal jurisdiction may also be welcomed, because it limits impunity for grave crimes. Thus, in order to take advantage of the welcome elements while excluding the problematic ones, it only applies to a few international crimes of particular gravity. Traditionally, piracy attracts universal jurisdiction.³² After World War II, slavery, genocide, war crimes, and crimes against humanity joined the category of crimes of universal jurisdiction.³³ It is unclear whether terrorism can be added to this list.

Despite some commentary to the contrary,³⁴ an “extradite or prosecute” provision in a treaty does not create universal jurisdiction because it only applies to states parties to the treaty in question.³⁵ Such a provision remains inapplicable to those states that have remained outside it. This notwithstanding, treaty provisions might provide evidence of a rule in customary international law, or might be instrumental in the development of such a rule.³⁶ A rule of customary international law may, for example, extend the permissive

³¹ See Morris, *supra* note 28, at 337; Randall, *supra* note 28, at 788.

³² Randall, *supra* note 28, at 788.

³³ E.g., THIRD RESTATEMENT, *supra* note 8, § 404; PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (2001) [hereinafter PRINCETON PRINCIPLES]; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 112–22 (2001) (most forms of slavery, as well as genocide, war crimes, and crimes against humanity, are subject to universal jurisdiction); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 130 (2007); Willard Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177, 194, 217 (1945) (war crimes, like piracy and brigandage before them, are subject to universal jurisdiction); Rosalyn Higgins, *The General International Law of Terrorism*, in TERRORISM AND INTERNATIONAL LAW 24 (Rosalyn Higgins & Maurice Flory eds., 1997); Morris, *supra* note 28, at 337.

³⁴ E.g., M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 68 (1995); Hervé Ascensio, *Are Spanish Courts Backing Down on Universality?*, 1 J. INT’L CRIM. JUST. 690, 700 (2003); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-party States*, 35 NEW ENG. L. REV. 363, 382 (2001).

³⁵ Vienna Convention on the Law of Treaties, *supra* note 13, art. 38.

³⁶ *Id.*; see also Colangelo, *supra* note 33, at 125, 176–78, 181–83. Although the jurisdictional rules in the Financing Convention are mandatory, jurisdiction as a matter of customary law is traditionally permissive. See Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 391–92 (2001).

jurisdictional scope to offences that have no link to states parties to the treaty itself, and to a broader definition of “financing of terrorism.”

However, caution must be exercised in considering the role of treaties in creating and evidencing customary international law, in particular in establishing *opinio juris sive necessitates*—the psychological element indicating that a state adheres to a practice out of a sense of legal duty³⁷—which is required, together with “general practice,” in founding a rule of customary international law.³⁸ The adoption of a general treaty may indicate (i) either the parties’ desire to codify and declare existing and therefore binding custom or, alternatively, (ii) that the existing customary rules do not themselves oblige states to act in a manner prescribed by the treaty and states thus wish to change it by creating treaty law.³⁹

I will first study the text, legislative history, and generality of participation in determining the effect of the “extradite or prosecute” clause in the Financing Convention on customary law, before turning to consider other evidence of state practice: Resolution 1373, national legislation, and other international instruments.

The text of the Financing Convention fails to state whether it intends to codify existing customary international law or to create new general law.⁴⁰ The preamble to the Convention states that “the financing of terrorism is a matter of grave concern to the international community as a whole,”⁴¹ which could be interpreted as evidence of either position. The text does not state that financing terrorism is a crime of universal jurisdiction. To the contrary, Article 7 sets out detailed rules on jurisdiction, including a duty to extradite or prosecute between the states parties, as discussed above.⁴²

³⁷ North Sea Continental Shelf (Ger.-Neth.), 1969 I.C.J. 3, para. 77 (Feb. 20) (“The states concerned must . . . feel that they are conforming to what amounts to a legal obligation.” This is the “subjective element . . . implicit in the very notion of the *opinio juris sive necessitates*.”).

³⁸ See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055; North Sea Continental Shelf, 1969 I.C.J. 3, para. 77.

³⁹ David Freestone, *International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction*, in *TERRORISM AND INTERNATIONAL LAW*, *supra* note 33, at 58.

⁴⁰ See generally Financing Convention, *supra* note 2 (not mentioning of whether the Convention codifies existing customary law or creates new general law).

⁴¹ *Id.* pml., at 230.

⁴² See *supra* notes 26–27 and accompanying text.

The Financing Convention was adopted by the United Nations General Assembly in its fifty-fourth session without a vote,⁴³ indicating broad international consensus for its content. However, while the preparatory materials from the Sixth Committee of the General Assembly that drafted the Convention are largely silent on whether the Treaty was codifying or creating law, it was recorded that:

Some delegations stated that the draft convention, which would *enable* States effectively to deter as well as to prosecute and punish the financing of terrorist acts, was an important contribution to the fight against terrorism It was stressed that *a new instrument was needed* to meet the growing sophistication of transnational terrorism, especially in regard to how it is financed.⁴⁴

The fact that the Financing Convention was viewed by states as a new instrument that was “needed” in order to “enable” them to prosecute terrorist financiers suggests that the Convention was not considered to codify existing international law, but rather to bring the law in line with states’ needs in the fight against terrorism.

With 180 parties,⁴⁵ the Financing Convention is a widely adopted treaty. However, because of Resolution 1373, it is difficult to conclude that this popularity of the Convention is any indication of *opinio juris* relating to the crime of financing terrorism.⁴⁶

After the attacks of September 11, 2001, the United Nations Security Council swiftly introduced and passed Resolution 1373, which strongly condemned terrorism in general and financing terrorism in particular.⁴⁷ The resolution is important in two respects regarding state practice on jurisdiction for financing terrorism. First, Resolution 1373 has undoubtedly impacted states’ willingness to become parties to the Financing Convention.⁴⁸ Secondly, it is a significant factor in the development of domestic legislation in criminalizing terrorist financing.⁴⁹

⁴³ U.N. GAOR, Rep. of the 54th Sess., 76th plen. mtg. at 8, U.N. Doc. A/54/V.76 (Dec. 9, 1999).

⁴⁴ Rep. of the Sixth Comm. Working Grp., 54th Sess., Oct. 20, 1999–Dec. 7, 1999, Measures to Eliminate International Terrorism, at 56, U.N. Doc. A/C.6/54/L.2 (Oct. 26, 1999) (emphasis added).

⁴⁵ *Financing Convention Status*, *supra* note 3.

⁴⁶ *Cf.* Colangelo, *supra* note 33, at 180 (concluding that state adherence to the reporting requirements of Resolution 1373 is the determining factor in whether there is an *opinio juris* prohibiting terrorism, even if one rejects the idea that widely ratified treaties create custom).

⁴⁷ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁴⁸ *See infra* notes 50–53 and accompanying text.

⁴⁹ *See infra* notes 56–62 and accompanying text.

Paragraph 3(d) of Resolution 1373 urges states to become parties to the Financing Convention.⁵⁰ States around the world duly responded to this call: Prior to Resolution 1373 forty-eight states had signed the Financing Convention, and only four states had ratified it.⁵¹ In the six months following the passing of Resolution 1373, eighty-four states signed the Financing Convention and twenty-one states ratified or acceded to it.⁵² Although Security Council resolutions adopted under Chapter VII of the United Nations Charter (like Resolution 1373) are legally binding on United Nations member states,⁵³ the value of this surge in becoming a party to the Financing Convention as evidence of *opinio juris* is curtailed by the fact that the resolution did not require such action; it merely urged it. However, Resolution 1373's urging of states to become parties to the Financing Convention has undoubtedly been a significant factor in some states' decision to do so. That states may have been responding to pressure from the Security Council further erodes the value of the statistical evidence of states' ratifications and accessions of the Financing Convention as establishing *opinio juris*.

Regarding national legislation on financing terrorism, paragraph 1(b) of Resolution 1373 states that "all States shall . . . [c]riminalize the wilful provision or collection, by any means, directly or indirectly, of funds *by their nationals or in their territories* with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."⁵⁴

Although this provision is obligatory, the obligation established is a narrow one, and extends only to criminalizing the financing of terrorism on the basis of the territoriality and nationality principles.⁵⁵ This has two potential consequences for an examination of state practice and *opinio juris*: Either states have legislated only to the extent required by the U.N. Security Council,

⁵⁰ S.C. Res. 1373, *supra* note 47, para. 3(d); *see also* Anna Gardella, *The Fight Against the Financing of Terrorism Between Judicial and Regulatory Cooperation*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 28, at 432.

⁵¹ *Financing Convention Status*, *supra* note 3.

⁵² *Id.*

⁵³ U.N. Charter arts. 25, 48; *see also* Stefano Betti, *The Duty To Bring Terrorists to Justice and Discretionary Prosecution*, 4 J. OF INT'L CRIM. JUST. 1104, 1108 (2006); Andrea Bianchi, *Security Council's Anti-terror Resolutions and Their Implementation by Member States: An Overview*, 4(5) J. INT'L CRIM. JUST. 1044, 1047 (2006); Thomas Weigend, *The Universal Terrorist: The International Community Grappling with a Definition*, 4 J. INT'L CRIM. JUST. 912, 920 (2006).

⁵⁴ S.C. Res. 1373, *supra* note 47, para. 1(b) (emphasis added).

⁵⁵ *See id.* (referring to acts by nationals or persons within their territories).

or, if the states' legislation has broader jurisdictional reach, one must look beyond Resolution 1373 for evidence of *opinio juris*.

Turning next to the national legislation itself, there is, unusually, an abundance of evidence. Paragraph 6 of Resolution 1373 obliges states to report to the U.N. Security Council Counter-Terrorism Committee on domestic legislation criminalizing financing terrorism, and these reports are publicly available.⁵⁶ One hundred ninety-three states have submitted one or more reports.⁵⁷ According to the reports, seventeen states legislated to criminalize the financing of terrorism by September 28, 2001.⁵⁸ Seventy-seven states proceeded to enact such legislation,⁵⁹ whereas ninety-nine states had yet to do so by the time of submission of their last publicly available report to the U.N. Security Council Counter-Terrorism Committee.⁶⁰ Several of these states contended that the financing of terrorism would be criminalized by domestic law, at least in some circumstances, as inchoate offences like aiding, conspiracy, or attempt.⁶¹ Other countries had plans to criminalize the financing

⁵⁶ See *id.* para 6.

⁵⁷ *Reports Submitted to the U.N. Security Council Counter-Terrorism Committee by Member States Pursuant to Security Council Resolution 1373 (2001)*, SECURITY COUNCIL COUNTERTERRORISM COMMITTEE, <http://www.un.org/en/sc/ctc/resources/1373.html> (last visited Sept 26, 2012).

⁵⁸ See, e.g., U.K. of Great Britain & N. Ir., Rep., transmitted by letter dated Dec. 19, 2001, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2001/1232 (Dec. 24, 2001); Switz., Rep., transmitted by letter dated Dec. 19, 2001, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 4, U.N. Doc. S/2001/1224 (Dec. 20, 2001).

⁵⁹ See, e.g., Union of the Comoros, Rep., transmitted by letter dated July 27, 2005, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2005/501 (Aug. 2, 2005); Thai., Rep., transmitted by letter dated Dec. 27, 2004, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2004/1023 (Dec. 30, 2004).

⁶⁰ See, e.g., Fed. Dem. Rep. of Eth., Rep., transmitted by letter dated May 31, 2006, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2006/352 (May 31, 2006) [hereinafter Report of Ethiopia]; Republic of Yemen, transmitted by letter dated May 23, 2006, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2006/329 (May 25, 2006).

⁶¹ See, e.g., Argentine Republic, Rep., transmitted by letter dated Oct. 31, 2006, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 5, U.N. Doc. S/2006/856 (Oct. 31, 2006); Kingdom of Saudi Arabia, Rep., transmitted by letter dated Nov. 2, 2004, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2004/884 (Nov. 2, 2004).

of terrorism in the future.⁶² This indicates a trend towards criminalizing the financing of terrorism under domestic laws.

Unfortunately, the country reports do not consistently explain whether and to what extent the states that have criminalized the financing of terrorism have broader jurisdictional provisions than Resolution 1373 requires.⁶³ For example, the United Kingdom and the United States do not specify in their reports the extent to which their legislation has extra-territorial effect.⁶⁴ Thus, the evidence that can be gleaned from the reports in this essential respect is merely anecdotal. The most relevant category consists of the non-parties to the Financing Convention, as Article 7 presumably guided the state parties drafting as they drafted their domestic rules on jurisdiction. Out of the fifteen states that have submitted reports to the U.N. Security Council Counter-Terrorism Committee, and that are not parties to the Financing Convention, only three states (twenty percent) have specific legislation criminalizing terrorist financing, whether promulgated prior or subsequent to the adoption of Resolution 1373.⁶⁵ Of these states, only Lebanon explained that its national laws provided for universal jurisdiction, where the offender was present within the state's territory.⁶⁶ No indication was given that Lebanon had enacted the jurisdictional provision in question because of a perceived international law duty to do so. The other two states—Iraq and the Republic of the Congo—have

⁶² See, e.g., Report of Ethiopia *supra* note 60, at 3; Republic of Kaz., Rep., transmitted by letter dated May 3, 2005, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2005/287 (May 4, 2005).

⁶³ See generally U.S., Rep., transmitted by letter dated Jan. 31, 2006 from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2006/69 (Feb. 3, 2006) [hereinafter 2006 Report of U.S.]; U.K. of Great Britain & N. Ir., Rep., transmitted by letter dated Sept. 12, 2005, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2005/583 (Sept. 12, 2005) [hereinafter Report of U.K.].

⁶⁴ 2006 Report of U.S., *supra* note 63; Report of U.K., *supra* note 63.

⁶⁵ See generally Dem. Rep. of the Congo, Rep., transmitted by letter dated Jan. 30, 2008 from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2008/59, Annex, (Feb. 20, 2008) [hereinafter Report of the Dem. Rep. of the Congo]; Leb., Rep., transmitted by letter dated June 21, 2006, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2006/424 (June 22, 2006); Iraq, Rep., transmitted by letter dated May 4, 2006, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 4, U.N. Doc. S/2006/280 (May 8, 2006) [hereinafter Report of Iraq].

⁶⁶ Leb., Rep., transmitted by letter dated Dec. 13, 2001, from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2001/1201, (Dec. 13, 2001) [hereinafter Report of Lebanon].

more limited jurisdictional rules.⁶⁷ Accordingly, one may cautiously conclude that this evidence lends no support to the view that universal jurisdiction is the norm in domestic legislation criminalizing financing terrorism.

Outside the Financing Convention and the Global Terrorism Conventions, there exist also several regional treaties and other instruments on terrorism.⁶⁸ Out of these, only the European Council Framework Decision on combating terrorism and the Inter-American Convention against Terrorism oblige states parties to criminalize financing terrorism.⁶⁹ The Framework Decision also includes an “extradite or prosecute” provision in Article 9. The Inter-American Convention, by contrast, has no provision on domestic prescriptive jurisdiction.⁷⁰ The majority of regional instruments on terrorism do not require criminalization of terrorist financing, although two others include an “extradite or prosecute” provision for the terrorist offences they cover.⁷¹ Thus, the further evidence of state practice emerging from these regional treaties again lends no support to the proposition that there is universal jurisdiction for terrorist financing offences.

In order to complete this evaluation of state practice, one should place it in the context of general principles on universal jurisdiction, and financing in the scheme of terrorist crimes. Considering first the broader question of whether terrorism is subject to universal jurisdiction, it remains unsettled whether the rationale for universal jurisdiction is (i) the reprehensibility of the offence,⁷² (ii) the fact that it harms the international community generally,⁷³ (iii) the fact

⁶⁷ See generally Report of the Dem. Rep. of the Congo, *supra* note 65; Report of Iraq, *supra* note 65.

⁶⁸ E.g., OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, Declarations and Decisions Adopted by the Thirty-fifth Assembly of Heads of State and Government, July 12–July 14, 1999, O.A.U. Doc. AHG/DEC. 132 (XXXV) [hereinafter OAU Convention]; European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93; see also *Text and Status of United Nations Conventions on Terrorism*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (last visited Oct. 21, 2012).

⁶⁹ Council Framework Decision of June 13, 2002 on Combating Terrorism 2002/475/JHA, art. 2(2)(b), 2002 O.J. (L 164) 3, 5 (replacing earlier decisions on the same topic); Inter-American Convention Against Terrorism, art. 4, June 3, 2002, O.A.S. Doc. AG/RES 1840 (XXXII-O/02).

⁷⁰ See generally Inter-American Convention Against Terrorism, *supra* note 69.

⁷¹ E.g., OAU Convention, *supra* note 68, art. 6.4; European Convention on the Suppression of Terrorism, *supra* note 68, art. 6.1.

⁷² *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003); Colangelo, *supra* note 33, at 130; Kolb, *supra* note 28, at 252; Morris, *supra* note 28, at 337; Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001); Scharf, *supra* note 34, at 368, 372–73.

⁷³ PRINCETON PRINCIPLES, *supra* note 33, at 23; Bassiouni, *supra* note 33, at 97; Higgins, *supra* note 33, at 24; Morris, *supra* note 28, at 345.

that international cooperation is required to suppress it, or perhaps a combination of these.⁷⁴

There is an abundance of evidence that terrorism is universally condemned, at least in theory. Actual state practice is, by contrast, heterogeneous: Most states are parties to the majority of the Global Terrorist Conventions and have criminalized terrorism in their domestic codes. However, the phenomenon of “state-sponsored terrorism” is far from eliminated⁷⁵ and the issue remains highly politicized with states frequently accusing each other of sponsoring or tolerating terrorism.⁷⁶ A few examples include: the United States listing Cuba, Iran and Syria as state-sponsors of terrorism;⁷⁷ the U.S. reports to the U.N. Security Council Counter-Terrorism Committee; Azerbaijan accusing Armenia of engaging in terrorism;⁷⁸ Cuba accusing the United States of supporting terrorism;⁷⁹ Iraq and North Korea accusing the United States of engaging in terrorism;⁸⁰ Democratic Republic of Congo accusing Burundi, Uganda and Rwanda of engaging in terrorism;⁸¹ and Iraq accusing Iran of supporting terrorism.⁸²

⁷⁴ *Yousef*, 327 F.3d at 105; S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, para. 251 (Sept. 7) (separate opinion of Judge Moore); Maxwell O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Enquiry*, 39 VA. J. INT’L L. 1069, 1132–33 (1999); Scharf, *supra* note 34, at 368–69, 373.

⁷⁵ *E.g.*, *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1066–67 (9th Cir. 2002) (finding that Iran has funded the Palestine Islamic Jihad).

⁷⁶ *See infra* notes 77–82.

⁷⁷ OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, at 171–76 (2008).

⁷⁸ Azer., Rep., transmitted by letter dated Dec. 28, 2001, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2001/1325 (Dec. 31, 2001).

⁷⁹ Republic of Cuba, Rep., transmitted by letter dated Jan. 9, 2002, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 4, U.N. Doc. S/2002/15 (Jan. 2, 2002).

⁸⁰ Republic of Korea, Rep., transmitted by letter dated May 30, 2003, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 3, U.N. Doc. S/2003/634 (June 9, 2003); Iraq, Rep., transmitted by letter dated Dec. 27, 2001, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 2, U.N. Doc. S/2001/1291 (Dec. 27, 2001).

⁸¹ Dem. Rep. of the Congo, Rep., transmitted by letter dated Dec. 28, 2001, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 4, U.N. Doc. S/2001/1331 (Jan. 24, 2002).

⁸² Iraq, Rep., transmitted by note verbale dated Aug. 14, 2002, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 9, U.N. Doc. S/2002/943 (Aug. 19, 2002) [hereinafter 2002 Report of Iraq].

Most importantly, attempts to conclude a universal convention on terrorism have foundered time and again,⁸³ in most cases due to an inability to agree on a definition of terrorism.⁸⁴ Indeed, the definition included in Article 2.1(b) of the Financing Convention is the only widely accepted definition, but it remains a matter of contention how much weight can be given to a definition in such a technical Convention.⁸⁵ The lack of universally accepted definition of terrorism probably suffices on its own to preclude the crime of terrorism from attracting universal jurisdiction, and judges, academics and other commentators have also been traditionally skeptical of concluding that universal jurisdiction extends to terrorism.⁸⁶ Recently, however, there have been opinions voiced in favor of universal jurisdiction for certain specific terrorist offences—such as aircraft hijacking—that have been proscribed by a widely accepted treaty for decades.⁸⁷

Aircraft hijacking is the mostly likely candidate among terrorist offences for universal jurisdiction because it fulfills all the potential rationales for universal jurisdiction and it is actually relatively similar to the quintessential universal crime, piracy. Certain other acts of terrorism, particularly large-scale unprovoked attacks on civilians—such as the attacks of September 11, 2001, the Bali nightclub bombings of October 12, 2002, London public transport attacks of July 7, 2005, and the coordinated attacks in Mumbai on November 26–29, 2008—also probably fulfill these criteria for universal jurisdiction: (i) they are universally censured at least in words if not always in deeds; (ii) the perpetrators choose their victims randomly; and (iii) they are often

⁸³ See Sixth Comm., Rep., transmitted by letter dated Aug. 3, 2005, from the Chairman of the Sixth Comm. addressed to the President of the General Assembly, 7, U.N. Doc. A/59/894 (Aug. 12, 2005).

⁸⁴ *United States v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003); Higgins, *supra* note 33, at 14–19; Kolb, *supra* note 28, at 276; Weigend, *supra* note 53, at 915, 921–22.

⁸⁵ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Promotion and Protection of Human Rights*, para. 29, Comm'n on Human Rights, Econ. & Soc. Council, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005) (by Martin Scheinin); Kolb, *supra* note 28, at 234; cf. Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 28, at 214–15.

⁸⁶ *Yousef*, 327 F.3d at 97; Higgins, *supra* note 33, at 24; Weigend, *supra* note 53, at 926.

⁸⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971) (the Convention has 185 state parties); see also THIRD RESTATEMENT, *supra* note 8, § 404; CASES AND MATERIALS ON INTERNATIONAL LAW 272 (Martin Dixon & Robert McCorquodale eds., 4th ed. 2003); Freestone, *supra* note 39, at 44, 60; Kolb, *supra* note 28, at 275, 277–78; Randall, *supra* note 28, at 822.

transnational in nature, thus harming the very fabric of the international community and requiring international cooperation in order to suppress them.⁸⁸

Terrorist financing, by contrast, is a proximity crime. It is not reprehensible for its own sake, but because it enables terrorist attacks to be carried out.⁸⁹ Thus, it is unlike any of the presently recognized crimes of universal jurisdiction. Concluding that terrorist financing attracts universal jurisdiction would necessitate a significant expansion of the general principles of international law and should thus be done only on the basis of incontrovertible evidence.

Summarizing the evidence discussed above, no such conclusion can be reached. First, neither the text nor the drafting history of the Financing Convention suggests that its jurisdictional provisions were codifying existing customary law.⁹⁰ Second, state practice condemning financing terrorism is undoubtedly widespread and relatively consistent.⁹¹ The Financing Convention is widely adopted, and a significant number of states have criminalized financing terrorism nationally.⁹² However, these trends have emerged very recently if one considers the usual timescale for the development of customary international law, inviting any observer to tread carefully in using them as evidence of new rules of customary law.⁹³ Third, Resolution 1373 dilutes the value of this record as evidence of *opinio juris*. The general adherence to the

⁸⁸ Cf. Madeline Morris, *Arresting Terrorism: Criminal Jurisdiction and International Relations*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 28, at 68. Some terrorist attacks, such as those committed in Oslo and Utøya in Norway on July 22, 2011, appear to remain “domestic” and do not therefore fulfill the third potential criterion for universality (transnationality).

⁸⁹ CHARLES DOYLE, CONG. RESEARCH SERV., RL33035, MATERIAL SUPPORT OF TERRORISTS AND FOREIGN TERRORIST ORGANIZATIONS: SUNSET AMENDMENTS 1 (2005); VAN KRIEKEN, *supra* note 25, at 53–54. Concerns have also been voiced about the effectiveness of attacks on terrorist financing in suppressing terrorism itself. INT’L BAR ASS’N’S TASK FORCE ON INT’L TERRORISM, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES xxv–xxvi, 118 (2003); Iain Cameron, *Terrorist Financing in International Law*, in INTERNATIONAL AND EUROPEAN FINANCIAL CRIMINAL LAW ¶4.11 (Ilias Bantekas & Giannis Keramidas eds., 2006); JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 49 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf; Richard Barrett, *Time To Re-Examine Regulation Designed To Counter the Financing of Terrorism*, 41 CASE W. RES. J. INT’L L. 7, 10–11 (2009).

⁹⁰ See *supra* text accompanying notes 44–45.

⁹¹ See *supra* text accompanying notes 58–61.

⁹² See *supra* text accompanying notes 52, 58–61.

⁹³ Cf. Barrett, *supra* note 89, at 11 (stating that regulations countering terrorist financing took center stage after the terrorist attacks on the United States in 2001). *But see* DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 19 (3d ed. 2010) (“There . . . is no requirement that a practice necessarily be observed for a long period of time before it will be confirmed as a binding custom.”).

Financing Convention is likely the result of the Security Council's urging.⁹⁴ Domestic legislation criminalizing the financing of terrorism enacted pursuant to a legal obligation imposed by Resolution 1373 is specifically limited in its jurisdictional scope to financing committed in the territory or by nationals of the state in question.⁹⁵ In turn, the Financing Convention requires broader jurisdictional scope.⁹⁶ Fourth, the anecdotal evidence available from the country reports submitted to the U.N. Security Council Counter-Terrorism Committee does not support the contention that legislating for universal jurisdiction for terrorist financing is common among states, in particular those states that are not under an obligation to legislate for broad "extradite or prosecute" jurisdiction as parties to the Financing Convention are. Fifth, only one among several regional conventions on terrorism includes a wide jurisdictional provision for financing terrorism.⁹⁷

Thus, it can be concluded on the basis of the available evidence, that although there is a clear trend condemning financing terrorism and increasing acceptance of broad jurisdictional reach of national laws, it is not yet a crime that is subject to universal jurisdiction under international customary law.

C. Jurisdiction for the Financing of Terrorism Under the Passive Personality and Protective Principles in Customary International Law

Although terrorist financing is not subject to universal jurisdiction, it may still extend the traditional grounds of territorial and nationality jurisdiction, if one can conclude that there are grounds for permitting a looser nexus with the prosecuting state on the basis of the protective principle, used when an offence affects the basic interests of a state, and passive personality principle, used based on the nationality of the victim, because something "in the nature of [the] proceedings . . . justifies a wider application . . . than is generally accepted in other matters."⁹⁸

Terrorist offences are unlike most other offences, in that their victims play merely an instrumental role in achieving a political goal. The real target of the

⁹⁴ See *supra* notes 50–52 and accompanying text.

⁹⁵ See *supra* notes 54–55 and accompanying text.

⁹⁶ INT'L BAR ASS'N'S TASK FORCE ON INT'L TERRORISM, *supra* note 89, at 124.

⁹⁷ See *supra* notes 68–71 and accompanying text.

⁹⁸ AIDE-MÉMOIRE FROM THE UNITED KINGDOM TO THE COMMISSION OF THE EUROPEAN COMMUNITIES, OCT. 20, 1969, IN THE *DYESTUFFS* CASE, *reprinted in* EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 144, 146 (A.V. Lowe ed. 1983).

offences is usually a state.⁹⁹ Thus, they affect the national security of the target state or states in ways that very few offences do, giving rise to a need to extend jurisdiction on the basis of the protective principle.¹⁰⁰

Similarly, as terrorist acts are politically motivated offences, states have a larger responsibility for shielding their nationals from such action in which they are the surrogate victims for the state itself, than from other crimes, and thus a case may also be made for jurisdiction on the basis of the passive personality principle.¹⁰¹ Choosing victims on the basis of their nationality can also be a method of targeting the state, indicating that there is a link between the two principles in the present context. Furthermore, the universal condemnation of terrorism and terrorist financing has stemmed from a combined concern over the impact on state security and for the victims of such crimes,¹⁰² indicating that these are considered key links in the criminalization of terrorism.

One must also consider whether these rationales for broadening jurisdiction for terrorist offences extend to proximity crimes such as terrorist financing. It is submitted that, on balance, they do. It would be unrealistic to prevent states from attempting to protect themselves and their nationals against terrorism—similar in many ways to espionage or treason—at the early stages of planning, such as obtaining financing.¹⁰³ Financing is—or is at least perceived to be—a key element in the momentum of terrorism itself,¹⁰⁴ and states have a concrete interest in disrupting the activities of those that are funding terrorist acts targeting them or their citizens. The risks that come with refusing states the right to do so under international law are arguably unacceptable.

State practice also offers some support for this expansion: Under Article 7.2 of the Financing Convention, state parties may extend their jurisdiction on the basis of protective and passive personality principles, and should make a

⁹⁹ See Financing Convention, *supra* note 2, art. 2.1, at 230.

¹⁰⁰ The protective principle allows a state to have jurisdiction over “certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.” THIRD RESTATEMENT, *supra* note 8, §§ 402 (3), 402 cmt. f.

¹⁰¹ *Id.* § 402 cmt. g; cf. Geoff Gilbert, *Crimes sans Frontières: Jurisdictional Problems in English Law*, 63 BRIT. Y.B. OF INT’L L. 415, 419 (1992).

¹⁰² INT’L BAR ASS’N’S TASK FORCE ON INT’L TERRORISM, *supra* note 89, at 1–2.

¹⁰³ However, one may question the utility of such an approach.

¹⁰⁴ See *supra* note 1 and accompanying text. Because of the particular relationship between financing and terrorist acts, the threat to the state or its citizens should be seen as of a *terrorist act* being carried out against them. It is difficult to see how the *financing* itself could directly threaten a state or its citizens.

declaration pursuant to Article 7.3 if they choose to do so.¹⁰⁵ Forty-six states have made such declarations for the protective principle and forty-five for the passive personality principle.¹⁰⁶ These figures are likely to significantly underrepresent the true situation,¹⁰⁷ as, for example, (i) the United Kingdom and United States have failed to make such declarations, although they extend their jurisdiction to financing of terrorism that threatens them or their nationals;¹⁰⁸ and (ii) anecdotal evidence available from the publicly available country reports submitted to the U.N. Security Council Counter-Terrorism Committee suggests that such extension of jurisdiction is the norm rather than the exception.¹⁰⁹

As discussed above, of the states that have submitted reports to the U.N. Security Council Counter-Terrorism Committee, three that are not parties to the Financing Convention have criminalized financing terrorism.¹¹⁰ Of these, Iraq uses the protective principle, but not the passive personality principle.¹¹¹

This evidence is only moderately more convincing than that for universal jurisdiction, and suffers from many of the same countervailing concerns (such as the value of the Financing Convention in evidencing or creating customary international law and the impact of Resolution 1373 on *opinio juris*). In my opinion, the critical difference is that whereas extending jurisdictional rules for terrorist financing to universal jurisdiction would amount to a significant expansion of the rules and underlying general principles of universal jurisdiction, this is not necessarily the case in relation to the protective and passive personality principles. Thus, it appears that the evidence need not be

¹⁰⁵ Financing Convention, *supra* note 2, art. 7, at 232–33.

¹⁰⁶ See generally *Financing Convention Status*, *supra* note 3, at 35–40.

¹⁰⁷ *Id.*

¹⁰⁸ Cf. U.S., Rep., transmitted by letter dated Jan. 31, 2006, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2006/69 (Jan. 31, 2006) (discussing local enforcement efforts to combat the financing of terrorism); U.K., Rep., transmitted by letter dated Feb. 23, 2004, from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council U.N. Doc. S/2004/157 (Feb. 24, 2004). (discussing local enforcement efforts to combat the financing of terrorism).

¹⁰⁹ See *Reports Submitted to the U.N. Security Council Counter-Terrorism Committee by Member States Pursuant to Security Council Resolution 1373 (2001)*, *supra* note 57.

¹¹⁰ See *supra* note 70 and accompanying text.

¹¹¹ 2002 Report of Iraq, *supra* note 82, at 6, 11. Congolese legislation against financing terrorism is limited to its territory and nationals. Republic of the Congo, Rep., transmitted by letter dated June 23, 2003 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 9, U.N. Doc. S/2003/670 (June 16, 2003). Lebanon uses universal jurisdiction. Report of Lebanon, *supra* note 66, at 3.

equally compelling as it does for universal jurisdiction and states are permitted under customary international law to criminalize terrorist financing on the basis of the protective and passive personality principles.

This leaves the question of definition: How to identify the “financing” and “terrorism” that states are permitted to criminalize under the protective and passive personality principles? While the issue undoubtedly merits additional detailed analysis, the most obviously available answer is to turn to the definition in Article 2.1 of the Financing Convention. This definition is widely (if not universally) accepted and manifestly workable in the context of terrorist financing.¹¹²

In sum, state parties to the Financing Convention are obligated to extend their jurisdiction to offences specified in the treaty and its Article 7¹¹³ and all states are probably further entitled, as a matter of customary international law, to criminalize financing terrorism that threatens their security or harms their nationals.¹¹⁴ However, no universal jurisdiction for financing terrorism offences presently exists in customary international law.¹¹⁵

The following Parts will consider whether the United Kingdom and United States legislation complies with these international law rules.

II. JURISDICTION FOR THE FINANCING OF TERRORISM IN THE UNITED KINGDOM AND ITS COMPATIBILITY WITH PUBLIC INTERNATIONAL LAW

The United Kingdom is no stranger to terrorism, due mainly to the troubled history of Northern Ireland. In the last decade the Westminster Parliament also decided to make its contribution to the worldwide fight against terrorism by enacting a statute that criminalizes financing terrorism anywhere, by anyone, in terms that are ultimately incompatible with international law.

¹¹² The definition in the legislation of Iraq, the non-signatory state to the Financing Convention that has criminalized financing terrorism on the basis of the protective principle differs somewhat from the definition in art. 2.1 of the Financing Convention: Iraq has criminalized “any economic or financial activity aimed at financing persons who commit, attempt to commit or participate in the commission of terrorist acts.” 2002 Report of Iraq, *supra* note 82, at 6.

¹¹³ See *supra* text accompanying notes 22–28.

¹¹⁴ See *supra* Part I.B.

¹¹⁵ See *supra* Part I.B.

A. *Traditional Position on Extraterritorial Jurisdiction in United Kingdom Criminal Law*

Under general English law,¹¹⁶ legislation only has territorial scope, unless otherwise specified.¹¹⁷ In contrast with the position in the United States,¹¹⁸ there are no constitutional or other domestic legal restrictions on the Parliament's power to legislate extraterritorially, as long as it does this explicitly, in order to override the presumption of purely territorial criminality.¹¹⁹ However, English courts will interpret legislation to conform to international law whenever possible.¹²⁰

B. *Development of Legislation Against Financing Terrorism*

Specialist legislation dealing with terrorism has been on the United Kingdom statute books since the Prevention of Terrorism (Temporary Provisions) Act 1974¹²¹—a temporary measure enacted in response to the Birmingham pub bombings in which the Provisional IRA killed twenty-one people.¹²² The provisions of this Act, dealing with the terrorist threat relating to Northern Ireland, were modified and re-enacted in several forms until the Prevention of Terrorism (Temporary Provisions) Act 1989.¹²³ On the basis of a government-commissioned report by Lord Lloyd of Berwick, a bill was introduced in Parliament in 1999 aimed at “reform[ing] and extend[ing]

¹¹⁶ Although the terrorism legislation extends to the whole of the United Kingdom (with the exclusion of overseas territories and crown dependencies), general principles have only been examined as a matter of English law. *See, e.g.*, Terrorism Act, 2000, c. 11, §130 (U.K.).

¹¹⁷ *Air-India v. Wiggins*, [1980] 2 All E.R. 593 (H.L.) at 596 (Eng.); *MacLeod v. Att’y Gen. for NSW*, [1891] A.C. 455, 458–59 (P.C.) (U.K.) (appeal taken from NSW).

¹¹⁸ *See discussion infra* Part III.

¹¹⁹ *Al-Skeini v. Sec’y of State for Def.*, [2007] 1 A.C. 153 (H.L.) [paras. 44–45] (Eng.) (citing PETER ST. JOHN LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES 183 (12th ed. 1969)).

¹²⁰ *Id.* para. 45.

¹²¹ Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (U.K.).

¹²² *See generally* SELECT COMMITTEE ON THE CONSTITUTION, FAST-TRACK LEGISLATION: CONSTITUTIONAL IMPLICATIONS AND SAFEGUARDS, 2008-9, H.L. 116-II, at 178 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/116ii.pdf>; *The IRA Campaigns in England*, BBC NEWS (Mar. 4, 2001), http://news.bbc.co.uk/2/hi/uk_news/1201738.stm (indicating the number of individuals killed in the IRA bombing). Additionally, the United Kingdom enacted legislation in 1939 in response to “an earlier I.R.A. campaign in Britain and [the legislation] contained the ideas of exclusion and special police powers.” SELECT COMMITTEE ON THE CONSTITUTION, *supra*.

¹²³ Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (U.K.).

previous counter-terrorism legislation, and put[ting] it largely on a permanent basis.”¹²⁴

The bill, which later became the Terrorism Act, 2000, (hereinafter the *2000 Act*), applies not only to terrorism connected with the affairs of Northern Ireland, but also to terrorism connected with other parts of the United Kingdom, as well as international terrorism.¹²⁵ One of the main aspects of the 2000 Act is the criminalization of financing terrorist activities.¹²⁶

C. *Jurisdictional Reach of Crimes against the Financing of Terrorism*

The 2000 Act departs from the English law presumption that legislation is intended to have only territorial scope.¹²⁷ Pursuant to Section 63, an offence is committed under Sections 15–18 when the act in question takes place outside the United Kingdom, but would have constituted an offence if committed within the country.¹²⁸ Sections 15–18 of the 2000 Act criminalize behavior relating to the financing of terrorism.¹²⁹ The acts caught by these provisions are:

- (i) fund-raising;¹³⁰
- (ii) use and possession of property;¹³¹
- (iii) funding arrangements;¹³² and
- (iv) money-laundering¹³³

“for the purposes of terrorism,” including financing organizations proscribed by the Secretary of State for the Home Department under Section 3 of the 2000 Act.¹³⁴

¹²⁴ HOME OFFICE & N. IR. OFFICE, TERRORISM ACT, 2000, EXPLANATORY NOTES, 1999–2000, para. 3 (U.K.) [hereinafter EXPLANATORY NOTES].

¹²⁵ Terrorism Act, 2000, c. 11, § 62 (U.K.); EXPLANATORY NOTES, *supra* note 124, § 8.

¹²⁶ Terrorism Act, 2000, c. 11, § 15–18 (U.K.); EXPLANATORY NOTES, *supra* note 124, § 9.

¹²⁷ *Air-India v. Wiggins*, [1980] 2 All E.R. 593 (H.L.) at 596 (Eng.); *MacLeod v. Att’y Gen. for NSW*, [1891] A.C. 455, 458–59 (P.C.) (U.K.) (appeal taken from NSW).

¹²⁸ Terrorism Act, 2000, c. 11, § 63 (U.K.); *see also* Magistrates’ Courts Act, 1980, c. 43, § 11 (U.K.) (for the proposition that no automatic limitation on enforcement jurisdiction of the kind applicable in the United States can be implied as defendants can in certain circumstances be convicted also in absentia in the case of less serious charges); discussion *infra* Part III.D.

¹²⁹ Terrorism Act, 2000, c. 11, §§ 15–18.

¹³⁰ *Id.* § 15.

¹³¹ *Id.* § 16.

¹³² *Id.* § 17.

¹³³ *Id.* § 18.

¹³⁴ *Id.* § 62.

Section 63, creating universal jurisdiction¹³⁵ was not included in the previous legislation nor in the original bill presented to Parliament in 1999, but added later by the government, with the explanation that it was required to enable the government to ratify the Financing Convention.¹³⁶ The second stated rationale for universal prescriptive jurisdiction was a desire to send a signal to the effect that “[t]he United Kingdom has no intention of becoming a safe haven or a weakling state . . . for international terrorists and their supporters.”¹³⁷

However, the legislation, as it presently stands, goes beyond what is required by the Financing Convention and permitted by customary international law. Section 18 includes money-laundering within the prohibited “financing” offences subject to Section 63,¹³⁸ whereas Article 2.1 of the Financing Convention is restricted to the provision and collection of funds—which, while possibly quite wide in its terms, does not encompass money-laundering,¹³⁹ which as an analytical matter is neither provision nor collection, but rather handling and manipulation of funds.

To determine whether the financing crimes in Sections 15–18 of the 2000 Act violate international law in other respects, one needs to examine the intent of the financier, as financing crimes are proximity crimes. Even though Section 63 provides for ostensibly unlimited prescriptive jurisdiction for the offences in Sections 15–18,¹⁴⁰ a nexus with the United Kingdom might be provided by these “predicate acts”¹⁴¹ for which the prohibited financing must have been intended.

Section 1 of the 2000 Act defines “terrorism” for the purposes of, among others, triggering the offences in Sections 15–18.¹⁴² The definition covers an action or threat that (i) involves serious violence against a person or damage to property, endangers a person’s life, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere

¹³⁵ *Id.* § 63.

¹³⁶ Feb. 8, 2000, STANDING COMM. DEB. H.C. (2000) (U.K.); *see also* EXPLANATORY NOTES, *supra* note 124, para 57; Michael Carpenter, *Foreword* to THE UNITED KINGDOM’S LEGAL RESPONSES TO TERRORISM, viii n.5 (Yonah Alexander & Edgar H. Brenner eds., Transnat’l Publishers 2003).

¹³⁷ 347 PARL. DEB., H.L. (5th ser.) (2000) 1486, 1439 (U.K.).

¹³⁸ Terrorism Act, 2000, c. 11, § 18 (U.K.).

¹³⁹ Financing Convention, *supra* note 2, art. 2, at 230–31.

¹⁴⁰ Terrorism Act, 2000, c. 11, § 63.

¹⁴¹ This term is defined in as the underlying acts of terrorism for which the financing is intended. 18 U.S.C. § 2339C(e)(6) (2006)

¹⁴² Terrorism Act, 2000, c. 11, § 1.

with or disrupt an electronic system; (ii) is made for the purpose of advancing a political, religious, racial,¹⁴³ or ideological cause; and (iii) is designed to influence the government or an international governmental organization¹⁴⁴ or to intimidate the public or a section of the public.¹⁴⁵

This definition is very broad,¹⁴⁶ and in many respects broader than that included in Article 2.1 of the Financing Convention, as it covers:

- (i) threats, whereas the Financing Convention requires the financing to be intended for the actual commission of an “act intended to cause death or serious bodily injury”;¹⁴⁷
- (ii) acts aimed at damage to property or disrupting an electronic system, whereas the Financing Convention requires “death or serious bodily injury” or a specific offence under the Global Terrorism Conventions;¹⁴⁸
- (iii) creating a serious *risk* to the health or safety of the public, whereas the Financing Convention requires an intention to cause actual death of serious bodily harm,¹⁴⁹ and
- (iv) those engaged in armed conflict come within the definition of victims of terrorism whereas the Financing Convention expressly limits the definition of a victim of terrorism to “a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict.”¹⁵⁰

Moreover, no link is required to the United Kingdom within the definition of terrorism in Section 1. Under Section 1(4), the “action” constituting terrorism may:

- (i) occur outside the United Kingdom;¹⁵¹
- (ii) harm persons or property outside the United Kingdom;¹⁵²

¹⁴³ Counter-Terrorism Act, 2008, c. 28, § 75(1)(2)(a) (U.K.) (adding the term “racial” to the definition).

¹⁴⁴ Terrorism Act, 2006, c. 11, § 34(a) (U.K.) (adding the term “international governmental organization” to the definition).

¹⁴⁵ Terrorism Act, 2000, c. 11, § 1.

¹⁴⁶ DAVID ANDERSON, REPORT ON THE OPERATION IN 2011 OF THE TERRORISM ACT 2000 AND OF PART 1 OF THE TERRORISM ACT 2006 para. 2.27 (2012) (referring to “the extreme breadth of the definition of ‘terrorism’ in UK law”); *see also id.* paras. 3.2–6.

¹⁴⁷ Financing Convention, *supra* note 2, art. 2.1, at 230.

¹⁴⁸ *Id.* art. 2.1, at 230, annex, at 241.

¹⁴⁹ *Id.* art. 2.1, at 230.

¹⁵⁰ *Id.*

¹⁵¹ Terrorism Act, 2000, c. 11, § 1 (U.K.).

- (iii) be intended to intimidate public anywhere in the world;¹⁵³ or
- (iv) influence any government, including tyrannies and dictatorships.¹⁵⁴

This is inconsistent with international law. Sections 63 and 1(4) are not limited to funding or terrorist acts connected solely with other states parties to the Financing Convention, whereas the rules in the Convention are not applicable to non-parties.¹⁵⁵ Universal jurisdiction for terrorist-financing offences is not permitted as a matter of customary international law, as concluded in the first section of this article. Despite the wide acceptance of the Financing Convention,¹⁵⁶ this is not merely a theoretical concern when states such as Eritrea, Iraq, Iran, Kuwait and Lebanon still remain outside it.

Section 1(5) also specifies that any action taken “for the benefit of proscribed organisations,” whether violent or not, is covered by the definition of terrorism.¹⁵⁷ Further, the Section 14 definition of “property” encompasses all property of proscribed organizations,¹⁵⁸ ensuring that Sections 15–18 and Section 63 catch any support for such organizations. The proscribed organizations themselves need have no connection to the United Kingdom. The government has proscribed a total of forty-eight organizations concerned with international terrorism,¹⁵⁹ not because they pose a threat to the United Kingdom, or to British nationals overseas, or have a presence in the United Kingdom, but due to “the nature and scale of” their activities and “the need to support other members of the international community in the global fight against terrorism.”¹⁶⁰

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ R. v. F. [2007] EWCA (Crim) 243, [38] (Eng.).

¹⁵⁵ Terrorism Act, 2000, c. 11, § 5 (U.K.); *see, e.g.*, Financing Convention, *supra* note 2, at 232–33, arts. 5–9 (limiting jurisdictional requirements to “State Part[ies]”).

¹⁵⁶ *Financing Convention Status*, *supra* note 3 (noting there are currently 132 signatories to the Financing Convention).

¹⁵⁷ Terrorism Act, 2000, c. 11, § 1.

¹⁵⁸ *Id.* § 14.

¹⁵⁹ Prevention and Suppression of Terrorism, 2010, S.I. 2010/611 art. 2 (U.K.); Prevention and Suppression of Terrorism, 2011, S.I. 2011/108 art. 2 (U.K.); Prevention and Suppression of Terrorism, 2006, S.I. 2006/2016 art. 2 (U.K.); Prevention and Suppression of Terrorism, 2007, S.I. 2007/2184 art. 2 (U.K.); Prevention and Suppression of Terrorism, 2005, S.I. 2005/2892 art. 2 (U.K.); Prevention and Suppression of Terrorism, 2001, S.I. 2001/1261 art. 2 (U.K.); Prevention and Suppression of Terrorism, 2002, S.I. 2002/2724 art. 2 (U.K.). One organization, Mujaheddin e Khalq, was eventually de-proscribed because of a successful court appeal. *See* Lord Alton of Liverpool v. Sec’y of State for the Home Dep’t [2008] 1 WLR 2341 (C.A. (Civ. Div.), Eng.); Prevention and Suppression of Terrorism, 2008, S.I. 2008/1645 art. 2 (U.K.).

¹⁶⁰ Sec’y of State v. Lord Alton, [2008] EWCA (Civ.) 443, [12] (Eng.) (citing the Home Secretary’s cover letter to Parliament).

The Financing Convention only concerns the financing of terrorist *acts*, rather than organizations.¹⁶¹ Thus, criminalizing financing non-violent activities of proscribed organizations with no connection with the United Kingdom is a further incompatibility with international law.

D. Conclusions and Further Considerations

In order to violate Sections 15–18 of the 2000 Act, no link is required to the United Kingdom either for the financing or for the predicate acts of terrorism or proscribed organizations.¹⁶² Although there appears to be no question that Section 63 of the 2000 Act is perfectly valid as a matter of domestic U.K. law, the earlier words of the Parliamentary Undersecretary of State for the Home Department were ignored when it was enacted:

When introducing legislation aimed at combating international crime, we should be careful to ensure that the UK does not simply export its laws to other countries. Foreign Governments are responsible for determining what actions should be prohibited within their territories and how such behaviour should be dealt with under their laws.¹⁶³

The safeguard against abuse of the power to prosecute anyone, for acts committed anywhere, under Section 63 is political rather than legal. Both the Director of Public Prosecutions and the Attorney General must approve prosecuting offences committed “outside the United Kingdom”¹⁶⁴ or “for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom.”¹⁶⁵ Lord Carlile of Berriew, the original independent reviewer of the 2000 Act, indicated that in his view this mechanism sufficiently safeguards against abuse by concluding that “[a] rational view of history and precedent shows that these are effective protections against oppression, and that there is little likelihood of the U.K. government using the definition of terrorism as an instrument of oppression.”¹⁶⁶

¹⁶¹ See Financing Convention, *supra* note 2, art. 2, at 230.

¹⁶² Terrorism Act, 2000, c. 11, §§ 15–18.

¹⁶³ 289 PARL. DEB., H.C. (6th ser.) (1997) 627 (U.K.).

¹⁶⁴ Counter Terrorism Act, 2008, c. 28, § 29 (U.K.).

¹⁶⁵ Terrorism Act, 2006, c. 11, §19(2) (U.K.). The 2000 Act merely provided that only the Attorney General’s consent was required for prosecutions for offences where international elements were present. Terrorism Act, 2000, c. 11, § 117.3.

¹⁶⁶ ALEX CARLILE, REPORT ON THE OPERATION IN 2002 AND 2003 OF THE TERRORISM ACT 2000 para. 25 (2004); *see also* ALEX CARLILE, REPORT ON THE OPERATION IN 2004 OF THE TERRORISM ACT 2000 para. 158 (2005); ALEX CARLILE, REPORT ON THE OPERATION IN 2005 OF THE TERRORISM ACT 2000 para. 144 (2006); ALEX CARLILE, REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 para. 260 (2008); ALEX

However, the adequacy of this safeguard was already criticized when the bill was passing the Parliament,¹⁶⁷ and David Anderson Q.C., who was appointed in 2010 to replace Lord Carlile as the independent reviewer,¹⁶⁸ stated in his first report that “[i]t is undesirable, as a rule, for criminal offences to be defined so broadly as to depend wholly on prosecutorial discretion for their sensible use.”¹⁶⁹ He appears, however, to have made an exception to this rule for terrorism offences:

It is not easy however to see a principled basis upon which the scope (in particular, the extra-jurisdictional scope) of the United Kingdom’s definition of terrorism could or should be reduced. In practice, the prosecution of persons for terrorist offences committed outside the United Kingdom, or directed towards non-UK targets, tends to be restricted to cases in which there is some United Kingdom connection.¹⁷⁰

In my opinion, a plea to difficulty in definition to justify broad criminalization is not sufficient; a state subscribing to the notion of rule of law should not, as a matter of principle, equip itself with virtually unlimited legal powers subject only to purely political protections.

Moreover, this “safeguard” in Section 117(2A) of the 2000 Act might itself fall foul of the provisions of the Financing Convention, which requires in Article 10.1 that decisions regarding prosecutions are to be taken “in the same manner as in the case of any other offence of a grave nature under the law of that State.”¹⁷¹

In practice, no cases have been reported as having been brought under Section 63 for the financing of terrorism outside the United Kingdom.¹⁷² The lack of any visible use made of Section 63 in prosecuting major financiers of

CARLILE, REPORT ON THE OPERATION IN 2008 OF THE TERRORISM ACT 2000 AND OF PART 1 OF THE TERRORISM ACT 2006 para. 214 (2009); ALEX CARLILE, THE DEFINITION OF TERRORISM, 2007, Cm. 7052, at 31 (U.K.).

¹⁶⁷ *E.g.*, 346 PARL. DEB., H.C. (6th ser.) (2000) 383 (U.K.); 347 PARL. DEB., H.L. (5th ser.) (2000) (U.K.); 341 PARL. DEB., H.C. (6th ser.) (1999) 163, 213 (U.K.).

¹⁶⁸ David Anderson, *Message from the Independent Reviewer*, INDEP. REVIEWER TERRORISM LEGIS., <http://terrorismlegislationreviewer.independent.gov.uk/> (last visited Oct. 3, 2012).

¹⁶⁹ DAVID ANDERSON, REPORT ON THE OPERATION IN 2010 OF THE TERRORISM ACT 2000 AND OF PART 1 OF THE TERRORISM ACT 2006 para. 3.6 (2011).

¹⁷⁰ *Id.* para. 3.7.

¹⁷¹ Financing Convention, *supra* note 2, art. 10.1, at 234.

¹⁷² *Cf.* *The Counter-Terrorism Division of the Crown Prosecution Service (CPS)*, CROWN PROSECUTION SERV., <http://www.cps.gov.uk/publications/prosecution/ctd.html> (last visited Sept. 26, 2012) (providing information on all successful prosecutions concluded between 2007 and 2012).

international terrorism casts doubt on the necessity of the provision for anything other than the public relations purpose identified by the United Kingdom government as its secondary aim.

Nevertheless, an illustration of the dangers of the extensive scope of the provisions in Sections 15–18 together with Section 63 of the 2000 Act is provided by the case of *R. v. Hundal*.¹⁷³ Messrs. Hundal and Dhallwal were convicted under Section 11 of the 2000 Act for belonging to a proscribed organization for their membership of the International Sikh Youth Federation in Germany, where joining the organization was perfectly legal.¹⁷⁴

Presumably, Messrs. Hundal and Dhallwal also paid subscription fees to the Sikh Youth Federation, maybe from a German bank account to another German bank account. It is by no means far-fetched to imagine that they could have been convicted also for this act in the United Kingdom, although it is unclear whether the payment of such subscription fees would have been illegal under German law, where the act occurred, or whether it would have had any internationally recognized link to the United Kingdom. Such convictions would presumably have violated international law.¹⁷⁵

III. JURISDICTION FOR THE FINANCING OF TERRORISM IN THE UNITED STATES AND ITS COMPATIBILITY WITH PUBLIC INTERNATIONAL LAW

The situation regarding jurisdiction for crimes relating to financing terrorism is much more complex in the United States than in the United Kingdom, and thus requires the analysis to be broken down into more discrete elements. The interplay of legislative, constitutional, and judicial sources provides essentially that criminal jurisdiction is permissible under United States law, as long as (i) the offence or the offender has some nexus with the United States or (ii) international law provides for universal jurisdiction for the offence in question. The United States has in general provided for broad extraterritorial jurisdiction in the context of terrorism, especially since the terrorist attacks of September 11, 2001.¹⁷⁶ In the absence of consolidation, the

¹⁷³ *R. v. Hundal*, [2004] EWCA (Crim.) 389 (Eng.).

¹⁷⁴ *Id. passim*.

¹⁷⁵ The independent reviewer of the United Kingdom terrorism legislation has also remarked that participants in the “Arab spring” of 2011 would come within the definition of terrorists under the 2000 Act, as their financiers presumably would as well. ANDERSON, *supra* note 169, para. 3.5.

¹⁷⁶ See Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional Yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN. J. INT’L L. 313, 318 (2006).

present state of the law is plagued by complexity and ambiguity concerning its jurisdictional scope and potential overlap between its provisions. Neither the terrorism-financing offences themselves, nor the predicate acts, necessarily always require a connection with the United States on their face, subject only to the uncertain limits provided by the Constitution.¹⁷⁷ There is a risk that some of these provisions are incompatible with international law, although there are fewer elements that pose such a risk than in the case of United Kingdom legislation.

A. *Traditional Position on Extraterritorial Jurisdiction in United States Criminal Law*

There is a longstanding principle in United States law that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested.¹⁷⁸ However, ultimately United States courts are only mandated to apply their domestic laws, and where those are expressed unambiguously to provide for extraterritorial jurisdiction, courts will give effect to them, even at the risk of breaching international law.¹⁷⁹

The Due Process clause in the Fifth Amendment to the United States Constitution imposes more concrete constraints on United States courts' jurisdiction.¹⁸⁰ As decided by the Ninth Circuit in *United States v. Davis*, it is not enough for Congress to make it clear that legislation has extraterritorial reach, but the court also required that "there must be a sufficient nexus between the defendant and the United States . . . so that such application would not be arbitrary or fundamentally unfair."¹⁸¹ The "sufficient nexus" means in abstract terms, that "a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court,'" in the

¹⁷⁷ See *infra* Part III.E.

¹⁷⁸ *Rasul v. Bush*, 542 U.S. 466, 480 (2004); *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *United States v. Yousef*, 327 F.3d 56, 86, 94 (2d Cir. 2003); see also Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 503 (2005).

¹⁷⁹ *Yousef*, 327 F.3d at 91; *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

¹⁸⁰ Strictly speaking, the Due Process clause does not restrict the scope of legislation, but only its application to an individual that has no connection to the United States. See *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990).

¹⁸¹ *Id.* This was a civil rather than criminal case. However, the principle has been quoted and applied with approval in criminal cases, although arguably the analytical issue is very different.

United States.¹⁸² The appropriate test for establishing whether a sufficient nexus exists is to be found in customary international law rules on jurisdiction. For example, in *United States v. Yousef*, a terrorism case, the court determined that the required nexus was provided by the protective principle¹⁸³ and in *United States v. Lei Shi*, a piracy case, by the universality principle.¹⁸⁴ Thus, United States jurisdictional limitations track those of international law. In fact, no specific nexus to the United States is required as a matter of United States law where no such nexus is required under international law.¹⁸⁵

B. Development of Legislation Against Financing Terrorism

The highlighted concern with terrorism in the United States is more recent than in the United Kingdom, principally because America has escaped the type of large-scale sectarian tensions that plagued Northern Ireland for decades. The first express legislative attempt to regulate extraterritorial terrorism appears to have been the introduction of the Antiterrorism Act of 1990.¹⁸⁶ It was followed by other measures that dealt primarily with establishing civil liability before U.S. courts to U.S. citizens injured by terrorist attacks on foreign soil, and ordering the freezing of terrorist assets.¹⁸⁷ It was only natural that criminal prohibitions would follow.

U.S. legislation criminalizing the financing of terrorism has always had broad jurisdictional reach, but it has further widened after the terrorist attacks of September 11, 2001.¹⁸⁸ The relevant legislation is found in three provisions in Chapter 113B of Title 18 of the United States Code (2010) entitled “Terrorism.”¹⁸⁹

¹⁸² *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

¹⁸³ 327 F.3d at 110–11.

¹⁸⁴ 525 F.3d 709, 723 (9th Cir. 2008); *see also* *United States v. Perez-Oviedo*, 281 F.3d 400, 402 (3d Cir. 2002); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

¹⁸⁵ *See* Colangelo, *supra* note 33, at 124–25, 166–68.

¹⁸⁶ Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132(b)(4), 104 Stat. 2250, 2250–52 (subsequently codified in 18 U.S.C. §§ 2331, 2333–38 (2006)); *see also* *Weiss v. Nat’l Westminster Bank, PLC*, 242 F.R.D. 33, 46 (E.D.N.Y. 2007).

¹⁸⁷ *E.g.*, Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003(a)(3), 106 Stat. 4506, 4521–22; Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

¹⁸⁸ ROTH, *supra* note 89, at 47; George W. Bush et al., President Freezes Terrorists’ Assets: Remarks on Executive Order (Sept. 24, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010924-4.html>).

¹⁸⁹ 18 U.S.C. § 2331.

C. Jurisdictional Reach of the Crime of Material Support for Terrorist Acts

The Violent Crime Control and Law Enforcement Act of 1994 enacted 18 U.S.C. § 2339A.¹⁹⁰ It prohibits “providing material support” (and thus is not limited to financial support) for terrorist acts, but originally did so only “within the United States.”¹⁹¹ The expressly territorial jurisdictional reach of Section 2339A was altered by Congress with the enactment of the USA PATRIOT Act of 2001, removing the words “within the United States” from the description of the offence.¹⁹² It may nevertheless be questioned whether this amendment resulted in extending the United States’ jurisdiction over acts committed outside its territory, or merely removed the words that were superfluous in light of the general presumption against extraterritorial jurisdiction in the absence of clearly expressed intent to the contrary, discussed above. The legislative history for the amendment does not clarify the issue. No usual reports accompanied the amendment; presumably, because it was enacted with such haste in the aftermath of the terrorist attacks of September 11, 2001.¹⁹³

In contrast with U.K. legislation that criminalizes the extremely broadly defined financing of “terrorism,” Section 2339A is expressly limited to “providing material support” for certain specified offences.¹⁹⁴ These predicate acts cover over forty offences, such as the destruction of aircraft, biological and chemical weapons offences, the murder of federal officers or foreign dignitaries, torture, and the destruction of communications property or energy facilities.¹⁹⁵ Some of these offences expressly provide for extraterritorial federal jurisdiction, namely biological weapons offences; murder, kidnapping, or assault upon Members of Congress; murder, kidnapping, or assault of the President; and multinational terrorism.¹⁹⁶ Hence, Section 2339A “has no explicit extraterritorial provisions but almost certainly has extraterritorial application by virtue of the extraterritorial features of its predicate offenses.”¹⁹⁷

¹⁹⁰ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a), 108 Stat. 1796, 2022.

¹⁹¹ *Id.* To the extent that the clause criminalizes the provision of “material support” other than funds, it is beyond the scope of this article.

¹⁹² PATRIOT Act, Pub. L. No. 107-56, § 805(a)(1)(A), 115 Stat. 272, 377 (2001).

¹⁹³ Block, *supra* note 178, at 473.

¹⁹⁴ 18 U.S.C. § 2339A.

¹⁹⁵ *Id.*

¹⁹⁶ 18 U.S.C. § 175(a); 18 U.S.C. § 351(i); 18 U.S.C. § 1751(k); 18 U.S.C. § 2332(e).

¹⁹⁷ CHARLES DOYLE, CONG. RESEARCH SERV., RL31557, TERRORISM AND EXTRATERRITORIAL JURISDICTION IN CRIMINAL CASES: RECENT DEVELOPMENTS 16 (2002).

If Section 2339A applies to funding having no connection to the United States—a matter that remains unclear despite the removal of the words “within the United States” from the provision—*and* to the extent it applies to predicate acts having no connection to the United States, it has universal scope.¹⁹⁸ International customary law does not permit such a broad scope,¹⁹⁹ and thus the provision’s failure to exclude from its scope funding or terrorist acts connected solely with non-parties to the Financing Convention, renders it incompatible with international law. Moreover, while “providing material support”²⁰⁰ in the form of financing appears to constitute “provi[sion] or collect[ion]” as per Article 2.1 of the Financing Convention,²⁰¹ to the extent that the predicate offences attracting universal jurisdiction do not come under the definition of predicate acts in Article 2.1(b) of the Financing Convention,²⁰² (which biological weapons offences²⁰³ in particular may not do in all circumstances), they are incompatible with the Financing Convention as well as customary international law. However, to the extent that the provision breaches customary international law rules on jurisdiction, prosecutions based on it should be rejected by United States courts as violating the Due Process clause of the Fifth Amendment to the Constitution.

D. Jurisdictional Reach of the Crime of Material Support to Designated Organizations

The prohibition of terrorist financing was expanded by the addition of 18 U.S.C. § 2339B in 1996.²⁰⁴ Section 303(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (the “1996 Act”) prohibited providing “material support to a foreign terrorist organization.”²⁰⁵ Like the prohibition of financing of proscribed organizations in the United Kingdom, the provision of material support to “a foreign terrorist organization” in the United States is prohibited, even where the support or financing is intended for the lawful purposes of the

¹⁹⁸ See *id.* at 2.

¹⁹⁹ See *id.*

²⁰⁰ 18 U.S.C. § 2339A.

²⁰¹ This appears also to be the view of the Court of Military Commission Review, which stated in *United States v. Hamdan* that “[t]his language [in Article 2.1 of the Financing Convention] seeks to criminalize conduct falling within the definition of providing material support for terrorism.” 801 F. Supp. 2d 1247, 1283 (U.S.C.M.C.R. 2011).

²⁰² See Financing Convention, *supra* note 2, art. 2.1, at 230.

²⁰³ 18 U.S.C. § 175(a).

²⁰⁴ See 18 U.S.C. § 2339B.

²⁰⁵ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250-53.

organization in question.²⁰⁶ Although the expressed legislative motivation for the enactment was related to funding occurring within the United States²⁰⁷ and jurisdiction was originally intended to be limited to acts committed “within the United States,”²⁰⁸ the jurisdictional scope of the provision as enacted is in fact very wide. Originally the section in the statute books provided simply that “[t]here is extraterritorial Federal jurisdiction over an offense under this section.”²⁰⁹

In the post “9/11” era the Bush administration perceived the need to “describe [the provision’s] overseas application more explicitly and more expansively than was once the case,” since the earlier language “arguably referred [only] to American citizens, residents of this country, and entities organized under [U.S.] laws.”²¹⁰ The Intelligence Reform and Terrorism Prevention Act of 2004 inserted a list of six different grounds of jurisdiction to Section 2339B, five of which require a link to the United States, ranging from the offender being a national or resident of the United States to the offence occurring in or affecting interstate or foreign commerce.²¹¹ The most far-reaching addition found in Section 2339B provides for jurisdiction when “after the conduct required for the offense occurs an offender is *brought into* or found in the United States,”²¹²—making express the limitation on enforcement jurisdiction already existing in United States federal law;²¹³ however, the italicized text appears to be superfluous, as earlier case law had established that statutory text providing jurisdiction over offenders “found in the United States” covered instances where they were brought within U.S. territory

²⁰⁶ Compare *id.* § 301(a)(7), with Terrorism Act, 2000, c. 11, §§ 15–18 (U.K.); see also Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism*, 73 IND. L.J. 693, 699 (1998).

²⁰⁷ § 301(a), 110 Stat. 1214, at 1247; William J. Clinton, President, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996).

²⁰⁸ H.R. REP. NO. 104-383, at 3–4, (1995).

²⁰⁹ § 303(d), 110 Stat. 1214, at 1251. Section 303(a)(1) also mandated that the prohibited conduct had to occur “within the United States or subject to the jurisdiction of the United States.” *Id.* at 1250.

²¹⁰ DOYLE, *supra* note 89, at 7.

²¹¹ Material Support to Terrorism Prohibition Enhancement Act of 2004, Pub. L. No. 108-458, § 6603(d), 118 Stat. 3761, 3763. The legislation also removed the express requirement that the offence occur “within the United States or subject to the jurisdiction of the United States.” *Id.* § 6603(c)(1), 118 Stat. at 3762.

²¹² *Id.* § 6603(d), 118 Stat. at 3763 (emphasis added).

²¹³ LEA BRILMAYER ET AL., AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 329 (1986).

against their will.²¹⁴ Thus there is “universal” prescriptive jurisdiction under Section 2339B, limited by territorial enforcement jurisdiction.

However, provision of material support to designated terrorist organizations appears to include a nexus with the United States in the predicate act. Section 219(a)(1)(C) of the 1996 Act specifies that the Secretary of State may designate an organization as a “foreign terrorist organization” if he is satisfied that the organization’s activity “threatens the security of United States nationals or the national security of the United States.”²¹⁵ This provides designation on the basis of passive personality and protective principles under international law; however, arguably this requirement has not been interpreted very strictly in practice, as examples of designated organizations include organizations with domestic agendas that are well-known to be targeting their country of establishment, such as the Liberation Tigers of Tamil Elam and Kurdistan Workers’ Party.²¹⁶

Although the use of these principles is probably acceptable in the context of terrorist financing, such acceptance is likely to be limited to offences that come within the scope of Article 2.1 of the Financing Convention. No provision is made in that Article for prohibiting the financing of non-violent activities of organizations.²¹⁷

Admittedly, the conclusion above that jurisdiction based on the passive personality and protective principles in the context of terrorist financing is limited to the offence as defined in the Financing Convention was merely tentative. But the United States legislation might demonstrate why such a limitation is justified.

State X is unlikely to consider its sovereignty to have been compromised if State Y criminalizes the financing by nationals of State X within State X of terrorist acts that are aimed at killing or injuring State Y nationals and/or

²¹⁴ United States v. Shi, 525 F.3d 709, 724–25 (9th Cir. 2008) (applying 18 U.S.C. § 2280); United States v. Yousef, 327 F.3d 56, 88–89 (2d Cir. 2003) (applying 18 U.S.C. § 32(b)); United States v. Yunis, 924 F.2d 1086, 1092 (D.C. Cir. 1991) (applying 18 U.S.C. § 1472(n)), *aff’g* 681 F. Supp. 896 (D.D.C. 1988).

²¹⁵ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302(a), 110 Stat. 1214, 1248.

²¹⁶ Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650 (Oct. 8, 1997). However, the Supreme Court noted in *Holder v. Humanitarian Law Project* that some of the terrorist attacks by the Tamil Tigers and PKK had harmed American citizens, thus indirectly affirming that the Secretary of State’s designation was justified. 130 S.Ct. 2705, 2713 (2010), *aff’g in part, rev’g in part* 552 F.3d 916 (9th Cir. 2009).

²¹⁷ See generally Financing Convention, *supra* note 2.

influencing State Y policy. By contrast, State X would be more likely to object to State Y criminalizing State X nationals financing the political or humanitarian work of Organization Z within State X territory, even if Organization Z also carried out terrorist activities, which State X condemned.

Some of the world's most notorious terrorist organizations, such as Hamas, also have political and social programs that may be effective in areas where few other authorities or organizations can achieve results.²¹⁸ Without underestimating the threat to the United States' national security posed by the terrorist activities of such organizations, it is likely to be infringing, say, Ugandan sovereignty for the United States to criminalize a Ugandan national financing the Hamas-organized reconstruction of schools in the Gaza strip in Uganda. One could also argue that even if the tentative definition is wrong, and states may criminalize terrorist financing however defined under the protective and passive personality principles, the Ugandan-financed Hamas reconstruction example does not, as a matter of *fact*, threaten U.S. security or nationals and thus the protective and passive personality principles are inapplicable.²¹⁹

Accordingly, Section 2339B violates international law to the extent that it criminalizes the financing of non-terrorist related activities of organizations outside the territory of the United States by persons that are not U.S. nationals.

But even if Section 2339B breaches the international law rules of jurisdiction, the Fifth Amendment should again provide a defense for persons brought before U.S. courts in breach of international law. This safeguard is of crucial importance in the present circumstances, as it is the only thing that stands legally—as a matter of U.S. law—between our hypothetical Ugandan financier of Hamas' reconstruction efforts and U.S. prison, whether he voluntarily sets foot on American soil or not.

E. Jurisdictional Reach of the Crimes Under the Financing Convention

The most recent addition to the armory of statutory provisions against financing terrorism is Section 2339C, added by the Suppression of the Financing of Terrorism Convention Implementation Act of 2002 Section 202,

²¹⁸ *Humanitarian Law Project*, 130 S. Ct. at 2725.

²¹⁹ The Supreme Court appeared to reach a different conclusion in *Humanitarian Law Project*. *Id.* No consideration was given to any causation or remoteness issues, except in passing by the dissent. *Id.* at 2737 (Breyer, J., dissenting).

which, as the name suggests, purports to implement the Financing Convention in U.S. domestic law.²²⁰ The offence itself is defined as “unlawfully and wilfully provid[ing] or collect[ing] funds” for use in terrorist crimes specified in the Financing Convention,²²¹ thus ensuring that the scope of the prohibited conduct is within Article 2.1 of the Financing Convention. The jurisdictional scope of the offence is provided by a composite enumeration of different bases, dealing with both the offence of financing itself and the predicate terrorist act.²²² The stipulations on the offence of financing itself include a “sweep-up” provision that extends jurisdiction to persons “found in the United States,” which includes a person brought into the United States against his will.²²³ This complex jurisdictional provision endeavors to translate the jurisdictional rules in Article 7 of the Financing Convention, including the requirement to “extradite or prosecute,” into United States federal law.²²⁴ The only omission is funding for purely domestic terrorism committed within the United States by U.S. nationals aimed at U.S. interests.

Overall, Sections 2339C criminalizes the financing of terrorist acts when neither the financing nor terrorist acts have a connection with the United States.²²⁵ In other words, the prescriptive jurisdiction afforded is universal, but limited by territorial enforcement jurisdiction. As the provision is aimed at the transposition of the obligations under the Financing Convention into federal law,²²⁶ it replicates the wording of the Convention,²²⁷ and is thus largely in accordance with international law; however, the provision fails to exclude from its scope funding or terrorist acts connected solely with non-parties to the Financing Convention.²²⁸ Such federal offences are in breach of international law, but as with Sections 2339A–B, the courts provide the safeguard against prosecutions that violate international customary law, which should reject

²²⁰ H.R. 3275, 107th Cong. § 202(a) (2002).

²²¹ *Id.*

²²² *Id.*

²²³ *Supra* note 212–14 and accompanying text.

²²⁴ DOYLE, *supra* note 197, at 16.

²²⁵ 18 U.S.C. § 2339C (2006).

²²⁶ *Supra* note 220.

²²⁷ For example, the parallels between § 2339C and the Convention are apparent in the definitions of the offences covered. Compare 18 U.S.C. § 2339C(a)(1) (“Whoever . . . by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out”), with Financing Convention, *supra* note 2, art. 2, at 230 (“Any person commits an offence . . . if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: . . .”).

²²⁸ See 18 U.S.C § 2339C.

cases where a nexus is required by international law and none exists between the offence and the United States as unconstitutional.

F. Conclusions and Further Considerations

In sum, the jurisdictional landscape provided by the U.S. federal legislation criminalizing financing terrorism is a veritable patchwork, making the categorization of the offence crucial for purposes of establishing jurisdiction. The provisions range from jurisdiction based on passive personality and protective principles for providing material support to designated terrorist organizations under Sections 2339B²²⁹ to maximum extraterritorial jurisdiction limited only by the U.S. Constitution for financing terrorist offences specified under the Financing Convention under Section 2339C.²³⁰ Although all the provisions Sections 2339A–C are incompatible with international law, such instances of incompatibility are in reality limited, and in any event prosecutions based on them should be rejected by courts as unconstitutional.

One commentator predicted in 2003 that it was, despite the facially wide jurisdictional reach of several provisions in Chapter 113B of Title 18 of the U.S. Code, “far from certain that U.S. civilian courts will look favorably upon exercising jurisdiction based on universality against suspects caught in the President’s effort to eradicate global terrorism.”²³¹

Recent case law, including the decision in *United States v. Al-Kassar*, throws this prediction into doubt. The U.S. District Court for the Southern District of New York, in upholding jurisdiction to try the defendants for providing arms to a Colombian terrorist organization in breach of § 2339B(a)(1), among other provisions, stated that “agreeing to sell weapons to a terrorist organization with the express purpose of killing innocent civilians unquestionably violates the laws of all civilized nations, which uniformly punish, prosecute, and condemn terrorist violence.”²³²

²²⁹ See *supra* notes 220–25 and accompanying text.

²³⁰ See *supra* notes 225–28 and accompanying text.

²³¹ Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 350 (2003).

²³² *United States v. Al Kassar*, 582 F. Supp.2d 488, 495 (S.D.N.Y. 2008); see also *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp.2d 609, 632 (E.D.N.Y. 2006). The defendants in *Al Kassar* were subsequently convicted and their convictions affirmed upon appeal, the Second Circuit finding that there was sufficient nexus with the United States as the weapons were sold “with the understanding that they would be used to kill Americans and destroy U.S. property . . .” thereby relying upon the passive personality principle for purposes of jurisdiction, although not expressly disagreeing with or criticizing the earlier pronouncements of the District Court. *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011).

Although not expressly referring to the universality principle, this obiter dictum can be seen as supporting the notions that (i) universality provides a sufficient “nexus” for trying terrorists in U.S. courts, as terrorist acts “violate the laws of all civilized nations”;²³³ and (ii) the courts will take a generous view of offences attracting universal jurisdiction, at least in the terrorism context.

According to another commentator, “it is presently the stated policy of the United States to wage a war against ‘terrorism’ writ large, wherever it occurs around the world,”²³⁴ although this policy arguably changed when the Obama administration replaced the Bush administration in January 2009. In any event, Professor Sievert has warned against such conduct:

. . . [A]pparently the United States is the only government that has ever asserted universality as a potential basis for trying terrorists who may not directly impact the nation. . . . [I]f we pursue those who commit terrorist acts in the Philippines, Kashmir, or elsewhere, we will be acting as the oft-criticized “world’s policeman” when it would be better for others to accept responsibility for matters taking place in their own backyard.²³⁵

However, there is nothing wrong with acting as the world’s policeman where public international law rules permit jurisdiction of national courts—it is indeed the implicit aim of the universality principle to permit states to act as the global sheriff.²³⁶ This criticism would only be warranted in the rare cases where prosecutions of financiers of terrorism under U.S. laws were contrary to international law but were nevertheless allowed to proceed by the courts.

CONCLUSION

Terrorism arguably has been one of the main preoccupations of the last decade of politicians and legislators in the international as well as the domestic spheres. The pace of reform has been remarkable, at least in the context of seeking to prevent the financing of terrorism.

Although the efforts of the United Nations, and in particular the Security Council, have been decisive and comprehensive,²³⁷ leading to widespread

²³³ *Al Kassir*, 582 F. Supp.2d at 495.

²³⁴ Colangelo, *supra* note 33, at 122.

²³⁵ Sievert, *supra* note 231, at 350.

²³⁶ *See, e.g.*, *United States v. Shi*, 525 F.3d 709, 724–25 (9th Cir. 2008).

²³⁷ *See, e.g.*, S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

condemnation of terrorist-financing in domestic statute books and extensive adoption of the Financing Convention by states around the world, there is still no universal jurisdiction for terrorist financing offences. Thus, domestic legislation criminalizing financing terrorism extraterritorially must remain within the material scope of the Financing Convention, as well as ensure that the geographical scope of jurisdictional provisions based on the principle of “extradite or prosecute”²³⁸ do not overreach to acts having no connection with states parties to the Financing Convention.

The U.K. and U.S. laws, which have been called “models for terrorist-financing legislation,”²³⁹ are incompatible with the present state of international law.²⁴⁰ Due to the nature of international law and how it progresses, there are three possible developments in the international arena that may ensue from these national ones: either (i) other states will protest if and when prosecutions are brought under the offending provisions; (ii) such prosecutions will pass without comment, in which case, with time, customary law will change and financing terrorism will obtain the status of a crime of universal jurisdiction; or (iii) the focus of the world community will shift elsewhere, and the provisions will perhaps remain on the statute books while being rarely, if ever, used.

The United States and the United Kingdom have truly been at the forefront of legal developments in the combat against financing terrorism,²⁴¹ suggesting by their example that it is acceptable for national laws to race ahead of international law, and hoping the latter will follow suit; however, there are no good reasons for this rush. There is enough goodwill among the international community to achieve the required goals by consensus and cooperation; there should be no need to encroach upon the sovereignty of other states to effectively combat terrorist financing.

²³⁸ *Supra* note 23.

²³⁹ Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 328 (2003).

²⁴⁰ *See supra* notes 175, 219–29 and accompanying text.

²⁴¹ *See supra* Parts II & III.