

## Articles

# Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness

NOAH BIALOSTOZKY\*

*This Article posits that the present conception of protective jurisdiction—whereby states may assert jurisdiction over extraterritorial conduct that endangers certain national security interests—fails to delimit state conduct in a manner reconcilable with general principles of international law. Protective jurisdiction’s vague formulation has enabled states to use the concept as a pretext for legislating conduct in foreign territory that bears no meaningful connection to their national security. Take the example of a recent U.S. material support of terrorism law, which asserts protective jurisdiction over a broad range of foreign conduct in support of the Basque Fatherland and Liberty organization (ETA), even though the ETA arguably does not pose a meaningful threat of harm to U.S. national security. Under the prevailing international conception of protective jurisdiction, the U.S. statute is reviewed for “reasonableness” based on comity considerations and comparative state interests. Yet, without the consent of Spain and other affected states, such cross-border regulation should be subject to a rule of international law that requires a juridical link*

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\* Associate Legal Officer, United Nations Office of Legal Affairs. The views expressed herein do not necessarily reflect the views of the United Nations. The author would like to thank Lorand Bartels, James Crawford, Vaclav Mikulka, Christine Gray, Marko Milanovic, Audrey Tempelsman, Bart Szewczyk, and the members of the Cambridge University Ph.D. in Law Class of 2014 for their helpful comments on earlier drafts. The author would also like to thank the staff of the *Columbia Journal of Transnational Law* for their excellent editorial assistance. All views and errors are attributable to the author alone.

*between the extraterritorial conduct and national security. This Article proposes to standardize such a link by reformulating protective jurisdiction as a circumstance precluding wrongfulness under international law. Just as the state of necessity and self-defense doctrines indicate circumstances where otherwise internationally wrongful conduct is exceptionally permitted for the purpose of national security, this Article argues that protective, cross-border regulation should be limited to those exceptional circumstances where it is necessary to protect the regulating state from harm to an essential security interest. Only in those circumstances would a state be sufficiently connected to extraterritorial conduct to warrant interference in the domestic affairs of another state.*

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*There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances. Without that allocation of competences, all is rancor and chaos.<sup>1</sup>*

Judge Rosalyn Higgins

## INTRODUCTION

Protective jurisdiction evolved under international law as an extraterritorial exception to the territorial exclusivity of sovereign jurisdiction. Where extraterritorial conduct endangers certain national security interests, states may assert jurisdiction irrespective of the situs of the conduct or the nationality of those involved. Yet, this Article posits that protective jurisdiction as currently conceived fails to delimit state conduct in a manner reconcilable with general principles of international law; its vague formulation has enabled states to use the concept as a pretext for legislating conduct in the territory of a foreign sovereign that bears no meaningful connection to their own national security. As a result, this Article proposes that protective jurisdiction be reformulated to require a juridical link between the legislation of foreign conduct and national security.

Subject to the exceptions established by international law, it is widely accepted that the jurisdiction of a state corresponds with the exclusive authority to legislate conduct within its sovereign territory.<sup>2</sup>

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1. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 56 (1994).

2. JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456 (8th ed., 2012) ("Jurisdiction is an aspect of sovereignty: it refers to a state's competence under international law to regulate the conduct of natural and juridical persons. The notion

Indeed, jurisdiction, as a notion coterminous with sovereignty, is fundamental to the operation of the decentralized international legal system.<sup>3</sup> It is the dynamic concept of jurisdiction that establishes the boundaries of authority under international law, both horizontally and vertically. In other words, jurisdiction implicates both the exclusive authority of a sovereign state to regulate conduct within its territory, as well as the exceptions to that exclusivity established under international law. In a vertical sense, the exceptions are multifarious, as the international legal system imposes standards governing state regulation of conduct by way of international treaties and rules of customary international law. Horizontally, the exceptions to the exclusivity of sovereign jurisdiction are the accepted bases of extraterritorial jurisdiction.

Protective jurisdiction is one of five commonly accepted bases of extraterritorial jurisdiction,<sup>4</sup> and it is rooted in the notion that certain conduct abroad creates a juridical link between the actor and the state, regardless of the nationality of the actor.<sup>5</sup> Protective jurisdiction was historically accepted because the laws of other states were seen as inadequate to punish an offense committed specifically against the security of the regulating state.<sup>6</sup> Without a centralized, global authority capable of protecting states from extraterritorial harm, states required the competence to punish foreign conduct that frustrated their sovereign right to internal peace.<sup>7</sup> Yet, under the pre-

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of regulation includes the activity of all branches of government: legislative, executive and judicial.”).

3. See F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 9 (1964) [hereinafter Mann I] (“Jurisdiction is an aspect of sovereignty, it is coexistent with it, and indeed, incidental to but also limited by, the State’s sovereignty.”).

4. The other commonly accepted bases for extraterritorial jurisdiction are territoriality, nationality, passive personality, and universal jurisdiction. CRAWFORD, *supra* note 2, at 458–67; MALCOLM N. SHAW, *INTERNATIONAL LAW* 652–68 (6th ed., 2008). It should be noted, however, that the status and scope of the passive personality and universal principles remain unsettled. CRAWFORD, *supra* note 2, at 461, 467; SHAW, *supra* at 665, 668.

5. *Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT’L L. SUPP. 435, 555 (1935) [hereinafter *Draft Convention*] (quoting A. Mercier, *Le conflit de lois penales en matière de compétence*, 58 REV. DE DR. INT’L ET DE LEG. COMPARÉE 439, 464 (1931)).

6. *Draft Convention*, *supra* note 5, at 543–45; Harold G. Maier, *Jurisdictional Rules in Customary International Law*, in *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE* 69 (Karl M. Meesen ed., 1996) (“To conclude otherwise would put every state at the mercy of every person acting in every other state when the government at the *situs* of the acts has no self-interest in preventing those acts.”).

7. Manuel R. García-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 568 (1958) (citing DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT*

vailing conception of protective jurisdiction, states are not required to articulate why the legislation of foreign conduct is necessary for national security; protective jurisdiction is presently formulated by reference to comparative state interests and considerations of “reasonableness” and “good sense.” In effect, the present formulation dresses up comity considerations and presents them as an international rule.

Take the example of a recent U.S. material support of terrorism law, which asserts jurisdiction over the conduct of foreign nationals in foreign territory in support of the Basque Fatherland and Liberty organization (ETA), among other designated terrorist organizations. The law regulates a broad range of conduct in support of the ETA, including training, expert advice or assistance, and transportation, even though the ETA arguably does not pose a threat to U.S. security interests. Although the U.S. law is likely well-intentioned, it is a fundamental tenet of the international system that sovereign independence includes the right to exercise “to the exclusion of any other state, the functions of a state.”<sup>8</sup> Certainly the method of policing or addressing the threats posed by a local terrorist organization would fall squarely within this sovereign prerogative. It is for Spain and other directly affected states to determine whether the types of conduct proscribed by the U.S. statute—such as engagement in peace negotiations or efforts to reintegrate ETA members into society—should be criminalized or encouraged. Under the present formulation of protective jurisdiction, however, such cross-border regulation is deemed “reasonable” if relevant U.S. interests are found to exceed those of the forum state;<sup>9</sup> the United States is not required to articulate why the legislation of conduct in support of the ETA is necessary for U.S. national security.

To more effectively convey its purpose as an exception to the principle of non-interference<sup>10</sup> grounded in national security, this Ar-

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PÉNAL INTERNATIONAL 87 (1928)); *see also* Hersch Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105, 106, 126 (1928) (indicating that it is clear that a state is entitled to expect that the exclusivity of other states’ jurisdiction will not result in a serious menace to its existence and safety).

8. James Crawford, *Sovereignty as a Legal Value*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 121 (James Crawford & Martti Koskenniemi eds., 2012) (“Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.”) (citing *Island of Palmas*, Award of Apr. 4, 1928, 11 R.I.A.A. 831, 838 (Perm. Ct. Arb. 1928)).

9. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1988) (Limitations on Jurisdiction to Prescribe).

10. *See* Resolution Adopted by the General Assembly on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970),

ticle proposes that protective jurisdiction be reconceptualized as a circumstance precluding wrongfulness. Protective jurisdiction shares its historical origins and international legal justification with the two well-established circumstances precluding wrongfulness under international law for the purpose of national security, namely self-defense and the state of necessity. Like self-defense and necessity, protective jurisdiction evolved as a security exception where otherwise wrongful conduct was necessary to protect a state from grave extraterritorial harm. Accordingly, this Article argues that protective jurisdiction should be similarly circumscribed in a rule of international law.

Drawing on the self-defense and necessity doctrines, the rule proposed in this Article would limit protective jurisdiction to those instances where cross-border regulation is necessary to protect a state from grave harm to its essential security interests. Only then would a state be sufficiently linked to extraterritorial conduct to warrant interference in the domestic affairs of another state.

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This Article proposes a reformulated standard for the international evaluation of state claims to protective jurisdiction. To do so, the Article proceeds in five Parts. Part I discusses the historical origins of protective jurisdiction as a security exception, as well as its current formulation under international law. Part II examines the two well-established circumstances precluding wrongfulness for the purpose of state protection: self-defense and the state of necessity. Part III develops the reformulation of protective jurisdiction as a circumstance precluding wrongfulness. Part IV discusses the principles animating the reformulation, and Part V examines its practical implications.

## I. PROTECTIVE JURISDICTION

Broadly speaking, the protective theory of extraterritorial jurisdiction enables a state to regulate extraterritorial conduct that is directed against its national security.<sup>11</sup> Extraterritorial conduct that

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¶ 1 (“The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.”); 1 OPPENHEIM’S INTERNATIONAL LAW 432 (9th ed., 1992) (indicating that the principle of non-interference prohibits interference that is “forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question.”).

11. See, e.g., Bruno Simma & Andreas Th. Müller, *Exercise and Limits of Jurisdiction*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 134, 143 (James Crawford & Martti Koskeniemi eds., 2012) (“[I]t has long been recognised that certain interests of states are so essential that acts directed against them qualify as sufficiently close to prompt those

threatens a state's national security creates a "juridical link" between the actor and the regulating state, regardless of the nationality of the actor or any effect on the state's territory.<sup>12</sup> Protective jurisdiction is thus distinct from the territoriality or "effects" concepts of extraterritorial jurisdiction—where either the commencement, completion, or effects of conduct take place within the regulating state's territory<sup>13</sup>—as well as personality-based extraterritorial jurisdiction, which enables a state to regulate conduct that is either committed by or against its nationals abroad. Paradigmatic instances of conduct abroad that may be subject to protective jurisdiction include espionage by aliens and the counterfeiting of money and other national documents.<sup>14</sup>

Before proceeding further, it is important to clarify that "extraterritorial jurisdiction" as employed within this Article refers exclusively to legislative or prescriptive jurisdiction; the only enforcement jurisdiction contemplated here is a state's recognized competence to enforce its laws within its territorial jurisdiction. That a state has legislative jurisdiction with respect to extraterritorial conduct does not authorize it to enforce those laws unilaterally in a foreign state.<sup>15</sup> For the purposes of this Article, however, the distinction between prescriptive and enforcement jurisdiction is largely irrelevant. The existence of rules presupposes future enforcement.<sup>16</sup> As a

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states' jurisdiction."); Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 859 (2002) ("[I]t is commonly admitted that under traditional international law states are allowed to act upon the so-called protective principle, that is, for the safeguard of national interests, and can thus prosecute foreigners who commit crimes abroad (for instance, counterfeiting of national currency).") (emphasis omitted).

12. *Draft Convention*, *supra* note 5, at 555.

13. The territorial basis of extraterritorial jurisdiction is often subdivided into subjective territoriality—where the conduct starts within a state's territory but is completed abroad—and objective territoriality—where conduct begins abroad and is completed within the regulating state's territory. An extension of objective territoriality is commonly known as the "effects" principle, where effects of extraterritorial conduct are felt within a regulating state's territory. *See, e.g.*, M. CHERIF BASSIOUNI, 2 INTERNATIONAL CRIMINAL LAW 98–102 (3d ed., 2008); JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 151 (3d ed., 2005).

14. Simma & Müller, *supra* note 11, at 143.

15. F.A. Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years*, reprinted in F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 37 (1990) [hereinafter Mann II] ("As a matter of firm principle [a state cannot put its legislative jurisdiction into effect in another country] without the consent of the State in which the act of enforcement takes place.").

16. Andrea Bianchi, *Jurisdictional Rules in Customary International Law*, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 85 (Karl M. Meesen ed., 1996);

result, this Article focuses on national legislation that indicates state-initiated criminal or civil regulation of extraterritorial conduct for the purpose of national security.<sup>17</sup>

### A. *Historical Origins*

In 1824, U.S. Supreme Court Justice Joseph Story famously pronounced that “[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”<sup>18</sup> These iconic words reflected the allegiance to national sovereignty and territory in post-Westphalian international affairs, as well as Great Britain’s and the United States’ longstanding adherence to territoriality and nationality-based concepts of extraterritorial jurisdiction.<sup>19</sup> Those concepts were thought to best defend the inviolability of sovereign interests, both domestically and abroad. The British and American position starkly contrasted, however, with a developing theory of extraterritorial jurisdiction on continental Europe. Starting with Napoleon’s France, European states, acting in defense of the nation-state, asserted jurisdiction over acts allegedly injurious to the security of the state committed by aliens in foreign territory.<sup>20</sup> The European conception ultimately won out, and protective jurisdiction is now commonly accepted as a basis of extraterritorial jurisdiction under international law.<sup>21</sup>

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Mann I, *supra* note 3, at 14 (arguing that existence of legislative jurisdiction plainly implies likelihood of enforcement). *But see* Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 736 (2004) (“[J]urisdiction must be considered in its two distinct aspects, *viz.* jurisdiction to prescribe and jurisdiction to enforce.”).

17. This Article is limited to the consideration of state-initiated extraterritorial jurisdiction, including criminal and civil sanctions. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300 (7th ed., 2008) (“[T]here is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens.”). For the sake of convenience, extraterritorial jurisdiction, whether asserted by legislative or executive measures, is referred to herein alternatively as “legislative” or “prescriptive” jurisdiction.

18. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

19. *See* García-Mora, *supra* note 7, at 570 (indicating that for centuries the United Kingdom declined to assume criminal jurisdiction over hostile acts committed by foreigners unless there existed a “bond of allegiance”).

20. *Draft Convention*, *supra* note 5, at 543 (citing DE VABRES, *supra* note 7, at 86).

21. *See, e.g.*, Simma & Müller, *supra* note 11, at 143 (“[I]t has long been recognised that certain interests of states are so essential that acts directed against them qualify as sufficiently close to prompt those states’ jurisdiction.”); Cassese, *supra* note 11, at 859 (“[I]t

Protective jurisdiction's genesis can be traced back to the statutes of Italian city-states, though its first articulation in a national legal system came in the Napoleonic Code.<sup>22</sup> The French Code of Criminal Procedure of 1808 authorized the exercise of jurisdiction over alien acts that constituted "a crime against the security of the State, of counterfeiting the seal of the State, the national currency, national documents or banknotes authorized by law."<sup>23</sup> The French Code served as a general model for many other criminal codes drafted in nineteenth-century Europe, and similar provisions were duly incorporated by other European states.<sup>24</sup> Thereafter, domestic laws giving courts the power to punish aliens for extraterritorial acts directed against the safety of the state or its financial credit were adopted in South America and Asia as well.<sup>25</sup> Importantly, such provisions were seen as security exceptions<sup>26</sup> grounded in self-defense,<sup>27</sup> as the laws of other states were seen as inadequate to punish an offense committed specifically against the security of the regulating state.<sup>28</sup>

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is commonly admitted that under traditional international law states are allowed to act upon the so-called protective principle . . .").

22. Cassese, *supra* note 11, at 859.

23. CODE D'INSTRUCTION CRIMINELLE DE 1808 (Fr.), arts. 5–6.

24. M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE 3 (1980).

25. See W.E. Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 BRIT. Y.B. INT'L L. 44 (1925) (stating that France, Germany, Austria, Belgium, Brazil, Chile, Holland, Hungary, Italy, Japan, Norway, Russia, and Sweden all had protective provisions asserting jurisdiction over foreign conduct by aliens directed against the safety of the state or its financial credit); League of Nations, Comm. of Experts for the Progressive Codification of Int'l Law, Criminal Competence of States in Respect of Offenses Committed Outside Their Territory, Report of the Sub-Comm., by Brierly, 20 AM. J. INT'L L. SPEC. SUPP. 252, 254 (1926) [hereinafter League of Nations Report].

26. League of Nations Report, *supra* note 25, at 257–58 (citing the Institute of International Law Report of 1883 and adopting a territorial basis of competence, but recognizing an exception whereby states have the right to punish acts abroad by foreigners where they constitute an act against the existence of the state and compromise its security).

27. García-Mora, *supra* note 7, at 569 (indicating that states in Europe and Latin America that asserted protective jurisdiction in the 19th century did so as exceptions based on the principle of self-defense for acts directed against the security of the state).

28. *Draft Convention*, *supra* note 5, at 543–45; Maier, *supra* note 6, at 69 ("To conclude otherwise would put every state at the mercy of every person acting in every other state when the government at the *situs* of the acts has no self-interest in preventing those acts.").

### B. *The Current Conception*

Although protective jurisdiction is commonly invoked by states,<sup>29</sup> its scope remains controversial.<sup>30</sup> When protective jurisdiction is articulated as a standard of conduct, it is most often formulated by reference to two sources: the Draft Convention on Jurisdiction with Respect to Crime (Draft Convention) and the Restatement (Third) of United States Foreign Relations Law (Restatement).

The Draft Convention, the product of a League of Nations mandate, is considered by many publicists to have authoritatively reflected the commonly accepted bases of extraterritorial jurisdiction.<sup>31</sup> Article 7 of the Draft Convention, titled “Protection-Security of the State,” provides as follows:

A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.<sup>32</sup>

The Draft Convention then gave rise to the Restatement’s formulation of protective jurisdiction more than fifty years later.<sup>33</sup> Restatement § 402(3) indicates that a state has the competence to

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29. Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145, 158 (1972) (“The [protective] principle is well established . . .”); Cassese, *supra* note 11, at 859; Simma & Müller, *supra* note 11, at 143 (“[I]t has long been recognised that certain interests of states are so essential that acts directed against them qualify as sufficiently close to prompt those states’ [protective] jurisdiction.”).

30. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 44 (2010) (“The scope of [the protective principle] is not well defined . . .”); SHAW, *supra* note 4, at 666–68 (same); BROWNIE, *supra* note 17, at 304 (“Nearly all states assume jurisdiction over aliens for acts done abroad which affect the security of the state . . . [H]owever, it is obvious that the interpretation of the concept of protection may vary widely.”).

31. See, e.g., Akehurst, *supra* note 29, at 158 (citing the Draft Convention to offer a definition of the protective principle). The Draft Convention was a product of the League of Nations Assembly’s call for a “Conference for the Codification of International Law.” The faculty of the Harvard Law School, responding to the Assembly’s call, organized the “Research in International Law” for the purpose of preparing drafts of international conventions on subjects selected by the League of Nations. See *Draft Convention*, *supra* note 5.

32. *Draft Convention*, *supra* note 5, at 440.

33. Maier, *supra* note 6, at 67 (stating that the Draft Convention, along with its accompanying commentary, was the intellectual, if not the institutional, forerunner of the American Law Institute’s Restatement on the “Bases of Jurisdiction to Prescribe”).

regulate “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.”<sup>34</sup> Though there remains controversy as to the proper interpretation of the Restatement, this conception of protective jurisdiction is widely cited and relied upon by states and commentators, and arguably reflects customary international law.<sup>35</sup> Indeed, both the Restatement and the Draft Convention purported to reflect customary international law, though, as elaborated upon below, their success in that regard remains debatable.<sup>36</sup>

Whether or not protective jurisdiction has attained customary international law status, both the Restatement and the Draft Convention’s formulations of protective jurisdiction suggest an expansive state capacity to legislate extraterritorial conduct that threatens national security, and states throughout the world, including Ethiopia, France, and Venezuela, among many others, have codified provisions that follow the general protective rubric reflected in Restatement § 402(3) and the Draft Convention.<sup>37</sup>

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34. RESTATEMENT, *supra* note 9, § 402(3) (1988) (providing quoted text in section entitled “Bases of Jurisdiction to Prescribe”). It should be noted that an additional limitation on protective jurisdiction is introduced by the commentary to § 402(3), which would limit the exercise of jurisdiction to “offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems . . . .” *Id.* § 402(3), cmt. f.

35. See, e.g., OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 258 (1991) (indicating that the Restatement’s jurisdictional rules may have emerged as rules of international law); Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT’L L. 222, 236 (1992) (noting that France, Israel, and several Latin American countries have invoked the Restatement’s conception of protective jurisdiction in the counterterrorism context); OMER ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW* 132 (1988) (citing the Restatement § 402(3) as the basis for the international rule on protective jurisdiction).

36. See, e.g., Curtis Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323 n.2 (2001) (stating that the Draft Convention’s rules purported to reflect customary international law). The Restatement similarly represents the American Law Institute’s opinion as to “the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law.” David B. Massey, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement on Foreign Relations Law*, 22 YALE J. INT’L L. 419, 423 (1997). *But see* Cecil J. Olmstead, *Jurisdiction*, 14 YALE J. INT’L L. 468, 472 (1989) (disagreeing with the notion that the Restatement’s jurisdictional rules have emerged as customary international law).

37. See, e.g., Criminal Code of the Federal Democratic Republic of Ethiopia, art. 13, Proclamation No. 313/2004 (entered into force May 9, 2005), available at <http://www.unhcr.org/refworld/country,,NATLEGBOD,,ETH,,49216b572,0.html> (“Crimes Committed against Ethiopia Outside Its Territory . . . . [The Code] shall apply to any person who outside Ethiopia has committed one of the crimes against the State of Ethiopia, its safety or integrity,

### C. *The Need for Reform*

This Article posits that protective jurisdiction as currently conceived does not effectively standardize the concept's inherent historical exceptionality as an excusable intrusion into other states' territorial jurisdiction.<sup>38</sup> Protective jurisdiction is presently formulated by reference to ambiguous, subjective criteria that do not require states to identify a juridical link between extraterritorial conduct and state security. As a result, states have, in effect, been left to self-judge when their essential security interests are sufficiently harmed or threatened to warrant cross-border regulation.

#### 1. The Inefficacy of the Current Formulations

Both the Restatement and the Draft Convention implicitly recognize the risk of jurisdictional overreach. Yet, both formulations offer only comity considerations and a weighing of comparative state interests as a check on abuse.

The Draft Convention restricts protective jurisdiction to cases in which the cross-border regulation is in conflict with a liberty that is affirmatively recognized in the forum state,<sup>39</sup> and the law of the forum state is thus envisioned as the principal safeguard against abuse.<sup>40</sup> Balancing sovereign interests in this way, while perhaps well intentioned, is flawed for two main reasons. First, it puts the

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its institutions, essential interests or currency . . ."); CODE D'INSTRUCTION CRIMINELLE (Fr.), art. 113-10, available at [http://195.83.177.9/upl/pdf/code\\_33.pdf](http://195.83.177.9/upl/pdf/code_33.pdf) (defining "Offenses Committed Outside the Territory of the French Republic" to include "violations" against the "fundamental interests of the nation," as well as counterfeiting of state documents); Codigó Penal de Venezuela, Gaceta Oficial No. 5.768 del 13-04-05 ("A foreigner who, while in a foreign country, commits a crime against the security of the Republic of Venezuela . . ."). Relevant portions of the Venezuelan Code are available at AMNESTY INTERNATIONAL, VENEZUELA: END IMPUNITY THROUGH UNIVERSAL JURISDICTION 24–25 (2009), [http://www.iccnw.org/documents/Venezuela\\_End\\_Impunity\\_AI\\_22Nov2010.pdf](http://www.iccnw.org/documents/Venezuela_End_Impunity_AI_22Nov2010.pdf). Additional examples of protective provisions can be found in *Draft Convention*, *supra* note 5, at 547–51, as well as Milan Sahovic & William Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 311, 863–64 (M. Sorensen ed., 1968).

38. See BROWNLIE, *supra* note 17, at 312 ("[T]he general principles of law relating to [extraterritorial] jurisdiction are emanations of the concept of domestic jurisdiction and its concomitant, the principle of non-intervention in the internal affairs of states.").

39. *Draft Convention*, *supra* note 5, at 557.

40. This limitation was championed at the time of drafting as a critical restriction on jurisdictional overreach. *Id.* (commenting that this limitation rejects extreme claims that are likely to be unjust to nationals of other states or inconsistent with other principles of law, and safeguards important liberties).

onus on states to statutorily provide affirmative liberty guarantees for its citizens,<sup>41</sup> sometimes known as blocking statutes; where a state does not, its nationals could be at risk of abusive foreign prosecution. Second, and the corollary of the first, is that such an approach favors states that find lacunas in other states' domestic laws, and/or that wield sufficient global clout to assert a superseding national interest. Notably, the only restriction the United States arguably recognizes upon its authority to assert extraterritorial jurisdiction is foreign legislation that affirmatively renders illegal what the American law requires an extraterritorial actor to do.<sup>42</sup>

The Restatement similarly attempts to safeguard against the abusive exercise of protective jurisdiction by relying on states' willingness to balance their national interests against those of other states, and to make decisions based on "objective good sense."<sup>43</sup> Restatement § 403 provides that: "Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."<sup>44</sup> "Unreasonableness" in this context is to be determined by the regulating state through an evaluation of "all relevant factors," including the "link of the activity to the territory of the regulating state," "the importance of the regulation to the international, political, legal or economic system," "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by another state."<sup>45</sup> These considerations in § 403(2), in effect, offer interest balancing as a check on the broad authority indicated by Restatement § 402(3). According to § 403(3), where there is a jurisdictional conflict, "each state has an obligation to evaluate its own, as well as the other state's, interest in exercising jurisdiction, in light of all the relevant factors, including those set out in subsection (2); a state should defer to the other state if that state's interest is clearly greater."<sup>46</sup>

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41. *Id.*

42. Mann I, *supra* note 3, at 152. Yet, as recognized by Mann, "[t]he distinction drawn between acts required or prohibited, and acts tolerated, by the foreign law has no validity in international law." *Id.* at 153.

43. Maier, *supra* note 6, at 73.

44. RESTATEMENT, *supra* note 9, § 403(1) (1988) (Limitations on Jurisdiction to Prescribe).

45. *Id.* § 403(2). For the complete list of "factors" to be considered by a state asserting protective jurisdiction, see *id.* § 403.

46. *Id.* § 403(3); see also ELAGAB, *supra* note 35, at 132 (citing RESTATEMENT § 403 and indicating that "[A]ny claim for the exercise of jurisdiction on the basis of the protective

Such reliance on interest balancing has both practical and principled flaws.<sup>47</sup> The practical flaws of relying on national courts' application of an interest balancing test are patent: "When one State exercises its jurisdiction and another in protection of its interests attempts to quash the first exercise of jurisdiction, it is simply impossible to judicially balance these totally contradictory and mutually negating actions."<sup>48</sup> To date, in almost every case where the forum state has had more than a de minimis interest in extraterritorial jurisdiction, the national court has upheld its jurisdiction.<sup>49</sup> Ultimately, the reliance on interest balancing and the auto-determination of "reasonableness" is insufficient to safeguard against jurisdiction creep in the name of national security.<sup>50</sup> National determinations of comparative state interests are not bound by any effectual international standard and are notoriously colored by diplomatic considerations and wartime passions.<sup>51</sup>

Irrespective of its practical efficacy, it has also been observed that Restatement § 403 does not reflect a rule of international law. Section 403's reasonableness limitation reflects comity considerations that have not been accepted outside the United States as binding

principle must not be inconsistent with the so-called balance-of-interest factor.").

47. See Mann II, *supra* note 15, at 97 ("[I]nterest balancing belongs to diplomacy rather than to the judicial forum."); Bianchi, *supra* note 16, at 85 (criticizing the balance of interests approach as a vague concept that, in effect, leaves it to national judges to determine the propriety of extraterritorial jurisdiction by reference to national interests); SCHACHTER, *supra* note 35, at 260 ("The difficulties of interest balancing have been noted by several courts and many scholarly articles.").

48. *Laker Airways Ltd. v. Sabena, Belgium World Airlines*, 731 F.2d 909, 951–52 (D.C. Cir. 1984) (applying the interest balancing approach in a jurisdictional dispute involving the objective territorial principle).

49. SCHACHTER, *supra* note 35, at 260; *Laker Airways*, 731 F.2d at 909 (noting in dictum that the court knows of only one case where U.S. extraterritorial jurisdiction was denied as a result of a balancing test where there was more than a de minimis U.S. interest).

50. That "reasonableness" in this context becomes self-judging and thereby ineffectual is revealed by the following excerpt of a U.S. Senate report:

[T]here is no fixed rule among the customs and usages of nations which prescribes the limits of jurisdictional waters other than the rule of reasonableness, that a nation may exercise authority upon the high seas to such an extent and to so great a distance as is reasonable and necessary to protect itself and its citizens from injury.

*United States v. Gonzalez*, 776 F.2d 931, 939 (11th Cir. 1985) (citing S. Rep. No. 1036, 74th Cong. 1st Sess. 5 (1935)).

51. García-Mora, *supra* note 7, at 579 ("The only consideration of the courts in the presence of such [protective jurisdiction] cases is to ascertain by rather loose and arbitrary standards whether the act in question is one which injures the fundamental interests of the State. This inquiry is the more pointed since it is inevitably accompanied by emotional-historical conceptions which explain but do not rationally support the conclusion reached.").

rules of customary international law,<sup>52</sup> nor should they be. In some instances, a state's reliance on comity and a subjective determination of "reasonableness" may lead to an equitable result. But an objective rule on protective jurisdiction that effectively delimits state conduct and thereby preserves the sovereign equality of states of all sizes cannot rely on the subjective weighing of comparative state interests. Rather, an international rule on protective jurisdiction should actualize its inherent exceptionality and standardize its limitations based on neutral principles.

## 2. The Abuse of Protective Jurisdiction

Straying from its origins as a security exception, protective jurisdiction has been repeatedly exploited by states claiming extraterritorial menace to their interests where there is no meaningful connection to a legitimate national security interest. As recalled by Bruno Simma, protective jurisdiction has been exploited and expanded beyond the traditional instances of its application.<sup>53</sup> Simma draws particular attention to the troubling and contested "post-2001 atmosphere where 'security' appears to have become to some a catch-all concept."<sup>54</sup>

Indeed, for the past century, powerful states have instrumentalized protective jurisdiction to pursue their national ambitions abroad, without, in many cases, demonstrating any nexus between the regulated conduct and national security. Among numerous other examples, Italy's Penal Code of 1930 criminalized speech that in any

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52. SCHACHTER, *supra* note 35, at 258 ("[I]t is not evident that a requirement of reasonableness has emerged outside of the United States as a rule of international law."); Olmstead, *supra* note 36, at 472 (disagreeing with the Restatement's claim that § 403's reasonableness requirement had emerged as a principle of international law). Maier, *supra* note 6, at 72–73 (arguing that the interest balancing approach reflects the principle of comity and not an international legal rule). *But see* RESTATEMENT, *supra* note 9, § 403 cmt. a (noting that, although "[s]ome United States courts have applied the principle of reasonableness as a requirement of comity . . . . This section states the principle of reasonableness as a rule of international law").

53. Simma & Müller, *supra* note 11.

54. *Id.* at 144 (stating that "[t]he law [on protective jurisdiction] seems to be in a state of flux" as a result of its recent invocation in the name of "security"); *see also* Covey T. Oliver, *The Jurisdictional Competence of States*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 316 (Mohammed Bedjaoui ed., 1991) ("It is generally recognised that the protective principle is susceptible to reciprocally undesirable growth through expansions of the concept of fundamental State interest, such as to the criminalization by a particular State of criticism of it or its leaders by persons owing it no allegiance and not acting within its territory.").

way injured Italy's interests wherever globally it occurred.<sup>55</sup> Czechoslovakia convicted a U.S. national for his work for Radio Free Europe in West Germany following World War II. The United States imposed penalties on foreign corporations engaged in the export of certain non-military technology to the Soviet Union.<sup>56</sup> And Germany asserted protective jurisdiction over the extraterritorial narcotics trade to pursue its national drug policy.<sup>57</sup> Such expansive jurisdiction has resulted in international disputes<sup>58</sup> and calls into question the continued efficacy of protective jurisdiction as currently conceived.

Two recent examples demonstrate how protective jurisdiction continues to be exploited in response to contemporary transnational threats. First, as noted previously, the United States has asserted protective jurisdiction to justify its material support of terrorism laws,<sup>59</sup> which have recently become a primary prosecutorial tool in U.S.

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55. *Draft Convention*, *supra* note 5, at 558. The Committee of Experts convened by the League of Nations to consider the criminal competence of states with respect to extraterritorial offenses addressed this specific issue:

Every State is at present regarded as the judge of what endangers its own security. A State, for instance, may regard criticism of its Government in the Press as dangerous; if it chooses to impose special restrictions on its own Press or even on the journalistic activities of its own nationals in other countries, that is no affair of other states. But is such a State entitled to apply, in so far as it has the ability, its repressive Press laws to non-nationals who may venture to criticize it in the Press of other countries?

League of Nations Report, *supra* note 25, at 252–59. *But see* RESTATEMENT, *supra* note 9, § 402 cmt. f (taking the position that “[t]he protective principle does not support application to foreign nationals of laws against political expression, such as libel of the state or of the chief of state.”).

56. Akehurst, *supra* note 29, at 158–59.

57. Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, in *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE* 108 (Karl M. Meesen ed., 1996) (citing 34 Bundesgerichtshof [BGH] [Federal Court of Justice] 334, 339).

58. For example, in 1978, The Consultative Shipping Group—a group of thirteen countries—objected to U.S. unilateral regulation of the shipping industry. The Shipping Group proclaimed: “[We] accept neither the right of the U.S. Government to impose its own views on the regulation of events and activities taking place wholly or largely within the territories of other nations, nor the concept that one government should seek to regulate unilaterally and in its own interests activities of an industry which are international by nature and of equal and vital concern to other governments.” Mann II, *supra* note 15, at 92.

59. John Depue, *Fundamental Principles Governing Extraterritorial Prosecutions—Jurisdiction and Venue*, U.S. ATT’Y BULL. (Mar. 2007), at 6, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5502.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5502.pdf) (“The justification for the assertion of such jurisdiction is that, by providing assistance to an FTO . . . the defendant engages in conduct which, itself, threatens the security of the United States. This rationale is supported by the ‘protective’ theory of extraterritorial jurisdiction.”).

counterterrorism efforts.<sup>60</sup> For example, in 2012, the United States took custody of three European nationals in Djibouti, flew them to New York, and charged them in U.S. federal court with material support of the al-Shabaab militant organization.<sup>61</sup> The U.S. prosecutors have based their prosecution on the defendants' extraterritorial conduct in support of al-Shabaab, and not on the basis of allegations that the defendants' conduct posed a threat to the United States.<sup>62</sup>

Material support is prosecuted in the United States under the Anti-Terrorism Act (ATA), an amalgamation of U.S. counterterrorism laws enacted over the past two decades.<sup>63</sup> The ATA criminalizes

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60. CHARLES DOYLE, CONG. RESEARCH SERVICE, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 1 (July 19, 2010) [hereinafter CRS Report].

61. The three defendants are being charged with "knowingly and intentionally provid[ing] material support and resources, as defined in 18 U.S.C. § 2339A(b), including services and personnel, including themselves, to a foreign terrorist organization." Superseding Indictment, *U.S. v. Ahmed et al.* (E.D.N.Y. 2012) (Cr. No. 12-661(S-1)(SLT)) (Nov. 15, 2012); see also Craig Whitlock, *Renditions Continue under Obama, Despite Due-Process Concerns*, WASH. POST, [http://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a\\_story\\_2.html](http://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story_2.html). The al-Shabaab organization was designated in 2008 as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act. U.S. Department of State, "Designation of al-Shabaab as a Foreign Terrorist Organization," Public Notice 6136, Federal Register: Volume 73, Number 53, available at <http://www.state.gov/j/ct/rls/other/des/102446.htm>. The U.S. government has since acknowledged, however, that most al-Shabaab fighters are "merely participants in Somalia's long-running civil war." Whitlock, *supra* note 61.

62. Superseding Indictment, *U.S. v. Ahmed et al.*, (E.D.N.Y. 2012) (Cr. No. 12-661(S-1) (SLT)) (Nov. 15, 2012); see also Letter to the Honorable Sandra L. Townes from Loretta Lynch, U.S. Attorney, *U.S. v. Ahmed et al.*, (E.D.N.Y. 2012) (Cr. No. 12-661(S-1)(SLT)) (Sept. 18, 2013) (citing membership in al-Shabaab, "extensive weapons and combat training," previous use of "operational tradecraft and counter surveillance techniques," intention to join Ansar al Sharia in Yemen, and knowledge regarding other alleged terrorists as demonstrating the defendants "proclivity for terrorism" and necessitating separate appearances for the three defendants); Mark Hosenball, *New York Case Offers Insight into Secret War Against Somali Militants*, REUTERS (Oct. 6, 2013), <http://www.reuters.com/article/2013/10/06/usa-shabaab-rendition-idUSL2N0CQ0UH20131006> (last visited Dec. 6, 2013) ("U.S. prosecutors do not allege the suspects posed a specific threat to the United States.").

63. The U.S. criminal material support statute was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005 108 Stat. 2022 (1994), and codified at 18 U.S.C. § 2339A. Additional sections were added in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 323, 303, 110 Stat. 1255, 1250, and amended by the USA PATRIOT Act, Pub. L. No. 107-56, §§ 810(c), (d), 811(d), 115 Stat. 380, 381 (2001), and the USA PATRIOT Act Improvement and Reauthorization Act, Pub. L. No. 109-177, § 104, 120 Stat. 195 (2006). The civil corollary of the material support statute arises from the Antiterrorism Act of 1990, which is codified at 18 U.S.C. §§ 2331–38. See Antiterrorism Act of 1990, Pub. L. 101-519, § 132,

a wide range of material support of certain foreign terrorist organizations (FTOs), irrespective of whether the conduct was committed by a U.S. or non-U.S. national abroad. And material support is defined to include any property, service, training, expert advice or assistance, or transportation.<sup>64</sup> Notably, the U.S. Supreme Court recently concluded that the following conduct is prohibited under the ATA: training FTO members to use international law to resolve disputes peacefully, teaching FTO members to petition the United Nations and other international bodies for relief, and engaging in political advocacy in coordination with or at the direction of an FTO.<sup>65</sup>

To the extent the ATA asserts jurisdiction over foreign nationals for conduct that has no effect on U.S. territory or U.S. nationals, the protective and universal theories represent the only possible bases for its assertion of extraterritorial jurisdiction.<sup>66</sup> The multiple international terrorism conventions developed under the auspices of the United Nations do arguably evidence customary international law supporting universal jurisdiction over certain terrorist offenses;<sup>67</sup> but

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104 Stat. 2250 (1990). For ease of reference, this Article will refer to the civil and criminal statutes, 18 U.S.C. §§ 2331–39, collectively as the Anti-Terrorism Act or the ATA. *See, e.g.,* People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 327 F.2d 1238 (D.C. Cir. 2003) (referring to the Antiterrorism and Effective Death Penalty Act of 1996 alternatively as the AEDPA or the Anti-Terrorism Act).

64. 18 U.S.C. § 2339A(b)(1). Only the provision of medicine and religious materials are definitively identified as lawful exceptions. Precisely what conduct is prohibited by the ATA has been controversial since the law’s inception in the 1990s. *Compare* U.S. v. Assi, 414 F. Supp.2d 707 (E.D. Mich. 2006), and U.S. v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005) *with* Weiss v. National Westminster Bank PLC, 453 F.Supp. 2d 609, 624–25 (E.D.N.Y. 2006), and Humanitarian Law Project v. Reno, 9 F.Supp. 2d 1176 (C.D. Cal. 1998). *See also* CRS Report, *supra* note 60, at 2–3.

65. Holder v. Humanitarian Law Project, 561 U.S. \_\_\_, slip op. at 9 (June 21, 2010).

66. Insofar as the ATA criminalizes the provision of financial or economic resources to FTOs by individuals and organizations *within* the United States, it is likely authorized by United Nations Security Council Resolution 1373. S.C. Res. 1373, ¶ 1(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (deciding that all U.N. member states shall “prohibit their nationals or any persons and entities *within their territories* from making funds, financial assets, or economic resources . . . available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts”) (emphasis added). Additionally, the Convention for the Suppression of the Financing of Terrorism requires that state parties criminalize the provision or collection of funds with the intention or knowledge that those funds be used to carry out terrorist offenses. 39 I.L.M. 270 (2000) (entered into force Apr. 10, 2002) art. 2. Yet, the ATA proscribes far more than conduct within the United States and support that intentionally or knowingly assists an FTO’s terrorist activities; as a result, the ATA’s extraterritorial proscription must find another jurisdictional basis under international law.

67. *See* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121,

material support of terrorism—particularly as the concept is broadly defined by the ATA—is not one such offense.<sup>68</sup> Accordingly, protective jurisdiction is the only plausible basis for the ATA’s regulation of non-U.S. nationals’ conduct.

The ATA represents a problematic and ultra vires invocation of protective jurisdiction as there is substantial conduct prohibited by, and prosecuted under, the ATA that, in and of itself, bears no direct connection to any harm or threat of harm to U.S. national security. The ATA prohibits a broad range of conduct undertaken by any foreign actor in support of any FTO, yet the United States has not articulated how the conduct regulated as material support is directly connected to the protection of U.S. security interests. That linkage is seemingly presumed as a result of the U.S. government’s unilateral determination of the “terrorist” nature of certain foreign organizations.<sup>69</sup>

Secondly, protective jurisdiction is arguably being exploited in the context of transnational cybercrime. Jurisdictional disputes have already arisen regarding cross-border regulation of the Internet,<sup>70</sup> and protective jurisdiction has been invoked to defend against certain extraterritorial cyber conduct.<sup>71</sup> Moreover, protective jurisdiction is being proposed as a method to target an increasingly broad range of foreign cyberconduct, including software piracy rings and cyberterrorism.<sup>72</sup> While in some instances there may be a direct con-

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177 (2007) (indicating that several multilateral terrorism treaties authorize universal jurisdiction); Puttler, *supra* note 57, at 109 (noting that treaties can create universal jurisdiction).

68. Colangelo, *supra* note 67, at 177 (“[O]ffenses that are not the subjects of widely held international prohibitions, like material assistance to, or receiving military training from a FTO, do not qualify as universal.”).

69. The U.S. Secretary of State has designated a list of fifty FTOs pursuant to § 219 of the U.S. Immigration and Nationality Act. “Foreign Terrorist Organizations,” United States Department of State, Office of the Coordinator for Counterterrorism, Sept. 28, 2012, available at <http://www.state.gov/j/ct/rls/other/des/123085.htm>; see also Depue, *supra* note 59 (“[B]y providing assistance to an FTO—which by definition presents a threat to the security of the United States—the defendant engages in conduct which, itself, threatens the security of the United States.”).

70. See, e.g., *Yahoo Inc. v. La Ligue Contre le Racisme et Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001) (finding that French court judgments regarding Yahoo’s sale of Nazi paraphernalia on the Internet were unenforceable in the United States).

71. See, e.g., Computer Crimes Act 1997 [Malaysia], art. 9, available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN025630.pdf> (asserting protective jurisdiction over a variety of extraterritorial cyberconduct).

72. See also J.G. Castel, *The Internet in Light of Traditional Public and Private International Law Principles and Rules Applied in Canada*, 39 CAN. Y.B. INT’L L. 13 (2001) (recognizing that “[t]he protective principle is justified on the ground of self-defense since a

nection between wholly extraterritorial cyberconduct and state protection, Malaysia's Computer Crime Act (CCA) reveals the genuine risk of abuse in this context. The CCA provides, in relevant part:

The provisions of this Act shall, in relation to any person, whatever his nationality or citizenship, have effect outside as well as within Malaysia, and where an offense under this Act is committed by any person in any place outside Malaysia, he may be dealt with in respect of such offense as if it was committed at any place within Malaysia . . . . [T]his Act shall apply if, for the offense in question, the computer, program or data was in Malaysia or capable of being connected to or sent to or used by or with a computer in Malaysia at the material time.<sup>73</sup>

The CCA, in effect, asserts protective jurisdiction over a broad range of cyberconduct, anywhere in the world, and thus raises substantial jurisdictional issues. The CCA is a bold initiative to reassure investors in Malaysia of the country's tough stance on cybercrime, yet, in doing so, it extraterritorially criminalizes certain conduct that is not criminalized in other countries.<sup>74</sup> Certainly it is Malaysia's prerogative to enact such strict cyberlaws domestically, but it should be internationally unlawful for Malaysia to apply its standards of conduct to cyberactivity abroad unless it is necessary for its national security.

#### *D. The Reformulation's Methodology*

This Article proposes that protective jurisdiction be progressively developed and standardized in light of its origins as a security exception—protective jurisdiction evolved as an exceptional violation of another state's jurisdictional sovereignty where necessary to protect against extraterritorial conduct that was specifically linked to the regulating state's security. To reintroduce this exceptional, jurid-

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state has a legitimate right to protect itself from the effects of harmful acts or conduct that take place abroad," and that it could be used in the cyber context to prevent disclosure of classified information, espionage, counterfeiting, cyberterrorism, software piracy, propaganda for the enemy in wartime, and intrusion into national security systems).

73. Computer Crimes Act 1997 [Malaysia], art. 9; see also Susan W. Brenner & Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, 4 J. HIGH TECH. L. 1 (2004).

74. See Donna L. Beatty, *Malaysia's 'Computer Crimes Act 1997' Gets Tough on Cybercrime but Fails to Advance the Development of Cyberlaws*, 7 PAC. RIM POL'Y J. 351, 359–60 (1998) (indicating that the CCA criminalizes unauthorized access (§ 3) and modifications (§ 5) in a manner that goes beyond the recommendations of the Organization for Economic Cooperation and Development and the Council of Europe).

ical link into a reformulated international standard, this Article draws on the theory of international jurisdiction developed by F. A. Mann.

Mann argued that the classical principles of extraterritorial jurisdiction should be discarded as archaic and unwieldy in light of the modern complexities of international commerce and mobility. In their place, Mann posited a one-size-fits-all rule to be applied to every assertion of extraterritorial jurisdiction. Mann's theory provides:

[A] State has jurisdiction, if its contact with a given set of facts is so close, so substantial, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of states, the principles of non-interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a specific connection.<sup>75</sup>

For Mann, the lawful exercise of international jurisdiction is to be determined by reference to a state's "meaningful connection" with the facts, irrespective of the location of the activity in question, or the nationality of the relevant actors.<sup>76</sup>

Though not widely accepted, Mann's theory has provoked substantial and constructive discourse. Prominent amongst the commentary have been attempts at tweaking Mann's theory based on updated interpretations of state practice and customary international law. For example, Andrea Bianchi posits that the legality of extraterritorial jurisdiction is dependent on the existence of an "effective and significant connection" between the regulating state and the conduct in question.<sup>77</sup> The novelty of Bianchi's approach is that the propriety of the connection is to be determined in light of state practice in a particular legal area—only claims founded on a connection accepted by a majority of states in a given legal area are to be deemed sufficient.<sup>78</sup>

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75. Mann I, *supra* note 3, at 49.

76. Mann II, *supra* note 15, at 29 ("In each case, the overriding question is: does there exist a sufficiently close legal connection to justify, or make it reasonable for, a State to exercise legislative jurisdiction."); *cf.* Bianchi, *supra* note 16, at 90 (conceiving the requisite "meaningful connection" to be in terms of "factual links or similar criteria").

77. Bianchi, *supra* note 16, at 90 (agreeing with Mann that jurisdiction should not be subject to the classical principles of international jurisdiction, but proposing a slight variant as the operative standard).

78. Bianchi's rationale is that state practice is highly heterogeneous across a variety of issues, and thus the degree of connection required in different areas of activity should be different. *Id.* at 76.

Mann's theory on international jurisdiction has rightfully moved the dialogue toward the definition of objective legal standards reflective of the modern realities of international engagement.<sup>79</sup> And Bianchi's proposition that the determination of whether a meaningful connection exists be considered in light of the particular type of legislation at issue seems sensible. Bianchi's reformulation of the Mannian conception also usefully explains varying degrees of "connection" across different areas of international jurisdiction.

For the time being, however, the five classical principles remain the dominant conception of extraterritorial jurisdiction, and call for reconsideration and reform in this area should thus likely begin by taking account of states' claims to jurisdiction under the auspices of those principles. Nevertheless, it is suggested here that the utility of the Mannian conception of international jurisdiction—i.e., whether extraterritorial legislation bears a meaningful connection to the regulating state—is not exclusive to an international legal framework rid of the classical bases of extraterritorial jurisdiction.<sup>80</sup> To the contrary, for certain classical bases, including protective jurisdiction, consideration of the quality of the requisite extraterritorial connection could prove useful to identifying effective legal standards.

The reformulation developed below proposes that the quality of the requisite connection between extraterritorial conduct and protective regulation be determined by reference to the principles upon which protective jurisdiction was founded—namely, the sovereign equality of states and a state's excusable interference in the domestic affairs of another state for the exceptional purpose of national security.

## II. CIRCUMSTANCES THAT PRECLUDE WRONGFULNESS FOR THE PURPOSE OF NATIONAL SECURITY

There are two primary doctrines for evaluating the circumstances in which states may violate international obligations for the specific purpose of national security. Identified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) as

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79. See Mann I, *supra* note 3, at 46 ("The question whether the contact is sufficiently close, though a question of degree, is answered, not by the idiosyncrasies or the discretion of the States or judges, but by the objective standards of international law.").

80. See Mann II, *supra* note 15, at 29 (explaining that the process of weighing the reasonableness of extraterritorial jurisdiction, as advanced by the Restatement, will be different in various fields of law, but that the overriding question—whether there is a meaningful connection—will remain the same).

circumstances precluding wrongfulness, self-defense and the state of necessity are both standardized doctrines that justify otherwise unlawful conduct where necessary to protect national security.<sup>81</sup> Notably, the doctrines are explicitly of general application—their relevance is not restricted to the breach of any particular type of international obligation.<sup>82</sup>

### A. *Self-Defense*

Self-defense under international law refers to a state's exceptional right to initiate otherwise unlawful countermeasures in order to protect its national security. Self-defense has been standardized in both conventional and customary international law with specific, objective criteria governing its invocation. A state may invoke its right to self-defense only to protect against imminent and grave harm, and any such defensive measures must be necessary and proportional to that harm.

#### 1. Treaty Law

Article 51 of the United Nations Charter standardizes the international legal criteria applicable to forcible self-defense.<sup>83</sup> When an armed attack occurs against a U.N. member state, the Charter affirmatively recognizes an exception to its strict prohibition on the use of force in Article 2(4).<sup>84</sup> The U.N. Charter provides that the use of force to settle international disputes is only lawful in exceptional circumstances, either where authorized by the U.N. Security Council or by a state acting based on its “inherent right” of self-defense.<sup>85</sup>

In essence, the U.N. Charter proceduralizes the circumstances precluding the wrongfulness of a state's use of force in self-defense and places strict limitations on forcible countermeasures.<sup>86</sup> Referring

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81. See *Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. INT'L L. COMM'N 31, art. 21 (self-defense), art. 25 (necessity), [hereinafter ILC Articles]. References *infra* to the ILC Articles and their accompanying commentaries will be identified, where possible, by article or paragraph number.

82. *Id.* ch. V, cmt. 2 (“[T]he circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided, they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source.”).

83. U.N. Charter art. 51.

84. *Id.* art. 2, para. 4.

85. *Id.* art. 51.

86. ANTONIO CASSESE, *INTERNATIONAL LAW* 303 (2d ed., 2005) (indicating that Article

explicitly to Article 51, the ILC Articles on State Responsibility identify “self-defense” as an excusable violation of a state’s international obligations in certain limited circumstances.<sup>87</sup> Lawfulness under Article 51 has been interpreted by reference to customary international law to permit only proportional and necessary defensive measures,<sup>88</sup> and the necessity and proportionality of such measures is to be considered in light of the gravity and imminence of specific armed attacks.<sup>89</sup> Importantly, forcible self-defense’s constitutive criteria are now recognized as “strict and objective” under international law, “leaving no room for any measure of discretion.”<sup>90</sup>

## 2. Customary International Law

Though Article 51 explicitly restricts and proceduralizes forcible self-defense as a right under international law, its underlying criteria predate the U.N. Charter and are drawn from customary international law. In the seventeenth century, Hugo Grotius identified three requirements that must be satisfied before a state could properly take defensive measures. Broadly speaking, the measures must (1) respond to immediate danger, (2) be necessary to defend the threatened interest, and (3) be proportionate to the dangers presented.<sup>91</sup>

The requirements Grotius identified were then arguably crystallized as customary international law during the resolution of the *Caroline* dispute of 1837.<sup>92</sup> There, British forces entered U.S. terri-

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2(4) of the U.N. Charter provides that “[c]ountermeasures may not derogate from the obligations concerning the threat or use of force.”); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 118–19 (3d ed., 2008) (describing the operation of Article 51’s Security Council reporting requirement and indicating that even states that argue for expansive interpretation of forcible self-defense invoke Article 51).

87. ILC Articles, *supra* note 81, art. 21 (“The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter . . .”).

88. *Id.* art. 21, cmt. 6; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8) (“The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.”); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 176 (June 27) (indicating that it is well established in customary international law that “self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it”).

89. *Case concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 62 (Nov. 6).

90. *Id.* ¶ 73 (internal quotation omitted).

91. *See* 2 HUGO GROTIUS, *THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS)*, 72–76 (Louise R. Loomis trans., 1949).

92. GRAY, *supra* note 86, at 148–50 (indicating that self-defense requirements of

tory and attacked and destroyed a vessel being used by American citizens to carry recruits and other military supplies to Canadian insurgents fighting British forces in Canada. In response to U.S. protests, a British minister argued that the “necessity of self-defense and self-preservation” legitimized the British conduct.<sup>93</sup> U.S. Secretary of State Daniel Webster then famously replied that the British must prove that its intrusion into U.S. territory had been caused by “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>94</sup> The international community coalesced around this language, and the self-defense elements of necessity and imminence survive in customary international law to this day.<sup>95</sup> The International Court of Justice (ICJ) has recognized on multiple occasions that the requirements of necessity and proportionality continue to underpin the customary international law rule on self-defense.<sup>96</sup>

### 3. Non-Forcible Self-Defense

It is posited here that customary international law on self-defense, as well as the historical evolution of protective jurisdiction, indicate that the self-defense doctrine may, in certain circumstances, be applicable to non-forcible, defensive countermeasures. U.N. Charter Article 51 arguably “only highlights one form of self-defense (namely in response to an armed attack),”<sup>97</sup> and customary interna-

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necessity and proportionality are “often traced back to the 1837 *Caroline* incident” and are “part of customary international law”); *see also* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 82 (1938) (stating that the *Caroline* incident transformed self-defense into a legal doctrine). *But see* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 275 (5th ed., 2011) (arguing that the ICJ sensibly ascribes Article 51’s “inherent right” to customary international law, but any customary international law on self-defense prior to the U.N. Charter must be considered only to have existed since the Kellogg-Briand Pact of 1928).

93. ILC Articles, *supra* note 81, art. 25, cmt. 5.

94. *Id.* (citing 29 BRITISH AND FOREIGN STATE PAPERS, 1840–1841, at 1129 (1857)).

95. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 176, 193–94 (June 27) (recognizing the customary international law self-defense requirements of immediacy, necessity, and proportionality).

96. *Id.*; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (same).

97. DINSTEIN, *supra* note 92, at 196 (describing—though disagreeing with—the “scholarly school of thought maintaining that Article 51 only highlights one form of self-defense (*viz.* response to an armed attack) without negating other patterns of permissible action in self-defense vouchsafed by customary international law”); D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 113 (1958) (indicating self-defense may “justify action not involving force but *prima facie* illegal. For example, a state may on grounds of self-defense

tional law arguably permits the invocation of self-defense to justify otherwise unlawful conduct for the purpose of state protection.<sup>98</sup>

The concept of non-forcible measures as self-defense has been previously raised outside the context of protective jurisdiction. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* case before the ICJ, Israel argued, *inter alia*, that the wall constituted an action taken in national self-defense. In its advisory opinion, the ICJ rejected this claim, but not on the basis that non-forcible measures inherently fall outside the scope of self-defense.<sup>99</sup> By contrast, when evaluating the legality of Israel's wall, the Supreme Court of Israel relied on the premise that both non-forcible and forcible measures may qualify as acts of self-defense.<sup>100</sup>

Non-forcible self-defense in response to economic aggression has also been previously, although sparingly, considered. Derek Bowett, in his acclaimed book on self-defense in international law, saw no doctrinal or methodological obstacle to a state's defense of its

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justify discrimination against the products of another state despite a duty of non-discrimination assumed towards that state under treaty.”); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 173 (June 27) (dissenting opinion of Judge Schwebel) (citing, *inter alia*, C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, in *RECUEIL DES COURS* 496–97 (1952); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232–41 (1961) (rejecting the notion that Article 51 confines the scope of self-defense to its express terms).

98. Emmanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier?*, 38 *CORNELL INT'L L.J.* 574, 576 (2005) (arguing that customary international law provides states the right to defend themselves in every case of aggression); C. OKIDI ODIDI, *REGIONAL CONTROL OF OCEAN POLLUTION: LEGAL AND INSTITUTIONAL PROBLEMS AND PROSPECTS* 118 (1978) (citing CHARLES DE VISSCHER, *THEORY AND REALITY IN INTERNATIONAL LAW* 294–95 (P. E. Corbett trans., 1957) (arguing that the vital interests to the state that may be protected against through self-defense may include armed attack, or economic and ideological threat or subversion).

99. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 138–39 (July 9) [hereinafter *Palestinian Wall*]. The ICJ rejected the claim because the threat at issue emanated from within Israel's territory, and thus self-defense was unavailable. *Id.* Notably, Judge Rosalyn Higgins, in her separate opinion, indicates that she “remains unconvinced that non-forcible measures (such as the building of a wall) fall within self-defense under Article 51 of the Charter as that provision is normally understood . . . . [E]ven if it were an act of self-defense, properly so called, it would need to be justified as necessary and proportionate.” *Id.* ¶ 3 (Separate Opinion of Judge Higgins). Judge Higgins did not, however, explain why conceiving of non-forcible measures as self-defense would be legally incoherent. *Id.*; see also James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense under International Law*, 44 *VAND. J. TRANSNAT'L L.* 285, 310 (2011).

100. HCJ 2056/04 *Beit Surik Village Council v. Government of Israel* 43 I.L.M. 1099, ¶ 33 [2004] (Isr.).

essential economic interests, nor to its use of non-forcible measures to defend such interests.<sup>101</sup> Indeed, Bowett acknowledged that “essential economic interests may be equally great as [a state’s] interests in safeguarding its territory, its political independence, or its people.”<sup>102</sup> Citing protective economic legislation, Bowett indicated that self-defense to protect against economic aggression may, in exceptional circumstances, be justified as defensive conduct that is *prima facie* illegal, but which protects against injury to a state’s economic interests.<sup>103</sup> In fact, Bowett acknowledged that despite self-defense being “*primarily* important as an exception to the prohibition on force . . . . This does not, however, exclude its application to the defense of economic rights entirely.”<sup>104</sup> Nevertheless, Bowett stopped short of fully recognizing a limited right of economic self-defense for terminological reasons, as he believed that economic self-defense was “more accurately described as economic ‘self-preservation.’”<sup>105</sup>

Though Bowett conceded that non-forcible aggression may, in limited circumstances, trigger a state’s right to non-forcible self-defense, there are many notable commentators that conceive of self-defense as involving only a forcible response to forcible aggression.<sup>106</sup> Yet, reducing the concept of self-defense to those instances where the use of force is the only way of protecting against harm unduly apologizes for the historical violence of interstate relations, and unnecessarily assumes that forcible measures are the only defensive method to protect the state from extraterritorial harm, even forcible harm.<sup>107</sup> The consistent use of economic sanctions and boycotts to

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101. BOWETT, *supra* note 97, at 107–09 (“There is logically no reason why [a right to economic self-defense] should not be admitted . . .”).

102. *Id.* at 106 (indicating that states have become increasingly cognizant of vulnerability to “economic aggression” and the necessity of economic self-defense).

103. *Id.* at 113 (“[B]ut even when injurious [economic] conduct can really be characterized as delictual, the role of self-defense will not, [but for] exceptional circumstances, be to sanction the use of force. It may, within a very limited field, find some application as a justification for *other conduct* which is *prima facie* illegal but which is designed solely to protect a state’s economic rights against unlawful injury.”) (emphasis added).

104. *Id.* at 109–11 (emphasis added); *see also id.* at 111 (“The field in which the right of self-defense can apply to those measures of protection which a state takes to protect its economy is, therefore, limited.”).

105. *Id.* at 113.

106. *See, e.g.*, IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 305 (1963); DINSTEIN, *supra* note 92, at 196–97.

107. *See* MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 41–70 (2005) (conceptualizing international legal argument to run on a continuum between “apology”—rules that solely describe state

respond to both military and economic aggression, as well as the historical use of protective jurisdiction, illustrate why conceiving of self-defense as strictly a use-of-force doctrine is flawed.<sup>108</sup>

When conceptualizing self-defense in terms of state responsibility on the international plane, a state's excusable violation of its international obligations through forcible measures is not materially different from otherwise unlawful, non-forcible measures that are exceptionally necessary to defend a state's essential security interests. Even if the label of "non-forcible self-defense" is resisted, the soundness of this conceptualization is evidenced by the state of necessity doctrine, another well-established international legal doctrine grounded in self-preservation<sup>109</sup> that may be invoked for the purpose of state protection.

### B. *State of Necessity*

The state of necessity doctrine allows a state to take exceptional measures where they are "the only way . . . to safeguard an essential interest against a grave and imminent peril."<sup>110</sup> The primary distinction typically drawn between the state of necessity and self-defense is that the necessity doctrine is not dependent on the prior wrongful act of another state.<sup>111</sup> A state of necessity may arise without an armed attack by another state, whereas such an attack or threat is arguably a required precondition for forcible self-defense under Article 51.<sup>112</sup>

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practice—and "utopian" rules that aspire to indemonstrable principles).

108. See BOWETT, *supra* note 97, at 111 ("[T]here may still be room for the application of the right of self-defense in those circumstances in which a state claims to justify action not involving force but is *prima facie* illegal.").

109. See *id.* at 10 (citing Georg Schwarzenberger, *The Fundamental Principles of International Law*, in 87 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 344 (1955)) ("It is doubtful whether self-preservation can have any meaning as a legal concept apart from a generic term for self-defense, self-help, and necessity . . .").

110. ILC Articles, *supra* note 81, art. 25. Notably, the French version of the ILC Articles on State Responsibility refers in Article 25 to the "état de nécessité" (state of necessity) as opposed to simply "necessity."

111. Roberto Ago (Special Rapporteur), Addendum to the Eighth Report on State Responsibility: Internationally Wrongful Act of the State, Source of International Responsibility, ¶ 4 U.N. Doc. A/CN.4/318/Add.5-8 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N 13, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1) [hereinafter Ago ILC Report].

112. Emmanuel Roucouas (Rapporteur), *Present Problems of the Use of Force in International Law*, 72 INSTITUT DE DROIT INTERNATIONAL 75, 128 ¶ 108 (2007), available at

Yet, where a state takes defensive measures to protect its national security, the distinction between self-defense and the state of necessity is arguably “artificial and erroneous.”<sup>113</sup> The state of necessity doctrine itself grew out of state practice on the right to self-defense.<sup>114</sup> The elements of necessity and proportionality are critical to the operation of both concepts, and there are numerous cases where both the state of necessity and self-defense may be invoked by states for the same action.<sup>115</sup> For example, necessity is arguably the triggering predicate for the use of extraterritorial, defensive force against terrorist or other non-state actors, regardless of whether a state is invoking the right to self-defense or the state of necessity.<sup>116</sup>

In fact, despite its traditional association with self-defense, some commentators, as well as the ILC itself, contend that the *Caroline* incident discussed previously is better understood as an invocation of the plea of necessity.<sup>117</sup> Where a state is threatened with imminent harm—whether emanating from a state or non-state actor—

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<http://www.idi-iil.org/idiF/annuaireF/2007/Roucounas.pdf>. The ICJ has taken the restrictive view that an attack by a non-state actor must be attributable to a state to trigger the Article 51 right to self-defense. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27). Yet, state practice since 1945 evidences a growing international acceptance of defensive measures against harm emanating from non-state actors. Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defense in the Wall Case*, 16 EUR. J. INT’L L. 963, 972 (2005).

113. DINSTEIN, *supra* note 92, at 271 (“The distinction drawn by the [ILC] between self-defense and necessity . . . is artificial and erroneous.”); see also Roucounas, *supra* note 112, ¶¶ 108–09 (“Nevertheless, confusion is not always avoided, since the principles of necessity and proportionality are decisive for the legality of the operation of the two concepts and the ILC only here refers to *Caroline* . . . .”); Ago ILC Report, *supra* note 111, ¶ 88 (indicating that “a state acting in self-defense, like a state acting in a state of necessity, acts in response to an imminent danger”).

114. Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT’L L. 637, 641 (2007) (citing BURLEIGH RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* (1928) and PAUL WEIDENBAUM, *NECESSITY IN INTERNATIONAL LAW* 24 (1938)).

115. See, e.g., Ago ILC Report, *supra* note 111, ¶ 65 (finding that raids into foreign territory to free hostages that were justified on self-defense grounds “may have borne more relation to the state of necessity than to self-defense”).

116. SCHACHTER, *supra* note 35, at 173 (“‘Necessity’ is at the heart of the problem of extra-territorial force against terrorism. This holds true whether self-defense or a plea of [state of] necessity is invoked.”); see also CASSESE, *supra* note 86, at 355 (indicating that, contrary to prior findings of the ICJ, the aggression triggering individual self-defense may emanate from non-state or state actors).

117. See ILC Articles, *supra* note 81, art. 25, cmt. 5 (“The *Caroline* incident of 1837, though frequently referred to as an instance of self-defense, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present.”).

the triggering circumstance that enables a state to resort to exceptional, protective measures is necessity.<sup>118</sup> Where such a triggering circumstance does not exist, any extraterritorial conduct would be unnecessary and, thus, unlawful.<sup>119</sup> Moreover, any international acceptance of anticipatory self-defense, where an armed attack is imminent but has not yet occurred, would further blur any meaningful distinction between the doctrines.<sup>120</sup> When threatened with grave and imminent harm, a state could arguably plead either a state of necessity or the equivalent need to engage in anticipatory self-defense.

Before proceeding, it is important to clarify why this Article introduces self-defense and the state of necessity as the relevant legal constructs, rather than self-preservation or self-help. The basic rationale is that self-preservation and self-help are considered to be indiscriminate instincts, rather than legal rights, which are irreconcilable with an international legal order grounded in objective standards of conduct.<sup>121</sup> Though self-defense, self-preservation, and self-help

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118. See Ago ILC Report, *supra* note 111, ¶ 4 (“The ‘necessity’ there invoked is a ‘necessity of State’. The alleged situation of extreme peril does not take the form of a threat to the life of individuals whose conduct is attributed to the State, but represents a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace . . .”).

119. “‘The state of necessity is a ground recognized by customary international law’ that ‘can only be accepted on an exceptional basis.’” *Palestinian Wall*, *supra* note 99, ¶ 140.

120. Anticipatory self-defense is defined as a preventive strike where it is necessary to safeguard against an imminent, non-contingent threat of armed attack. Elli Louka, *Precautionary Self-Defense and the Future of Preemption in International Law*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 962 (2011). Anticipatory self-defense is distinguishable from preemptive self-defense, which would authorize a forcible response to prevent against future, contingent threats of an armed attack. *Id.*; see also CASSESE, *supra* note 86, at 358–62 (arguing that “rationale behind doctrine of ‘anticipatory’ self-defense . . . is a strong meta-legal argument” and a number of states support the doctrine, though an overwhelming majority do not believe it is allowed by Article 51 of the U.N. Charter); cf. GRAY, *supra* note 86, at 160 (indicating that “[t]he majority of states reject anticipatory self-defense” and arguing that state reluctance to invoke anticipatory self-defense is “a clear indication of the doubtful status of this justification for the use of force”).

121. See F.B. Schick, *Peace on Trial—A Study of Defense in International Organization*, 2 *W. POL. Q.* 1 (1949) (citing 1 L. OPPENHEIM, *INTERNATIONAL LAW* 244 (5th ed., 1937)) (“Self-preservation as a biological phenomenon does not constitute a right compatible with the idea of order. The indiscriminate use of this instinct would be destructive of any system of law. Self-help as the outflow of the instinct of self-preservation falls in the same category.”); *id.* (citing J.L. BRIERLY, *THE LAW OF NATIONS* 256–57 (2d ed., 1938)) (“Self-preservation usually refers to an instinct, and as such hardly falls within the modern concept of a legal right.”); BOWETT, *supra* note 97, at 10 (“It is doubtful whether self-preservation can have any meaning as a legal concept apart from a generic term for self-defense, self-help, and necessity; its appeal lies in the realm of ideology rather than of

are similar in regards to the underlying motive of state self-protection, as the international legal system has evolved, only self-defense and the state of necessity<sup>122</sup> have emerged as legal doctrines authorized and standardized by the international community.<sup>123</sup>

Ultimately, though there remain differences between self-defense and the state of necessity—most notably that forcible self-defense is strictly regulated by the U.N. Charter—both doctrines may be invoked as circumstances precluding wrongfulness for the purpose of state protection. It is thus proposed here that where a state employs otherwise unlawful, defensive measures to protect its national security—e.g., through protective jurisdiction—both the self-defense and state of necessity doctrines should inform the applicable legal standard.

### III. PROTECTIVE JURISDICTION AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

Though it is articulated in a number of ways, the underlying and primary justification for protective jurisdiction is self-defense of the state and its security interests.<sup>124</sup> As discussed previously, the

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law.”).

122. It is true, of course, that necessity under international law has traditionally been associated with the concept of “self-preservation.” *See, e.g.*, 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (2d ed., 1912) (indicating that violations “in the interest of self-preservation are excused in cases of necessity only”); *see also* BOWETT, *supra* note 97, at 10 (“In so far as self-preservation and necessity find a use as concepts justifying conduct which, though not lawful (and therefore distinct from self-defense) is yet excusable, their scope is necessarily limited.”). Yet, over the last century, the concept of self-preservation has fallen out of favor, both generally as an international legal doctrine and specifically with respect to the conceptualization of necessity as a circumstance precluding wrongfulness. *See generally* ILC Articles, *supra* note 81, art. 25 and accompanying commentary (describing the necessity doctrine without a single reference to self-preservation).

123. STANIMIR A. ALEXANDROV, *DEVELOPMENTS IN INTERNATIONAL LAW: SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 25 (1996) (citing Report of the I.L.C. on its 32nd Session, II(2) I.L.C. Y.B. 1, 54 (1980)) (“Self-defense was thus viewed more and more as a species subordinate to the genus of self-help, i.e., a permissible form of ‘armed self-help.’”); BOWETT, *supra* note 97, at 11 (indicating that self-help is no longer a viable construct under international law).

124. Maier, *supra* note 6, at 69 (noting that states are free to act against conduct extraterritorially as a result of its interests in protecting its society); *Extraterritorial Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1090 (1974); Lotika Sarkar, *The Proper Law of Crime in International Law*, in *INTERNATIONAL CRIMINAL LAW* 68 (G. Mueller & E. Wise eds., 1965).

evolution of protective jurisdiction in continental Europe and Latin America was unequivocally rooted in the defense of state security.<sup>125</sup> In France, the first nation-state to assert protective jurisdiction, such extraterritorial regulation was grounded in an expressly affirmed right of “*légitime défense*” (self-defense).<sup>126</sup> Thereafter, protective jurisdiction became commonly accepted among other states as an exception to the exclusivity of sovereign jurisdiction where foreign conduct “constituted an act against the existence of [the regulating] state and compromised its security.”<sup>127</sup>

Despite its grounding in self-defense, there has, to this point, been no effort to reconcile the international limitations on self-defense through the use of force with those on self-defense through extraterritorial jurisdiction, even though there are similar considerations calling for restraint.<sup>128</sup> As noted previously, the customary international law right to self-defense arguably allows for both forcible and non-forcible measures,<sup>129</sup> yet the standards applicable to non-forcible measures diverge considerably from their forcible counterparts. While self-defense using force is standardized under international law—defensive measures must be *objectively* necessary and proportional in response to grave harm—the indeterminacy of protective jurisdiction’s current conceptualization leaves states with the discretion to be the ultimate arbiters of whether extraterritorial conduct is injurious to their interests.<sup>130</sup>

Again, even if the nomenclature of “non-forcible self-defense” is disputed, the reconceptualization of protective jurisdic-

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125. Professor García-Mora’s 1958 article provides a comprehensive explanation of how the principle is “legally justified on self-defense.” García-Mora, *supra* note 7, at 579 (citing PERCY E. CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 91 (1951)).

126. *Id.* (citing DE VABRES, *supra* note 7, at 87; 1 PODESTA COSTA, *DERECHO INTERNACIONAL PUBLICO* 127 (3d ed. 1955); PERCY E. CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 171 (1951)).

127. League of Nations Report, *supra* note 25, at 258.

128. *Cf.* Akehurst, *supra* note 29, at 159 (arguing that the protective principle should be limited in the same way as the territorial effects doctrine—a state should only claim protective jurisdiction if the primary effect of the conduct threatens the state).

129. BOWETT, *supra* note 97, at 107–09 (“There is logically no reason why [a right to economic self-defense] should not be admitted.”); DINSTEIN, *supra* note 92, at 196 (indicating that there is a “scholarly school of thought maintaining that Article 51 highlights only one form of self-defense”); Schwarzenberger, *supra* note 109, at 332 (defining self-defense as measures which a state may take outside its own jurisdiction against acts which threaten its territorial integrity or political independence).

130. García-Mora, *supra* note 7, at 579 (although protective legislation is grounded in the theory of self-defense, “considerable flexibility has attended its determination so that no particular element seems clearly discernible”).

tion as a circumstance precluding wrongfulness retains merit. It is ultimately the necessity element proposed below that achieves the task of standardizing the juridical link that has been critical to protective jurisdiction's historical acceptance and operation.<sup>131</sup> Irrespective of its conception as "self-defense," "self-preservation," a "state of necessity," or otherwise, protective jurisdiction relies fundamentally on the necessity of state protection in exceptional circumstances.<sup>132</sup>

Just as the state of necessity and self-defense doctrines indicate exceptional circumstances precluding wrongfulness, the lawful exercise of unilateral protective jurisdiction should be limited to those exceptional circumstances where it is necessary to protect the regulating state from the threat or actuality of grave harm to an essential security interest. Only in those circumstances would the regulating state's otherwise unlawful intrusion into another state's jurisdiction be sufficiently connected to extraterritorial conduct to warrant cross-border regulation.

#### A. Protectable "Essential" Interests

The reformulation begins by proposing that excusable assertions of protective jurisdiction be limited to the protection of "essential" security interests. That protective jurisdiction is intended to protect only such "essential" or "vital" national security interests is not a novel proposition.<sup>133</sup> Protective jurisdiction is commonly understood to enable a state to exercise jurisdiction over extraterritorial conduct that is deemed prejudicial to its essential interests—namely its territorial integrity, political independence, and/or security.<sup>134</sup>

A state's conduct when invoking self-defense and the state of

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131. See BROWNIE, *supra* note 17, at 311–12 (stating that extraterritorial jurisdiction is lawful only where there is a substantial and bona fide connection between the forum and the subject matter, and the principle of non-intervention in the domestic or territorial jurisdiction of other states is respected).

132. *Id.* at 734 (indicating that early statesmen used the terms self-help, self-preservation, and necessity of self-defense as "more or less interchangeable terms"). *But see* Ian Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y.B. INT'L L. 183 (1961) ("Categories such as self-preservation and necessity are too vague and susceptible to selfish interpretation to provide a sufficient basis for a legal régime.").

133. See, e.g., SHAW, *supra* note 4, at 667 ("[t]he [protective] principle is justifiable on the basis of protection of a state's vital interests"); League of Nations Report, *supra* note 25, at 258 ("[A] State cannot abandon to another the task of dealing with and punishing acts susceptible of causing injury to its *essential interests*."). (emphasis added).

134. *Draft Convention*, *supra* note 5, at 440; see also Simma & Müller, *supra* note 11, at 143 ("[I]t has long been recognised that certain interests of states are so essential that acts directed against them qualify as sufficiently close to prompt those states' jurisdiction.").

necessity must be similarly protective of an essential security interest.<sup>135</sup> And it is proposed here that protective jurisdiction should be correspondingly restricted to only those exceptional circumstances where legislation is necessary to protect an essential security interest from harm.

To limit jurisdiction in this way demands consideration of the scope of interests that may be considered “essential.” Identifying the definitional contours of this term, however, is easier said than done. Indeed, a primary animating force for this Article is the flaw of relying on terms such as “essential,” “fundamental,” or “vital” as limiting concepts. And the ILC itself has struggled with the definition of “essential interests,” most recently concluding that they cannot be defined in advance, but rather must be considered in light of the specific facts of a case.<sup>136</sup>

Although an *ex ante* enumeration of the precise state interests that may be deemed “essential” for the purposes of state protection is unrealistic,<sup>137</sup> it is possible to identify broad areas of interests that may, depending on the particular circumstance, trigger a protectable security interest. A 1980 ILC committee of experts on state responsibility chaired by Roberto Ago concluded that essential interests in-

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135. See Case concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 40 (Nov. 6) (finding that interpretation of treaty provision authorizing contracting parties to “protect essential security interests” will “necessarily entail an assessment of the conditions of legitimate self-defense under international law.”); see also Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defense*, 16 EUR. J. INT’L L. 499, 506–07 (2005) (indicating that necessity of forcible self-defense must be linked to a state’s essential security interests). Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 282 (June 27) (finding that whether state conduct was “necessary” for the purpose of protecting an essential security interest overlaps with the question of their validity as acts of self-defense); ILC Articles, *supra* note 81, art. 25(1)(a); *id.* para. 2 (“[The plea of necessity] arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the state invoking necessity on the other.”).

136. James Crawford, Special Rapporteur, *Second Rep. on State Responsibility, Addendum 2*, at 70, Int’l Law Comm’n, U.N. Doc. A/CN.4/498/Add.2 (July 23, 1999) (indicating that “no *a priori* definition of an essential interest can be offered,” and quoting commentary to draft article 33 (necessity), “The extent to which a given interest is ‘essential’ naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract.”).

137. See *id.*; see also LG&E Energy Corp. et al. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, ¶ 252 (Oct. 3, 2006), 46 I.L.M. 36 (2007) (“[A]n interest’s greater or lesser essential [sic], must be determined as a function of the set of conditions in which the State finds itself under specific situations. The requirement is to appreciate the conditions of each specific case where an interest is in play, since what is essential cannot be predetermined in the abstract.”).

cluded “a state’s political or economic survival, the continued functioning of [a state’s] essential services, the maintenance of internal peace, the survival of a sector of its population, [and] the preservation of the environment of its territory or a part thereof.”<sup>138</sup> Given the term’s use in the jurisdictional and state of necessity domains, such a conception rightfully expands essential security interests beyond only those circumstances that may trigger forcible self-defense. The ICJ seemingly embraced the ILC committee’s conception in the *Gabcikovo-Nagymaros* case, when it acknowledged that the environmental threat allegedly posed by the Danube river project related to an “essential interest” of the state.<sup>139</sup>

Indeed, the state of necessity doctrine has been invoked to protect a wide variety of interests, including grave economic and environmental harm emanating from abroad.<sup>140</sup> Notably, several recent cases before the International Centre for the Settlement of Investment Disputes (ICSID) have considered whether the Argentinean economic crisis threatened an essential security interest and, thus, justified the invocation of the state of necessity. One ICSID tribunal found that the term includes “economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation.”<sup>141</sup>

Similar to the state of necessity, essential interests for the purposes of protective jurisdiction should remain a state’s security, territorial integrity, and political independence.<sup>142</sup> Extraterritorial

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138. Ago ILC Report, *supra* note 111, at 14.

139. *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 53 (Sept. 25).

140. See Waibel, *supra* note 114, at 637–38 (discussing how some have divided necessity into categories such as environmental necessity, financial necessity, etc.); see also ILC Articles, *supra* note 81, art. 25, ¶ 14 (“The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin . . . including safeguarding the environment, preserving the very existence of the State . . . or ensuring the safety of a civilian population.”).

141. *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/I, Award, ¶ 251 (Oct. 3, 2006), 46 I.L.M. 36 (2007). By contrast, the tribunal in *CMS v. Argentina* found that, while the economic crisis was severe, it did not threaten an essential interest because there was no threat of “total economic and social collapse.” *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 319, 355 (May 12, 2005), 44 I.L.M. 1205. As noted previously, the state of necessity doctrine may be invoked to “safeguard an essential interest against a grave and imminent peril.” ILC Articles, *supra* note 81, art. 25; see also Jurgen T. Kurtz, *ICSID Annulment Committee Rules on the Relationship Between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis*, 11 ASIL INSIGHTS, Issue 30 (Dec. 20, 2007), <http://www.asil.org/insights071220.cfm>.

142. See *Draft Convention*, *supra* note 5 (“A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or

conduct that could give rise to protective regulation would thus arguably include threats to territorial security, such as terrorism, espionage, and immigration matters; economic security, including currency counterfeiting and other grave disruption to the state's financial system;<sup>143</sup> and environmental security, including grave contamination to a state's marine coastline, waterways, or aquifers.<sup>144</sup>

Identifying broad categories of protectable interests, however, does little to delimit state conduct in this area. Indeed, security, territorial integrity, and political independence have long been recognized as the broad categories meriting protective, cross-border regulation in this context.<sup>145</sup> The transformative limitation on protective jurisdiction is introduced by the necessity and proportionality elements elaborated upon below. Under the reformulation proposed here, states would be required to identify why extraterritorial jurisdiction is necessary to protect an essential security interest, and the regulatory response would have to be proportional. Though the essentiality of state interests has a role to play, it is the necessity element that is posited as the principal limiting agent, and that which would ensure a suitable juridical link between the regulated conduct and a state's national security.

### B. *The Necessity Element*

The rule proposed here would introduce a necessity element into an international standard on protective jurisdiction. Protective jurisdiction, like self-defense and the state of necessity, should be internationally lawful only when grave and imminent peril renders state

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political independence . . .”).

143. See D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BR. Y.B. INT'L L. 1, 11 (1982) (noting that protective jurisdiction may be necessary to protect a state's economy); ELAGAB, *supra* note 35, at 132 (same).

144. See, e.g., Int'l Law Comm'n, Draft Articles on Prevention on Transboundary Harm from Hazardous Activities, U.N. Doc. A/56/10, reprinted in *II Yearbook of the International Law Commission*, Part Two (2001) (indicating that the prevention of transboundary environmental harm is a principle of international law); Legality of the Threat or Use of Nuclear Weapons, *supra* note 88, ¶¶ 241–42 (confirming that states have a duty to prevent transboundary, environmental harm); United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (1994), art. 234 (recognizing the right of coastal states to assert protective jurisdiction over marine pollution that threatens their coastlines) [hereinafter UNCLOS]; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 970 U.N.T.S. 211, (entered into force May 6, 1975) (affirming the right of coastal states to take necessary measures to protect their coastlines from marine pollution).

145. See, e.g., *Draft Convention*, *supra* note 5.

protection necessary. Though it is commonly accepted that protective jurisdiction is grounded in self-defense, and “[n]ot to serve as a means of enforcing the state’s policy abroad,”<sup>146</sup> as described previously, the current formulation of protective jurisdiction is too easily exploited to achieve that very result. The necessity element would offer an objective criterion for evaluating the juridical link between the regulated conduct and a state’s security, as well as the suitability of the state’s regulatory response.

For it to be a necessary exercise of protective jurisdiction, the extraterritorial conduct at issue must constitute a non-contingent threat of harm to a state’s essential security interests. In other words, viewed through a Mannian lens, the necessity element would ensure a meaningful connection between the extraterritorially regulated conduct and the exercise of protective jurisdiction. By introducing an element of actual or proximate harm, the reformulation takes direct aim at the current conception’s failure to require any showing of harm or threat of harm to the state.

The necessity element would be operationalized by reference to three sub-elements: imminence, gravity, and proportionality. States invoking protective jurisdiction would be required to demonstrate a causal connection between the regulated conduct and grave injury, or an imminent threat of grave injury, to an essential security interest. Furthermore, even where the necessity of protection is established, any regulatory response would need to be proportional to the harm or threat of harm.

### 1. Imminence and Gravity

To begin, the necessity element would standardize the quality of harm that could give rise to an excusable invocation of protective jurisdiction. Protective jurisdiction would only be lawful where a state has suffered or is threatened with imminent and grave harm.

Both self-defense and the state of necessity provide that a state may only violate its international obligations for the exceptional purpose of state protection where necessary to protect against imminent and grave harm. Though states and commentators quarrel about the precise contours of both terms, gravity and imminence remain critical elements of both doctrines.<sup>147</sup> With respect to the state of ne-

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146. Puttler, *supra* note 57, at 109 (citing Akehurst, *supra* note 29, at 157) (“The protective principle, however, may not be used merely to impose a state’s policy or ideology on foreigners outside its territory.”).

147. See, e.g., GRAY, *supra* note 86, at 147–48 (indicating disagreement among states and commentators as to the scope of self-defense, particularly when precisely an armed

cessity, the ILC Articles on State Responsibility provide that a state may take action only where it is threatened by a “grave and imminent peril.”<sup>148</sup> The peril has to be objectively established, “imminent in the sense of proximate,” and not merely apprehended as possible.<sup>149</sup>

The reformulation proposed here would similarly limit protective jurisdiction to only those circumstances where a state is faced with imminent and grave harm. Proximate harm in this context refers to the direct causal relationship between the alleged conduct and the alleged harm. As noted previously, protective jurisdiction is only justified as an exceptional measure because “a State cannot abandon to another the task of dealing with and punishing acts susceptible of causing injury to its essential interests.”<sup>150</sup> The corollary of this is that protective jurisdiction should not be permitted where the conduct at issue is not causally connected to an injury to a state’s essential interests. As indicated by Charles de Visscher, protective jurisdiction safeguards against offenses against the security of a state “which, although they are committed in foreign territory, tend as a *direct consequence* to undermine the institutions of the State within the limits of its own territory.”<sup>151</sup> Hence, where the regulated conduct does not directly harm or threaten imminent harm, a regulating state would not be excused from its international obligation of non-interference.<sup>152</sup>

It is important to note that the temporal concept of “imminence” is not irreconcilable with prescriptive jurisdiction. In *Gabčíkovo-Nagymoros*, the ICJ indicated that the imminence requirement of the state of necessity doctrine “does not exclude . . . that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less

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attack begins and the required degree of gravity); Case concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 51, 62 (Nov. 6) (addressing dispute over the gravity of an alleged armed attack and the necessity of self-defense); Legality of the Threat or Use of Nuclear Weapons, *supra* note 88, ¶¶ 47–48 (finding that whether a “threat” is contrary to Charter Article 2(4) “depends upon whether the particular use of force envisaged would be *directed against* the territorial integrity or political independence of a State.”) (emphasis added).

148. ILC Articles, *supra* note 81, art. 25.

149. *Id.* art. 25, cmt. 15.

150. League of Nations Report, *supra* note 25, at 258.

151. *Id.* at 259. The Restatement’s commentary also indicates that regulated conduct must be “*directed* against the security of the [forum] state.” RESTATEMENT, *supra* note 9, § 402 cmt. d (emphasis added).

152. See Mann I, *supra* note 3, at 47 (“The reference to the paramountcy of international law implies what one may call the requirement of non-interference in the affairs of foreign States. More specifically, this important qualification renders unlawful such legislation as would have the effect of regulating the conduct of foreigners in foreign countries.”).

certain and inevitable.”<sup>153</sup> Applied to the jurisdictional domain, such a conception of long-term imminence would enable states to invoke protective jurisdiction to regulate conduct such as espionage and environmental malfeasance, as well as conspiring to commit a terrorist offense or other inchoate offenses that threaten harm to the state’s essential interests, if it could be shown that the realization of grave harm to the state is inevitable. Any such assertion of protective jurisdiction would be subject to the other elements introduced here, but the reformulation would preserve the possibility that extraterritorial jurisdiction may be internationally lawful even before destructive consequences are realized.

It is also useful to clarify the operation of gravity in the protective jurisdiction context. It is well established that forcible self-defense and the state of necessity may be invoked only to protect the state from grave injury.<sup>154</sup> This scale of harm might, at first blush, appear dissonant with the spectrum of conduct that would rightfully be contemplated under protective, legislative jurisdiction. As noted previously, states have often invoked protective jurisdiction to prosecute seemingly small-scale offenses such as immigration fraud and currency counterfeiting on foreign territory.

Yet, self-defense and the state of necessity nonetheless provide useful analogies for the type of harm that may be protected through cross-border regulation. For the purposes of protective jurisdiction, gravity should be evaluated by reference to the quality of the alleged harm or threat of harm. In other words, gravity refers to the quality or importance of harm vis-à-vis a state’s national security, rather than the scale of physical destruction any isolated act may cause. Though any isolated act of currency counterfeiting or passport fraud may appear trivial when compared to the circumstances triggering lawful, forcible self-defense, the cumulative effects of numerous, unpunished incidents of conduct such as extraterritorial counterfeiting, immigration fraud, or environmental contamination may arguably have a large-scale—or grave—impact on a state’s security interests.

The possibility of lawful regulation of smaller-scale conduct—in certain exceptional circumstances—acknowledges that a

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153. *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, ¶ 54 (Sept. 25); see also ILC Articles, *supra* note 81, art. 25, cmt. 16 (citing *Gabcikovo-Nagymaros*).

154. *Case concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 64 (Nov. 6); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 191 (June 27) (finding that a state invoking self-defense must establish that it was subject to a “grave form[] of the use of force”); *Palestinian Wall*, *supra* note 99, ¶ 140 (citing ILC Articles, *supra* note 81, art. 25) (indicating that the state of necessity may arise only where necessary to “safeguard an essential interest against grave and imminent peril.”).

legislator or prosecutor relying on protective jurisdiction operates in a markedly different forum than a military commander contemplating a military strike in self-defense. The very reason why protective jurisdiction is a useful method of national self-defense is because it presents a more nuanced tool than the blunt instrument of force. Where a state is able to demonstrate the required connection between certain extraterritorial conduct and its essential security interests, it should be able to leverage the deterrent capacity of its criminal justice system and exercise protective jurisdiction, irrespective of the scale of harm resulting from any isolated iteration of conduct. Otherwise, a perverse result would follow whereby a state could only legislate against large-scale conduct and would be helpless to safeguard against incremental, yet significant, damage to its security interests.<sup>155</sup>

When state security is considered holistically, serious environmental contamination emanating from abroad, or the cumulative effect of currency counterfeiting left unpunished, is arguably no less threatening to a state's security interests than an imminent armed attack. In other words, while it is important that protective jurisdiction be limited to defending against conduct that actually harms or threatens to harm a state's security, the international standard urged here would account for the possibility that grave harm may result from the cumulative effects of isolated, smaller-scale conduct.

Ultimately, the precise types of harm that may be protected against are subject to the evolution of state practice and international reaction; it is neither possible nor advisable to attempt to enumerate a precise list of harm that is sufficiently grave to warrant protective jurisdiction. Insofar as smaller-scale conduct may be shown to gravely threaten a state's essential security interests, that will be a showing for states to articulate and the international community to evaluate.

## 2. Proportionality

The reformulation also proposes to introduce proportionality as a sub-element of necessity to ensure that a state's regulatory response is narrowly tailored to the excusable objective of state protection. It is well established that both forcible and non-forcible countermeasures must be proportional to the injury at issue,<sup>156</sup> and

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155. See Green & Grimal, *supra* note 99, at 316–17 (arguing that it is illogical that a state suffering a minor armed attack may not use something short of force, such as a threat, in self-defense).

156. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 85 (Sept. 25) (“[A]n important consideration is that the effects of a countermeasure must be

proportionality is viewed as a limitation on protective measures that is partly independent of whether the measure was necessary.<sup>157</sup> Applied to the protective jurisdiction context, even if cross-border regulation is otherwise necessary—i.e., it targets a legitimate, protective purpose—proportionality would require that the scope and method of the regulatory response be necessary to fulfill that purpose.<sup>158</sup>

The reformulation's introduction of proportionality also draws on the emerging concept of proportionality in a variety of international legal regimes. The principle of proportionality is gaining traction in areas such as international investment and trade law as a method to evaluate the suitability, necessity, and proportionality of relevant legislation.<sup>159</sup> It is envisioned that the proportionality principle would play a similar role with respect to protective jurisdiction. Proportionality would serve to ensure that a protective, regulatory response is appropriately tethered to a state's legitimate claim to self-protection. If a less restrictive response would achieve protection of the state's interests, the measure would be disproportionate, unnecessary, and, thus, internationally unlawful.

The material-support-of-terrorism example described previously is illustrative here. Even if the United States were able to satisfy the reformulation's necessity element—i.e., whether it demonstrates that its regulation of material support is a legitimate basis for protective jurisdiction—its regulatory response would still need to be proportional to the excusable objective of state protection. In other words, the scope of conduct criminalized would need to be proportionate to the objective of state protection against terrorist activity.

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commensurate with the injury suffered"); ILC Articles, *supra* note 81, art. 51 ("Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 176 (June 27) (indicating that customary international law requires that self-defense measures be proportional to the injury).

157. ILC Articles, *supra* note 81, art. 51, cmt. 7 ("[Proportionality] has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance."); *cf.* GRAY, *supra* note 86, at 150 ("In theory it is possible to draw a distinction between necessity and proportionality, and the [ICJ] typically applies the two concepts separately . . . [Yet], [i]t is not clear how far the two concepts can operate separately.").

158. See BROWNIE, *supra* note 17, at 311–12 (stating that extraterritorial jurisdiction is lawful where principles of proportionality and accommodation are observed).

159. See Xiuli Han, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 CHINESE J. INT'L L. 635, 636–37 (2007) (describing the principle of proportionality's integration into a variety of international legal areas to ensure that the means are necessary to achieve the ends).

### C. Unilateral Versus Collective Protection

The exercise of protective jurisdiction should also be circumscribed to instances where it is the regulating state itself that is directly harmed or faced with a threat of imminent harm. This restriction aims to curtail states' abusive invocation of protective jurisdiction to assert sweeping jurisdiction over a variety of extraterritorial conduct, irrespective of whether the conduct is causally connected to its own security interests, or whether other states have formally consented to the legislation of conduct in its territory. Limiting unilateral protection to the defense of a nation's own interests draws on the well-established international legal rule that no state has the right to unilaterally act in self-defense of another state,<sup>160</sup> and reflects that consent operates as another circumstance precluding wrongfulness under international law.<sup>161</sup>

With respect to forcible self-defense, before a state may act in defense of another state, it must be shown that the victim state has suffered an armed attack, and the victim state has requested assistance from the state acting in its defense.<sup>162</sup> The consent requirement aims to protect the victim state's sovereignty by restricting the ability of additional states to unilaterally enter into armed conflict upon its territory. Moreover, it seeks to prevent the escalation of conflicts through unilateral intervention by third-party states. Rather than relying on unilateral or ad hoc proclamations of collective interests, the rule incentivizes multilateral cooperation and the international rule of law through collective defense treaties.

The reformulation proposed here would incorporate the consent requirement into the international rule on protective jurisdiction. Where protective regulation is unnecessary for the purpose of state protection, only valid consent would operate to preclude wrongfulness.<sup>163</sup> This restriction would reinforce the thrust of the reformulat-

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160. See Roucouas, *supra* note 112, para. 116 ("There is no right of a State to act unilaterally in self-defense for another State."); *but see* BOWETT, *supra* note 97, 200–38 (arguing for the theory of proximity, whereby even without agreement between two states, in the case of aggression against one state, any other state invoking the right of self-defense may prove that an armed attack against the victim state is an armed attack against itself).

161. ILC Articles, *supra* note 81, art. 20 ("Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limit of that consent.").

162. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27).

163. See ILC Articles, *supra* note 81, art. 20, cmt. 4 (indicating that, in the absence of other circumstances precluding wrongfulness, valid consent can operate to excuse a state's violation of an international obligation).

ed standard—a state proceeding unilaterally would need to demonstrate that the harm or threat of harm emanating from abroad is directly connected to its own security interests.<sup>164</sup>

It is important to emphasize that the reformulation's proposed restrictions are limited to *unilateral* state assertions of protective jurisdiction. Nothing here is intended to restrict the internationally lawful approach whereby states agree upon areas of reciprocal jurisdiction, whether through agreements on extradition, mutual legal assistance, or otherwise.<sup>165</sup> To the contrary, the reformulation seeks to promote a more systematic progression of cross-border regulation through multilateral, collective efforts grounded in consent. Requiring valid consent would incentivize formal agreement, whether through bilateral or multilateral treaties, where reciprocal criminal jurisdiction is desired by two or more states. Similarly, nothing about the reformulated principle denies the utility of treaty-based “universal” jurisdiction, whereby large numbers of states agree to reciprocal jurisdiction over a range of offenses deemed prejudicial to their collective interests. What the reformulated principle seeks to prevent, however, is the unlawful and chaotic escalation of disputes and tensions arising from unilateral regulation of conduct in another state's sovereign territory.

It is posited here that the indeterminacy of protective jurisdiction's current formulation unduly enables such abusive, unilateral jurisdiction. By invoking the protection of “fundamental interests” as a pretext, states unilaterally decide to “defend” other states from conduct deemed to be undesirable, even where there is no meaningful connection to the regulating state's own security interests. In other words, protective jurisdiction is exploited to assert a form of unilateral-universal jurisdiction.<sup>166</sup> Such a result is antithetical to the sovereign equality that underpins the international legal system; it is well established that the protection of collective security interests must be formally consented to by affected third-party states, or by the interna-

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164. Michael Akehurst has previously suggested a similar restriction on the protective principle, arguing that there must be evidence that the state most closely affected by certain conduct consents to its allies exercising jurisdiction on its behalf. Akehurst, *supra* note 29, at 159 (arguing that a victim state's consent to assistance must be evidenced).

165. See *Draft Convention*, *supra* note 5, at 476 (“[T]wo states, each strongly committed to the protective principle, may wish to mutually concede a special competence with respect to offenses against state security or credit committed by their nationals.”).

166. See Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1229–31 (2009) (arguing that acceptance of U.S. jurisdiction over drug crimes on the high seas “would eliminate any difference between [protective jurisdiction] and universal jurisdiction”).

tional community writ large.

Hungary's and the Soviet Union's protective legislation on behalf of other communist countries during the Cold War usefully illustrate the issue. The Hungarian Penal Code of 1950 invoked protective jurisdiction to criminalize any conduct, wherever it occurred, that offended a "fundamental interest relating to the democratic political and economic order of the Hungarian People's Republic."<sup>167</sup> In essence, Hungary considered its "security" to include acts contrary to communist social and economic ideology generally, wherever they occurred and regardless of any direct impact on Hungary.<sup>168</sup> The Soviet Union also unilaterally asserted jurisdiction over acts it deemed to be injurious to the security of other communist states, without any formal consent by those states to its cross-border regulation.<sup>169</sup>

The United States has also relied on protective jurisdiction as a pretext for asserting unilateral-universal jurisdiction. For example, the United States has justified its jurisdiction over non-U.S. vessels on the high seas based on the notion that "all drug trafficking aboard vessels threatens [its] security."<sup>170</sup> The United States ascribed itself the unilateral authority to assert such jurisdiction because "trafficking of narcotics is condemned universally by law-abiding nations,"<sup>171</sup> and because of the problem of stateless vessels on the high seas. In other words, the United States unilaterally decided to exercise protective jurisdiction on the high seas with respect to drug smuggling, not because of any meaningful connection to its own security interests, but based on its own unilateral appraisal of "universal condemnation" by "law-abiding nations."<sup>172</sup>

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167. Stephen Gorove, *Hungary: International Aspects of the New Penal Code*, 3 AM. J. COMP. L. 82, 85 (1954) (noting that "the New Hungarian Penal Code [by its invocation of the principle of universality] fails to live up to internationally accepted standards in regard to ordinary crimes committed by aliens abroad"); García-Mora, *supra* note 7, at 582. The Hungarian Penal Code cited here was designated as Law II of 1950, and went into effect on January 1, 1951. See Decree-Law No. 39 of 1950, art. 1 (Hung.).

168. Akehurst, *supra* note 29, at 159 (citing Soviet Law on Criminal Liability for State Crimes (1958), Art. 10, Hungarian Code, and Bulgarian Criminal Code, Art. 98 as examples of "Communist countries claim[ing] jurisdiction over offenses against the security of other Communist countries" in situations where consent to such jurisdiction by affected states should be required).

169. *Id.*

170. *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (discussing the justification for the Maritime Drug Law Enforcement Act's invocation of the protective principle to assert jurisdiction over non-U.S. vessels on the high seas).

171. *Id.*

172. *United States v. Angulo-Hernandez*, 576 F.3d 59, 61 (1st Cir. 2009) (Torruella, J., dissenting from denial of en banc review) ("Relying on the protective principle without any

The U.S. material support of terrorism law discussed previously also exhibits a form of unilateral-universalism. The United States has, in effect, decided that terrorist activity all over the world is worthy of U.S. regulation. Although the Basque Fatherland and Liberty organization (ETA) or the Liberation Tigers of Tamil Eelam (LTTE)—two organizations designated as “terrorist” by the United States—may indeed constitute terrorist organizations under commonly accepted international definitions, it is debatable whether an individual or entity that provides expert advice or assistance to the ETA or the LTTE, whether for terrorist purposes or otherwise, is harming or threatening to harm the national security of the United States. This Article posits that, without valid consent by states directly affected by the ETA or the LTTE, or an articulation of how the material support of such regulated groups is causally connected to U.S. security interests, the unilateral assertion of jurisdiction should be unlawful.

As discussed previously, protective jurisdiction developed as an exception to the rule of territorial jurisdiction where the regulating state has a special interest in criminalizing certain conduct damaging to its own national interests, and with respect to which the forum state *has no comparable interest*. In other words, the regulating state is authorized to act in self-defense where the forum state’s laws do not sufficiently prevent the alleged harm or threat of harm.<sup>173</sup> As noted previously, it is a fundamental tenet of the international system that sovereign independence includes the right to exercise, “to the exclusion of any other state[,] the functions of a state.”<sup>174</sup> Certainly, the method of addressing the threats posed by local terrorist organizations would fall squarely within this sovereign prerogative. For example, it is for Spain to determine whether the types of conduct likely proscribed by the U.S. ATA—such as engagement in peace negotiations or efforts to reintegrate the ETA’s Basque separatists in-

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nexus would be to conclude that Congress could allow for arrests and prosecutions of drug traffickers on the other side of the world, even without flag-nation consent. This cannot be and is not the correct result; the protective principle requires a showing that the particular conduct endangered the United States.”).

173. This aspect of protective jurisdiction parallels forcible self-defense’s arguably emerging, though controversial, “unwilling or unable” test, which would require a state to determine whether the territorial state is willing and able to address the threat posed by the non-state group before using force in the territorial state without its consent. Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 *VIRG. J. INT’L L.* 483, 487 (2012).

174. Crawford, *supra* note 8, at 121 (citing *Island of Palmas*, Award of Apr. 4, 1928, 11 *R.I.A.A.* 831, 838) (“Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.”).

to Spanish society—should be criminalized or encouraged. That it is not for the United States to unilaterally regulate such conduct is, then, the natural corollary.

Where the U.S. material support law seeks to regulate foreigners' conduct in foreign territories in support of terrorist organizations that do not directly threaten the United States, such an exercise of jurisdiction is arguably an abuse of its power and internationally unlawful. An organization that engages with the ETA, whether in a peacemaking capacity or otherwise, should not face the coercive uncertainty of possible U.S. prosecution based on a unilateral determination that any engagement with certain terrorist organizations amounts to a crime under U.S. law. Insofar as Spain, Sri Lanka, or other directly affected states find it in their interest to seek multilateral or bilateral assistance to address a threat presented by material support of the ETA or LTTE, valid consent through treaties, whether bilateral or multilateral, represent the appropriate source of jurisdiction. Requiring valid consent would appropriately safeguard against the use of domestic jurisdiction as a foreign policy tool, or as a way to interfere in the sovereign affairs of other states.<sup>175</sup> Where no treaty is applicable, an international rule on protective jurisdiction should govern.

The natural counterargument is that terrorist attacks against a U.S. ally, such as Spain or Sri Lanka, injure U.S. security interests. While perhaps true with respect to the operation of collective defense treaties,<sup>176</sup> without analogous consent in the jurisdictional context, the United States' unilateral determination of "allied" interests should not be sufficient. For the United States to lawfully assert extraterritorial jurisdiction over material support of terrorism in Spain or Sri Lanka, those states should have to formally consent to collective or reciprocal jurisdiction, just as is required for collective defense through the use of force.

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175. See Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 5 (1989) (arguing that there is a legally binding norm of non-intervention that reaches certain kind of non-forcible political influence—the position that interference in internal affairs is unlawful only if it entails the use or threat of force is too narrowly framed).

176. For example, both Spain and the United States are members of the North Atlantic Treaty Organization. Protocol to the North Atlantic Treaty on the Accession of Spain, Dec. 10, 1981, available at [http://www.nato.int/cps/en/SID-1373C968-97134386/natolive/official\\_texts\\_23106.htm](http://www.nato.int/cps/en/SID-1373C968-97134386/natolive/official_texts_23106.htm); North Atlantic Treaty, Apr. 4, 1949, 34 U.N.T.S. 243.

#### D. Treaty-Based Waivers of Exclusive Jurisdiction

Where the conduct in question is not causally connected to the regulating state's own security interests, other states would, as noted previously, retain the capacity to affirmatively consent to the regulating state's extraterritorial jurisdiction through bilateral or multilateral treaties. Such a waiver could be offense-specific, as is often provided for by multilateral conventions, or could be achieved through bilateral extradition treaties that accord reciprocal jurisdiction over certain offenses irrespective of the location of the alleged conduct.

The United Nations Convention on the Law of the Sea (UNCLOS) illustrates the operation of a multilateral, jurisdictional waiver. Article 234 provides coastal states with an international right to assert protective jurisdiction over its exclusive economic zone for the purpose of preventing marine pollution in ice-covered areas. The multilateral agreement to Article 234 reflects international consent to coastal states' exercise of extraterritorial jurisdiction in limited circumstances because the pollution of certain coastal marine environments risks major environmental harm to the coastal state.<sup>177</sup> Article 234 was an international response to Canada's unilateral, controversial invocation of protective jurisdiction in response to an environmental threat to its Arctic coastline.<sup>178</sup> Canada based its Arctic Waters Pollution Prevention Bill on the "right of self-defense of coastal states to protect themselves against grave threats to their environment."<sup>179</sup> Though the international lawfulness of Canada's legislation prior to UNCLOS is debatable, after the multilateral agreement on Article 234, such protective jurisdiction has now been formally consented to by way of a multilateral treaty.

As for bilateral relations, extradition or mutual legal assistance treaties would likely represent the appropriate source of treaty-based, jurisdictional waivers. Extradition treaties typically provide either a list of specific offenses subject to extradition (list treaties), or

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177. See UNCLOS, *supra* note 144, art. 234 (authorizing protective jurisdiction over certain marine pollution because of the risk of "major harm or irreversible disturbance of the ecological balance.").

178. Canadian Arctic Waters Pollution Prevention Bill, S.C. 1969–70, c. 47 (extending jurisdiction 100 nautical miles into the Beaufort Sea for the purpose of regulating marine pollution).

179. *Canadian Reply to U.S. Government*, 9 I.L.M. 607, 608 (1970) ("It is the further view of the Canadian Government that a danger to the environment of a state constitutes a threat to its security . . . . The proposed anti-pollution legislation is based on the right of self-defense of coastal states to protect themselves against grave threats to their environment.").

define extraditable offenses based on the dual criminality formula—where both the requesting and requested states have criminalized the conduct at issue (dual criminality treaties).<sup>180</sup> Extradition treaties have traditionally applied only to crimes committed within the territorial jurisdiction of the country seeking extradition; however, the United States is now attempting to expand the dual criminality formula to include extraterritorial crimes as extraditable offenses, largely in the counterterrorism context.<sup>181</sup>

A state desiring bilateral or multilateral assistance with conduct within its own territory may accord reciprocal jurisdiction over certain offenses through list treaties, or via a general jurisdictional waiver in a dual criminality treaty. In the listing scenario, states waive their jurisdictional sovereignty by identifying certain offenses over which each state has reciprocal jurisdiction. And under a general waiver scenario, states agree to extradite irrespective of where an offense satisfying the dual criminality formula occurs.<sup>182</sup> In either scenario, states are, in effect, contracting out of internationally operative limitations on jurisdiction by agreeing to collectively defend each other's interests through reciprocity.

Yet, even where such bilateral or multilateral agreements exist, the rule proposed here would remain critical to third-party states. For example, though material support of the LTTE is likely an extra-

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180. 2 CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT* 311–12 (3d ed., 2008) (“Some bilateral extradition treaties list [the extraditable offenses], but most of them provide for a formula, namely that the offense charged constitutes an offense under the laws of both states and that the offense be punishable by a certain term of imprisonment, usually one year.”); MICHAEL J. GARCIA & CHARLES DOYLE, *CONG. RESEARCH SERV., EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES*, Mar. 17, 2010, at 6 (same); cf. Geoff Gilbert, *Extradition*, 42 *INT’L COMP. L.Q.* 442, 446 (1993) (describing the Anglo-Indian Extradition Treaty of 1992, art. 6, which specifically accords reciprocal jurisdiction to both countries over certain terrorism offenses).

181. See also GARCIA & DOYLE, *supra* note 180, at 12 (“Largely as a consequence of terrorism and drug trafficking, however, the United States now claims more sweeping extraterritorial application for its criminal laws than recognized either in its more historic treaties or by many of today’s governments.”).

182. See, e.g., Treaty Between the United States of America and Sri Lanka, T.I.A.S. 13066, Sept. 30, 1999, art. 2(1)–(4), available at <http://www.state.gov/documents/organization/124816.pdf> (providing for dual criminality and indicating that “[e]xtradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed.”); Agreement on Extradition between the European Union and the United States of America, July 19, 2003, Official Journal of the European Union, L 181/27, art. 4(4) (“If the offense has been committed outside the territory of the requesting State, extradition shall be granted . . . if the laws of the requested State provide for the punishment of an offense committed outside its territory in similar circumstances.”).

ditable offense pursuant to the governing U.S.-Sri Lanka treaty,<sup>183</sup> under the ATA, the United States could seek extradition of an individual accused of materially supporting the LTTE in a third-party state that does not criminalize material support. In that instance, the reformulation developed in this Article would provide the internationally operative standard for evaluating such a claim.

Similarly, even where an extradition treaty is in force, the reformulation could be vital to a requested state's decision to extradite.<sup>184</sup> A state's duty under a dual criminality treaty depends on the requested state's law, if any, on the subject. Nonetheless, even if dual criminality exists, a number of extradition treaties allow for denial of extradition requests where the countries hold conflicting views on extraterritorial jurisdiction.<sup>185</sup> Where protective jurisdiction is implicated, the rule on protective jurisdiction proposed here could inform the requested state's discretion. Moreover, extradition and mutual legal assistance treaties customarily exempt a denial of cooperation where a request is deemed to prejudice the essential interests of the requested state.<sup>186</sup> If a state believes an extradition claim grounded in protective jurisdiction to be *ultra vires*, the reformulation would enable the aggrieved state to point to a fixed international standard, rather than yielding to the diplomatic pressure of a comparatively strong state.<sup>187</sup>

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183. Sri Lanka has enacted numerous counterterrorism laws targeting the LTTE's terrorist conduct, as well as the provision of finances and resources to the LTTE. For a full discussion of the breadth of Sri Lankan counterterrorism laws, see N. MANOHARAN, COUNTERTERRORISM LEGISLATION IN SRI LANKA: EVALUATING EFFICACY, East-West Center: Policy Studies 28, available at [http://www.eastwestcenter.org/sites/default/files/private/PS\\_028.pdf](http://www.eastwestcenter.org/sites/default/files/private/PS_028.pdf) (last visited July 31, 2013).

184. See BASSIUNI, *supra* note 180, at 312 (“[W]hen the U.S. is the requesting state, its expanding extraterritorial jurisdiction may conflict with a requested states [sic] understanding and application of jurisdictional principles, and may thwart U.S. extradition efforts.”).

185. GARCIA & DOYLE, *supra* note 180, at 12 (“More than a few [treaties] call for extradition regardless of where the offense was committed. Yet perhaps an equal number of contemporary treaties permit or require denial of an extradition request that falls within an area where the countries hold conflicting views on extraterritorial jurisdiction.”).

186. See, e.g., Treaty on Mutual Legal Assistance in Criminal Matters, Spain-U.S., Nov. 20, 1990, 1730 U.N.T.S. 113, art. 3 (limiting assistance where a request “would prejudice the security or similar essential interests of the Requested State.”).

187. See, e.g., Hannah Stone, *With Extradition Law, Honduras Outsources Justice to US*, IN SIGHT: ORGANIZED CRIME IN THE AMERICAS (Jan. 30, 2012), <http://www.insightcrime.org/news-analysis/with-extradition-law-honduras-outsources-justice-to-us> (indicating that several Latin American countries have bowed to U.S. pressure to extradite alleged drug traffickers).

## IV. THE REFORMULATION'S ANIMATING PRINCIPLES

The reformulation proposes a primary rule of state conduct that could be integrated coherently into the international legal system's existing normative framework. To achieve this result, the reformulation indicates restrictive and permissive aspects that draw on fundamental international legal principles—it balances sovereign equality with the exceptional circumstance where state protection is necessary. From the perspective of the forum state, the rule on protective jurisdiction would be restrictive and would protect the state's established right to exclusive jurisdiction and peaceful existence unfettered by unlawful assertions of extraterritorial jurisdiction by other states.<sup>188</sup> And from the perspective of a state seeking to protect itself from deleterious foreign conduct, the rule on protective jurisdiction would recognize an exceptional right to extraterritoriality in the name of national security.

Just as Article 51 of the U.N. Charter serves as the basis for exceptional authority to commit acts that would be otherwise unlawful under Article 2(4),<sup>189</sup> the rule proposed here would serve to standardize the exceptional circumstances where a state may interfere in the internal affairs of other states for the purpose of state protection.<sup>190</sup> In doing so, the reformulation seeks to restore the rule of law, equity, and stability to this aspect of international relations.<sup>191</sup> The reformulated rule arguably achieves this purpose by preferring an international rule grounded in general principles of international law to the current formulation's reliance on discretion and ad hoc

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188. Lauterpacht, *supra* note 7, at 105 (describing a state's right to peaceful existence and exclusive jurisdiction over its territory). This exclusivity is, of course, limited in certain areas by international law.

189. See Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Terrorist Actors*, 56 INT'L COMP. L.Q. 141, 142 (2007) (describing the balance that exists between the right of forcible defense against non-state actors and the right of forum states to territorial integrity).

190. See García-Mora, *supra* note 7, at 587 (citing J.L. Brierly, *The Lotus Case*, 44 LAW Q. REV. 154, 161 (1928)) (“[It is] legally objectionable to make every individual subject to the laws of every State at all times and at all places.”); Damrosch, *supra* note 175, at 48 (“The other state system values of the territorial integrity and political independence of states, sovereign equality, self-determination, and so on, serve to complement the prohibition on the use of force by establishing the ground rules for coexistence and making it less likely that states will intrude upon each other's sensitivities in ways that might escalate into interstate conflict.”).

191. García-Mora, *supra* note 7, at 587 (arguing that the protective principle as currently formulated puts individual rights at the mercy of unilateral state action and thus impairs the stability, certainty, and security inherent in the rule of law).

considerations of comity.<sup>192</sup>

### A. *Sovereign Equality*

It is well established and understood that the legitimacy and efficacy of the decentralized international legal system relies on the sovereign equality of states. International law is codified and proceduralized largely to balance the sovereign power of states and maintain international order.<sup>193</sup> As famously articulated by Emmerich de Vattel, “[a] dwarf is as much a man as a giant; a small Republic is no less sovereign a State than the most powerful Kingdom.”<sup>194</sup> Quite simply, the current formulation of protective jurisdiction does not effectively safeguard this fundamental equality of states.

International law emerged from a state of world affairs dominated by empires and imperial claims to universal jurisdiction.<sup>195</sup> Indeed, the statist system of international ordering is a result of transformative arguments regarding the deficiencies of claims to such global power.<sup>196</sup> Arising from the challenges presented by the Holy Roman Empire, Napoleon’s France, and Hitler’s Germany, international law has taken on the constitutive project of balancing power among nation-states and preventing the undue accretion of power in any one state.<sup>197</sup>

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192. See HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 102 (2011) (stressing the importance of legal standards in the construction of solutions to difficult cases).

193. Emmerich de Vattel’s heralded strategy of proceduralizing international law was based on the notion that the balance of power was the master principle of the international order. KOSKENNIEMI, *supra* note 107, at 120 (citing VATTEL (*DROIT DES GENS*), L. III, ch. III §§ 47–49).

194. Crawford, *supra* note 8, at 119 (citing VATTEL 1758 [2008], Bk. I, Preliminaries, § 18), *see also* Simma & Müller, *supra* note 11, at 135 (citing U.N. Charter art. 2, para. 1 (“[States] stand with one another in a relation of sovereign equality.”)); *see also* Mann II, *supra* note 15, at 20 (“Since every State enjoys the same degree of sovereignty, jurisdiction implies respect for the corresponding rights of other States . . . . [J]urisdiction involves both the right to exercise it within the limits of the State’s sovereignty and the duty to recognize the same right of other States.”).

195. Anne Orford, *Constituting Order*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 275 (James Crawford & Martti Koskenniemi eds., 2012).

196. *Id.* at 275 (“Those, like Hobbes, who championed state power sought to counter papal and imperial authority with detailed arguments showing why the claim to be *dominus mundi* or lord of the world was flawed. These statist arguments were premised on the claim that sovereignty, and thus jurisdiction, depended upon *de facto* control over territory.”).

197. *Id.* at 279 (“[R]ecognising the balance of power as a ‘constituent principle’ of international society would continue to shape thinking about international order into the

The reformulated standard proposed here draws on a similar motivation. The argument for reform proceeds—to the extent it is possible to do so—from a position of neutrality, targeting not the particular policies of any one state, but the achievement of an international legal system that better reflects that “[i]nternational law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection.”<sup>198</sup> To achieve such peaceful coexistence with regards to international jurisdiction, this Article urges consideration of protective jurisdiction from behind a Rawlsian “veil of ignorance,” divorced from particular national interests or comparative state power.<sup>199</sup>

Although U.S. practice presents many of the most recent and controversial examples of protective jurisdiction, its extraterritorial escapades often reflect a Hobbesian manifestation of its sovereign interests on the international plane. As long as such national interests are left unchecked by a meaningful international rule, such state activity will likely continue, whether by the United States, Germany, China, or other countries that emerge with the global power to do so. So long as the sovereignty model remains the *modus operandi* of the international system, it remains vital to the maintenance of peace and security that international law adapts to better safeguard the rights and interests of less powerful states.<sup>200</sup>

The position of those states that long resisted protective jurisdiction as a lawful basis for extraterritorial jurisdiction is revealing. Until after WWII, there existed two distinct approaches to extraterritorial jurisdiction: (1) states like the United Kingdom, the United States, and other common law countries that generally only asserted extraterritorial jurisdiction over nationals,<sup>201</sup> and (2) states like Bel-

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twentieth century”).

198. LAUTERPACHT, *supra* note 192, at 127 (citing *Island of Palmas*, Award of Apr. 4, 1928, 11 R.I.A.A. 831, at 911).

199. KOSKENNIEMI, *supra* note 107, at 93 (citing JOHN RAWLS, *A THEORY OF JUSTICE*, 378–79 (1971)) (“The principles which States would choose in such a situation—behind a “veil of ignorance” of their own and others’ particular interests, capabilities, wants etc. . . . would essentially seek to guarantee equality and independence.”).

200. See Frédéric Mégret, *International Law as Law*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 88 (James Crawford & Martti Koskenniemi eds., 2012) (“At the same time, international law as a broadly inclusive social project may need to become more imbued with debates about the conditions of an internationally just society.”).

201. League of Nations Report, *supra* note 25, at 253–54 (citing the diversity of practice among nations with respect to the protective principle, and indicating that Great Britain, the United States, Denmark, and Portugal do not assume any jurisdiction over foreign offenses by non-nationals); DE VISSCHER, *supra* note 98, at 254 (indicating that, as of 1953, the protective principle was still disputed by Great Britain and the United States).

gium and France that asserted protective jurisdiction over foreigners.<sup>202</sup>

Common law countries' reluctance to assert protective jurisdiction over foreigners arose from a belief that there must exist a "bond of allegiance" between the actor and the sovereign, and where there was no territorial or national link, no such bond existed.<sup>203</sup> For centuries, the United Kingdom declined to assume criminal jurisdiction over hostile acts committed by foreigners unless there was such a bond.<sup>204</sup> The decision to abstain was rooted in the maxims of territoriality and nationality, as well as political neutrality and deference to the sovereignty of other states.<sup>205</sup>

Until 1960, the United States was similarly reluctant to assert jurisdiction over foreigners for extraterritorial conduct.<sup>206</sup> Only in very limited circumstances—where conduct interfered with the functioning of its public agencies or instrumentalities operating abroad—did the United States assert protective jurisdiction over foreigners.<sup>207</sup> Indeed, the United States was reluctant to prosecute foreigners for hostile acts committed in foreign territory in part to maintain the logical consistency of its vigorous objections to other states' assertions of extraterritorial, penal jurisdiction.<sup>208</sup> In other words, until it became a dominant world power after WWII, the United States itself recognized that protective jurisdiction should only be exercised exceptionally, if at all, in deference to the sovereign equality of states.

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202. *Draft Convention*, *supra* note 5, at 543.

203. *See* *Rex v. Neumann* 1949 (3) SA 1238 (S. Afr.) (finding that a German national who had previously enlisted in the South African army could be prosecuted for treason for fighting with the Germans during World War II in Germany because a bond of allegiance with South Africa was established). South Africa went to great lengths to prove Neumann's bond of allegiance and relied entirely on the nationality principle of extraterritoriality, rather than invoking the protective principle.

204. *Mann I*, *supra* note 3, at 65 (quoting *Lopez v. Burslem*, [1843] 4. Moo. P.C. 300, 305 (Campbell, Lord) ("[T]he British Parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British crown.")).

205. *Id.* at 28–29.

206. A 1960 court decision is believed to be the first time a U.S. federal court explicitly invoked protective jurisdiction. *See* *United States v. Rodriguez*, 182 F.Supp. 479 (S.D. Cal. 1960) (asserting extraterritorial jurisdiction over an alleged sham marriage conspiracy).

207. *See, e.g.*, Act of Congress of Aug. 18, 1856, c. 27, § 24, 11 U.S. Stat. L. 61 (criminalizing perjury before a U.S. consular officer); Immigration Act of 1924, § 22, 43 U.S. Stat. L. 153, 165 (punishing perjury/fraud in immigration applications).

208. *García-Mora*, *supra* note 7, at 578 (citing 2 MOORE, A DIGEST OF INTERNATIONAL LAW 255 (1906)); *see also* League of Nations Report, *supra* note 25, at 254 (stating that the United States and Great Britain "appear to hold the view that by international law no state is entitled to assume [protective] jurisdiction").

This Article proposes that, with regard to extraterritorial jurisdiction, the international community should no longer rely on the discretion of states to safeguard sovereign equality. Instead, it is proposed that a rule should be adopted that allows for the objective evaluation of state conduct based on neutral principles. Such legal determinacy would better preserve sovereign equality, the rights of individuals and entities within those states, as well as the international rule of law.

### *B. The International Rule of Law*

The reconceptualization of protective jurisdiction is also animated by a desire to strengthen the rule of law in international disputes. As disputes concerning the legal interests of states on the international plane, jurisdictional disputes are primarily legal, not diplomatic, matters that call for a principled rule of international law. The reformulation thus seeks to articulate a rule that will temper the role of comparative state power and diplomatic influence in the resolution of jurisdictional disputes.

During the same historical period that bore fruit to the Draft Convention described previously, many prominent international lawyers and statesmen considered those disputes that affected the vital interests of states to be political, not legal, disputes.<sup>209</sup> Proponents of such a view argued that the more intensely a dispute affected a state's vital interests, the more appropriately it was placed in the diplomatic, rather than legal, sphere. In fact, forcible self-defense, as a matter of vital national interest, was itself deemed to be such an issue.<sup>210</sup> Thankfully, however, international law has largely moved beyond such growing pains. It is now commonly accepted that, in order to effectively maintain international peace and stability, international law, just like domestic law, cannot abdicate its responsibility to provide answers to areas of conflict between its subjects, irrespective of the severity or politicization of the conflict, or the relative power of

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209. See LAUTERPACHT, *supra* note 192, at 150 (“When in 1922 the Institute of International Law discussed the question of classification of international disputes, many of its members were content with describing as political all disputes affecting the independence, honour, and vital interests of nations.”); see also OLIVER JÜTERSONKE, MORGENTHAU, LAW AND REALISM 29–74 (2010) (discussing Hans Morgenthau’s concept of intensity as dispositive of the justiciability of international disputes).

210. LAUTERPACHT, *supra* note 192, at 186 (indicating that the right of self-defense was excepted from the General Treaty for the Renunciation of War—i.e., Kellogg-Briand Pact—because that right implies that each nation “alone is competent to decide whether circumstances require recourse to war in self-defense.”).

the disputants.<sup>211</sup> And it is equally accepted that states may also no longer pick and choose which interests are subject to the objective application of international law. If it were left to states to determine whether an issue was sufficiently minor to be subject to objective, legal evaluation, there would, in effect, exist an unrestricted right to opt out of international legal rules.<sup>212</sup> Such a result, whether in the jurisdictional context or otherwise, undermines the international rule of law.

Despite the evolution of international legal theory in many spheres, this Article posits that the current formulation of the standard applicable to protective jurisdiction remains a relic of an antiquated conception of international law. The effort to stress international legal dominion over an area of state conduct for which powerful states had not yet actually accepted international legal authority resulted in a formulation of protective jurisdiction that, in effect, presented comity considerations as an international rule.<sup>213</sup> Reliance on diplomatic discretion and comparative state interests accords powerful states an advantage that cannot be reconciled with a decentralized international system.

Consider the international reaction to U.S. sanctions levied against a variety of states over the past three decades. Admittedly, such sanctions are not always imposed for defensive or protective reasons. Yet, in certain circumstances, extraterritorial sanctions seek to regulate the conduct of non-U.S. nationals in response to an alleged threat to U.S. security interests. For example, the infamous Trans-Siberian pipeline dispute involved a vigorously contested U.S.

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211. *See id.* at 166 (“[A]ll international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognised, they are capable of an answer by the application of legal rules.”).

212. Martti Koskenniemi, *The Function of Law in the International Community: Introduction*, in HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* xxxix (2011) (“If important issues were excluded from judicial settlement, and if the determination of the ‘importance’ of an issue were left to the party itself, then there would in fact exist an unlimited right to opt out from third party settlement. And this would be absurd.”).

213. LAUTERPACHT, *supra* note 192, at 6 (“The law of nations is in many respects a deficient system of law, and international lawyers, anxious to stress the legal character of their discipline, are apt to invest the deficiencies of international law *qua* law with the authority of legal principles derived from the nature of international society . . . . These attempts at embellishment, dictated by a specifically conceived legal positivism, and frequently resulting in the legal justification for backward aspects of international relations, are of frequent occurrence in the field of international law.”); *see also* RESTATEMENT, *supra* note 9, § 403 cmt. a (“Some United States courts have applied the principle of reasonableness as a requirement of comity . . . . This section states the principle of reasonableness as a rule of international law.”).

attempt to restrict European corporations' trade with the Soviet Union through economic sanctions.<sup>214</sup> The protective sanctions were purportedly aimed at curbing the Soviet Union's military threat.<sup>215</sup> Similarly, in response to the Cuba Democracy Act of 1992 and the Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act)—under which the United States prohibits trade by foreign subsidiaries of U.S. companies with Cuba—Canada and the European Community responded with blocking statutes and substantial diplomatic pressure.<sup>216</sup> Indeed, the United States has consistently issued unilateral sanctions restricting trade abroad of non-U.S. nationals with states such as Libya and Iran,<sup>217</sup> and repeatedly, third states, claiming that the U.S. sanctions infringed their sovereignty and violated international law, have responded with diplomatic protests and domestic legislation designed to counteract the U.S. laws.<sup>218</sup>

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214. During the Cold War, the United States sought to prohibit the sale of certain pipeline equipment to the Soviet Union by companies in Western European states. KARL MEESEN, *INTERNATIONAL LAW OF EXPORT CONTROL: JURISDICTIONAL ISSUES* 4 (1992); ELAGAB, *supra* note 35, at 133. The European Community states objected vigorously to the U.S. invocation of protective jurisdiction. *See, e.g.,* A.V. LOWE, *EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS* 204 (1983) (citing European Community statement) (“[T]he practical impact of the . . . Export Administration Regulations is that European Community companies are pressed into service to carry out United States trade policy towards the U.S.S.R., even though these companies are incorporated and have their registered office within the Community which has its own trade policy towards the U.S.S.R.”).

215. The United States sought to justify the pipeline sanctions on the basis that the Soviet Union would be able to sell pipeline gas to Western Europe for currency that it would then be able to use to improve its military capabilities. *See* ELAGAB, *supra* note 35, at 133; Michael Reisman & William Araiza, *National Reports: United States of America*, in *INTERNATIONAL LAW OF EXPORT CONTROL: JURISDICTIONAL ISSUES* 4–5, 167–68 (Karl Meesen ed., 1992).

216. *See* Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L L. 419, 419–34 (1996) (describing the Helms-Burton Act and its exercise of extraterritorial jurisdiction upon third-party states); Manfred Wolf, *Hitting the Wrong Guys: External Consequences of the Cuban Democracy Act*, 8 FLA. J. INT’L L. 415 (1993) (discussing the Cuba Democracy Act: 1992, in which U.S. extended prohibition of trading with Cuba including “transactions between U.S.-owned or controlled firms in third countries and Cuba”).

217. *See, e.g.,* Iran-Libya Sanctions Act of 1996, Pub. L. 104-72, 110 Stat. 1542, 50 U.S.C. § 1701; The Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act), Pub. L. 104-14, 110 Stat. 785, 22 U.S.C. §§ 6021–91; CASSESE, *supra* note 86, at 305 (concluding that U.S. sanctions against Cuba, Iran, and Libya constitute unlawful, unilateral countermeasures because they breach the rights of third states not party to the dispute).

218. *See, e.g.,* Benjamin H. Flowe, Jr. & Ray Gold, *The Legality of U.S. Sanctions*, 2 GLOBAL DIALOGUE (2000), available at <http://www.worlddialogue.org/content.php?id=98> (describing Canada and Mexico’s critical responses to the Helms-Burton and Iran-Libyan

Leaving aside for the moment whether or not such U.S. sanctions were or are meaningfully connected to the protection of its essential interests, what is evident is that diplomacy was considered a primary tool for disputing U.S. jurisdiction, and only states wielding relative international influence were able to exert consequential diplomatic pressure. Undoubtedly, less powerful states would not have been able to exert the type of diplomatic pressure levied by the European Community in response to the pipeline sanctions and the Helms-Burton Act.<sup>219</sup> When faced with diplomatic protests, the United States, as the more powerful state, has routinely argued that its comparative interest in cutting off assets from its enemies was superior to any affected third-party state's countervailing interest in unrestricted trade and commerce.<sup>220</sup>

What the United States has not been required to argue on the international level, both during the Cold War and since, is how its defensive sanctions are meaningfully connected to its national security. For example, the United States has not had to justify on the international stage how the restriction of trade between third-party states and Cuba—as well as the sanctions' primary goal of promoting democracy in Cuba—is currently necessary to protect U.S. national security. Because of its global influence and interests, the United States has been able to routinely self-judge the propriety of universal restriction on trade with its enemies, irrespective of the nexus between the targeted conduct and an actual threat to its security, and of third-party states' sovereign prerogative to determine the scope of their own trade relations.<sup>221</sup>

As discussed previously, protective jurisdiction's present indeterminacy and reliance on comity leaves it dangerously detached from the normative principles it seeks to safeguard.<sup>222</sup> Though pro-

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Sanctions Acts).

219. See Harry L. Clark & Lisa W. Wang, *Foreign Sanctions, Countermeasures, and Other Responses to U.S. Extraterritorial Sanctions*, NFTC.ORG (Aug. 2007), <http://www.nftc.org/default/usa%20engage/Foreign%20Sanctions%20Countermeasures%20Study.pdf> (discussing the responses to U.S. extraterritorial sanctions by comparatively strong states, including European states' diplomatic pressure regarding the Helms-Burton Act and Japan's complaints regarding sanctions targeting Myanmar).

220. See, e.g., ELAGAB, *supra* note 35, at 133 (indicating that the United States justified pipeline sanctions on the basis that the Soviet Union would be able to sell pipeline gas to Western Europe for currency that it would then be able to use to improve its military capabilities); Reisman & Araiza, *supra* note 215, at 167–68.

221. As discussed below in Part V.C, the WTO treaties do provide an international legal framework for economic sanctions.

222. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 713 (1988) ("Perhaps the most self-evident of all characteristics making for legitimacy

tective jurisdiction is a rule that is meant to balance two well-established principles of international law—sovereign equality with a state’s limited right to protection in exceptional circumstances—its present conception does not convey this fundamental message. The reformulation proposed here thus seeks to rediscover protective jurisdiction’s foundational roots and build towards a clearer, more determinate standard of state conduct.

### C. *Pacific Settlement of International Disputes*

The standardization proposed here is based, in part, on the notion that protective jurisdiction constitutes a peaceful defensive measure available to a state faced with a grave extraterritorial threat. Certainly states’ traditional use of force to resolve conflict has an undeniable role in international law, but there remains a place for the development of international legal rules that aspire toward non-forcible, rather than forcible, resolution of disputes. As argued for by Lori Damrosch:

[t]he highest mission and greatest challenge of international law is to strive in every possible way to prevent or at least mitigate outbreaks of violence . . . . The elements of the state system cluster, apart from the value of conflict avoidance itself, must be elaborated in ways that will serve, rather than disserve, that most critical value.<sup>223</sup>

The U.N. Charter requires U.N. member states party to any dispute that is likely to endanger international peace and security to seek a pacific settlement.<sup>224</sup> The Charter thereby unequivocally indicates that member states *must*, in the first instance, seek to avoid the use of force, irrespective of whether the dispute was initiated by forcible means. Given this pacific mandate, it is mysterious that there is a vast conceptual lacuna between the peaceful means called for in Article 33—negotiation, mediation, arbitration, etc.—and the forcible

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[of a legal rule] is textual determinacy . . . the ability of the text to convey a clear message . . . . Obviously, rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process.”).

223. Damrosch, *supra* note 175, at 48.

224. U.N. Charter art. 2, para. 3 (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”); *id.* art. 33 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”).

self-defense authorized in Article 51. States undertake a number of defensive practices that are more aggressive than those listed in Article 33, yet fall short of the violence contemplated in Article 51. Economic sanctions, boycotts, severance of diplomatic relations, the construction of walls,<sup>225</sup> and protective jurisdiction may all constitute defensive measures undertaken to address harm or a threat of harm emanating from abroad. Indeed, non-forcible measures are, at times, all that is necessary to counteract extraterritorial aggression. Yet, despite their apparent availability, as well as their arguable preferability to violent force, such non-forcible, defensive measures presently lack any coherent international legal framework governing their use.<sup>226</sup>

Economic sanctions represent one such non-forcible measure. Under the WTO system, though trade sanctions are often associated with retaliatory action resulting from a trade dispute, economic sanctions—a distinct concept—are authorized as a defensive response to a security threat. Despite substantial U.N. efforts to address the abusive use of economic sanctions,<sup>227</sup> they remain internationally regulated primarily as trade violations subject to Article XXI of the General Agreement on Tariffs and Trade (GATT), Article XIV of the General Agreement on Trade in Services (GATS), as well as any applicable bilateral treaties.<sup>228</sup>

Notably for the purposes of this Article, GATT Article XXI

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225. See generally Palestinian Wall, *supra* note 99 (considering the international lawfulness of Israel's security fence in the Palestinian Territories). The United States has also constructed a wall for security reasons along the U.S.-Mexico border. Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence*, 14 HUM. RTS. BRIEF 31, 33–37 (2007).

226. Non-forcible, retaliatory measures are not directly regulated by U.N. Charter Article 2(4), “although its concept of ‘political independence’ is relevant to the nonintervention norm.” Damrosch, *supra* note 175, at 5.

227. See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. Doc. A/RES/20/2131 (Dec. 21, 1965), para. 2 (adopted without dissent, one abstention) (declaring that states may not use economic measures to coerce other states); Economic Measures as a Means of Political and Economic Coercion Against Developing Countries, G.A. Res. 42/173, U.N. Doc. A/RES/42/173 (Dec. 11, 1987) (same); see also Barry Carter, *Economic Coercion*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Rudiger Wolfrum ed., 2012) (indicating that such U.N. Declarations and Resolutions may evidence customary international law).

228. Economic Measures as a Means of Political and Economic Coercion against Developing Countries, Note by the Secretary-General, U.N. Doc. A/48/535 (Oct. 25, 1993), Agenda Item 91(a) at 1 (“[T]here is no clear consensus in international law as to when coercive measures are improper, despite relevant treaties, declarations, and resolutions adopted in international organizations which try to develop norms limiting the use of such measures.”).

and GATS Article XIV provide that states may take “any action which it considers *necessary for the protection of its essential security interests*.”<sup>229</sup> In other words, the language tracks closely to the legal framework for the state of necessity and self-defense, as well as the rule on protective jurisdiction proposed here. Nonetheless, economic sanctions are not presently conceived of as defensive measures, even if imposed for protective purposes. Instead, economic sanctions are typically classified as non-forcible countermeasures. Of course, where sanctions are undertaken to induce compliance by another state with an international obligation, they are properly considered countermeasures.<sup>230</sup> But where economic sanctions are imposed to respond to the perilous conduct of non-state actors, such protective measures are not countermeasures under international law,<sup>231</sup> and could arguably be conceived of as a form of protective regulation. Furthermore, even where sanctions imposed against a state are currently classified as countermeasures, those imposed for state protection could also logically be considered protective regulation, or non-forcible self-defense.<sup>232</sup>

Any such redescription or reconception of economic sanctions may seem unnecessary or irrelevant to this Article’s consideration of protective jurisdiction. Certainly, sanctions are distinguishable to the extent they merely alter bilateral trade relations. Subject to relevant international law, trade restrictions are not in and of themselves unlawful, and thus do not need to be excused as exceptional security measures.<sup>233</sup> Yet, where sanctions seek to extraterritorially

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229. General Agreement on Tariffs and Trade 1994, art. XXI, Apr. 15, 1994, 33 I.L.M. 1153, (1994); General Agreement on Trade in Services, art. XIV *bis*, Apr. 15, 1994, 33 I.L.M. 1167 (1994) (emphasis added).

230. ILC Articles, *supra* note 81, art. 22 (“[c]ountermeasures in respect of an internationally wrongful act”). In the *Military and Paramilitary Activities* case, the ICJ distinguished between “grave forms of the use of force,” which may trigger forcible self-defense, and other less grave forms of force, which may only justify “proportionate countermeasures” by the victim state. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 247–49 (June 27).

231. Countermeasures refer to the “measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State.” ILC Articles, *supra* note 81, ch. II, cmt. 1; *see also id.* art. 22.

232. *See* ELAGAB, *supra* note 35, at 5 (“[I]nvariably there is a certain overlap between [countermeasures and self-defense] in that both can be applied in response to breach . . . one aspect of counter-measures is concerned with self-protection which is an analogue of self-defense.”). Of course, countermeasures may also be motivated by purposes other than self-protection. *Id.*

233. *See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 245 (June 27) (finding that U.S. sanctions against Nicaragua, including a comprehensive trade embargo, were not a breach of the customary law principle

restrict the conduct of foreign actors on foreign territory to protect a state's essential security interests, they satisfy the general rubric of protective jurisdiction. Indeed, both protective jurisdiction and economic sanctions implicate similar international legal principles—namely, sovereign equality, non-interference, and the exceptional circumstances warranting extraterritorial regulation for the purpose of state protection. And these commonalities arguably demonstrate why a coherent legal framework, grounded in necessity, should apply to all exceptional, extraterritorial measures undertaken for the purpose of state protection, whether they rely on violence or not. International law already provides that economic sanctions and forcible self-defense must be necessary for the purpose of state protection, and it is here submitted that protective jurisdiction should be so standardized as well.

As mentioned previously, those who conceive of self-defense as only applicable where force is necessary, in effect, conceive of self-defense as a use-of-force-only necessity doctrine—only where force is necessary is self-defense an option under international law. Though such a view reconciles nicely with the state of necessity doctrine's "only way" requirement—which provides that a measure taken for state protection must have been the "only way of safeguarding an essential interest"<sup>234</sup>—it does not reconcile with the realities of inter-state engagement, where states routinely use non-forcible means to counter forcible and non-forcible threats. Indeed, the problematic upshot of such a conception of self-defense and the state of necessity is that state protection could thus only lawfully occur when there is a singular method available to do so.<sup>235</sup>

Practical consideration of protective jurisdiction also demonstrates the perverse nature of stringent adherence to the state of necessity doctrine's "only way" requirement, regardless of whether necessity is invoked in response to forcible or non-forcible harm. In the jurisdictional context, extradition demands or extraterritorial sanctions may not be the only way of pursuing an extraterritorial terrorist suspect—extrajudicial killing, abduction or other less pacific alternatives may exist—but the availability of more aggressive alternatives

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of non-intervention).

234. ILC Articles, *supra* note 81, art. 25(1)(a).

235. See Waibel, *supra* note 114, at 646. ("Taken to its logical conclusion, [the CMS tribunal's] approach leads to the absurd result that necessity is barred simply because ICSID tribunals lack the jurisdiction to assess economic policy alternatives. Circumstances in which a government will have one, and only one, policy measure at its disposal will be extremely rare. Necessity will then be limited to situations where economic and social order has entirely collapsed.").

should not undermine the “necessity” of a state’s self-protection. Such defensive action should still be considered “necessary” for national security if it is causally connected to the protection of an essential security interest from grave harm.

Given the explicit goal of the peaceful settlement of international disputes, it is proposed here that the international community should develop rules of international law that would promote the orderly use of non-forcible defensive measures.

## V. PRACTICAL IMPLICATIONS

Though grounded in international legal theory, the rule proposed here would also offer substantial practical advantages, including rule-of-law benefits for both state and non-state actors. In addition, the reformulation has the potential to positively affect the evolution of new areas of international regulation, such as cyberconduct and transboundary environmental harm.

### A. *For State Actors*

Pursuant to the rule on protective jurisdiction, state actors, whether as part of legislative or administrative efforts, would be required to articulate how each invocation of protective, extraterritorial jurisdiction is necessary to protect a national security interest. For some categories of protective jurisdiction, such as immigration fraud, such a legislative prescription is likely relatively straightforward. Most domestic statutes in the area of immigration fraud already make provision for some degree of actual or proximate harm, and preventing unlawful immigration entry is well understood as a vital national interest.

The requirements advanced here should not be regarded as novel or unduly burdensome, at least not in the United States. In fact, the International Economic Emergency Powers Act—the current authorizing legislation for the United States’ issuance of extraterritorial sanctions—already requires the U.S. President to articulate the existence of an “unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States” that originates “in whole or substantial part outside of the United States.”<sup>236</sup> The reformulated rule proposed here would particularize this requirement by mandating that states articulate how each assertion of

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236. International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701–06 (West 2014).

protective jurisdiction is necessary to defend against grave harm to a state's essential security interests. For example, the ATA discussed previously would need to be amended to indicate how its regulation of extraterritorial conduct in support of foreign terrorist organizations is causally connected to the protection of U.S. security interests.

The reformulation should also not be misinterpreted as calling for the *ex ante* international authorization of any protective measure. States would be free to enact legislation without any such authorization, but, upon adoption, protective legislation would be subject to external, objective evaluation or challenge according to a primary rule of international law.<sup>237</sup> Just as in cases of forcible self-defense, unless there is an explicit waiver by the affected state(s), the applicable international legal standard would no longer rely on comity and discretion.<sup>238</sup>

The reformulation would also not require the oversight of international arbitral and judicial bodies to be effective. Of course, the possibility of formal, international dispute resolution procedures would exist and could be called upon in certain circumstances; but even external evaluation by non-judicial, international entities has been shown to have a powerful mitigating influence on the conduct of states. Though not as depoliticized and binding as one would hope judicial pronouncements to be, non-judicial, international entities have had a significant role in condemning unlawful, unilateral acts of forcible self-defense, even by powerful states.<sup>239</sup> What is envisaged

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237. "Primary rules" refer to rules of conduct that create obligations under international law; the term is used in contradistinction to "secondary rules" which, as "rules on rules," govern, *inter alia*, the creation, interpretation, or operation of the primary rules. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed., 1994). The ILC Articles on State Responsibility, for example, emphasized the elaboration of "secondary rules of State responsibility," rather than primary rules of state responsibility on particular questions of international law. ILC Articles, *supra* note 81, at 31, ¶ 1 of the General Commentary. It should be noted that self-defense and the state of necessity, although they are included in the ILC Articles on state responsibility, also constitute primary rules of state conduct which govern the behavior of states in particular circumstances. *See, e.g.*, U.N. Charter, art. 51 (self-defense); General Agreement on Tariffs and Trade 1994 art. XXI, Apr. 15, 1994, 33 I.L.M. 1153 (necessity).

238. *Compare* Case concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. ¶ 73 (Nov. 6) ("[The] requirement of international law that measures taken avowedly in self-defense must have been necessary for the purpose is strict and objective, leaving no room for any 'measure of discretion.'"), with Simma & Müller, *supra* note 11, at 147 (describing the present state of international law of jurisdiction as "endorsing a flexible and differentiated approach combining a series of factors such as the nature of the subject matter involved [and] the individual interests of affected states vis-à-vis the interest of the international community as a whole").

239. *See* SCHACHTER, *supra* note 35, at 139 ("[But e]ven the most powerful States have not been immune to censure by States [on matters of self-defense] by States that would

here is the evolution of similar international watchdog efforts in the area of aggressive jurisdiction.

Admittedly, the reformulation will not do away with jurisdictional disputes and interpretive controversies. The rule and elements proposed here would naturally evolve according to the practice of states and the interpretation and application of tribunals and courts.<sup>240</sup> Just as with forcible self-defense and the state of necessity, the assessment of an assertion of extraterritorial jurisdiction will often require “careful and sophisticated analysis where relevant evidence is conflicting, secretive and confusing.”<sup>241</sup> Yet, in this context of exceptional jurisdictional claims, purposive efforts to mitigate the instrumentalization of international law by powerful states calls for the consideration and adoption of an exacting, concrete rule, regardless of any added evaluative task that such a rule may entail.<sup>242</sup>

### B. For Non-State Actors

In many circumstances, extradition and mutual legal assistance treaties may provide sufficient, practical safeguards for non-state actors subject to claims of extraterritorial jurisdiction. Unless an alleged extraterritorial actor is found on the regulating state’s territory, extradition likely represents the only internationally lawful mechanism by which an accused could be presented to a forum state’s court. And the extradition mechanism in and of itself would provide an opportunity for states to mitigate the practical implica-

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normally follow their lead.”).

240. See LAUTERPACHT, *supra* note 192, at 110 (“[J]udicial activity is essentially the last link in the chain of the crystallisation of the rule of law, that is to say, it is the bridge between the necessarily abstract legal rule and the necessarily individual nature of the particular case.”); see also KOSKENNIEMI, *supra* note 107, at 40 (“The doctrine of *relative indeterminacy* seeks to explain how it is possible not to abandon the important insight that the solution of normative problems is not an automatic process and yet preserve the law’s identity vis-à-vis politics on the grounds that it is objectively constraining.”) (emphasis in original) (citations omitted).

241. Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 75 (2005); see also W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525, 548 (2006) (indicating that careful consideration of context is required to assess the lawful invocation of self-defense).

242. See Martti Koskenniemi, *International Law in the World of Ideas*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 61 (James Crawford & Martti Koskenniemi eds., 2012) (“To avoid critiques [of international law as a hypocritical servant of power or abstract expression of idealist imagination], legal rules or institutions should be both ‘normative’ and ‘concrete’ simultaneously.”).

tions of the abusive exercise of jurisdiction over non-state actors.

Yet, as described previously, even where extradition treaties are in place, the rule proposed here would have an important role in protecting individuals from unlawful assertions of extraterritorial jurisdiction. A more exacting international legal rule on state conduct in this area would likely further protect the nationals of comparatively weak states, above and beyond the sovereign discretion states retain by way of any extradition treaty that may be in place. A requested state that can point to a non-discretionary rule of international law would likely not be as susceptible to pressure to extradite, which would in turn protect the rights of non-state actors. Moreover, the reformulated principle would likely embolden a comparatively weak state to more stubbornly protect its jurisdictional rights when drafting bilateral or multilateral treaties. Conversely, whether there is an extradition treaty in place or not, a non-discretionary international rule would serve to legitimate the extradition demands of all states where the alleged conduct is indeed causally connected to its national security interests.

The reformulation also offers an additional rule-of-law benefit for non-state actors. A fundamental tenet of any rule-of-law system, including the international system, is that law is meant to meaningfully guide conduct. Though the law of international jurisdiction is predominantly an inter-state matter,<sup>243</sup> the question of how to best protect the rights and freedoms of non-state actors remains a critical aspect of the international legal system.<sup>244</sup> The current interest balancing approach to protective jurisdiction offers little meaningful guidance to non-state actors regarding whether their operations in state X are lawfully subject to the jurisdictional claims of state Y.<sup>245</sup>

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243. James Crawford & Martti Koskenniemi, *Introduction*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 9 (James Crawford & Martti Koskenniemi eds., 2012) (“Like some other traditional areas of international law, the law of jurisdiction is dominantly an inter-state matter—individuals and corporations being treated as ‘objects’ rather than right-holders.”).

244. See Orford, *supra* note 195, at 280 (“The notion of subjective rights thus supported the authority both of civil society and of private trading companies. The question of how best to ensure the protection of such rights and freedoms has ever since been understood as part of the project of international ordering.”); LAUTERPACHT, *supra* note 192, at 162 (“A wrong done to the individual is a wrong done to his State. The overwhelming majority of cases which come before international tribunals are grounded in the alleged unlawful treatment of individuals and of claims arising therefrom, in particular in alleged denial or miscarriage of justice.”).

245. See LOWE, *supra* note 214, at 269 (indicating that uncertainty of extraterritorial application of U.S. laws leads foreign businesses to conduct their activities in accordance with American regulations wherever there is even a “mere possibility that they might be found subject to American jurisdiction”).

Multinational corporations presently have no reliable way to determine whether their business activities in controversial states will be subject to prosecution or fines in another state, and humanitarian organizations engaged with terrorist groups for peacemaking purposes face similar uncertainties.<sup>246</sup>

A principled rule on protective jurisdiction has the potential to lend greater clarity and predictability to this aspect of international jurisdiction. States would be required to whittle down their assertions of protective jurisdiction to those instances where they can identify the requisite causal connection. As a result, non-state actors would be granted relief from the coercive uncertainty that presently hovers over their operations.<sup>247</sup> And where prosecution or sanctions based on protective jurisdiction persist, non-state actors, in concert with their lawyers, would be able to mount a defense based on a fixed international rule, rather than relying on interest balancing, reasonableness, or diplomatic discretion.

### C. For New Areas of International Regulation

The rule on protective jurisdiction will also have practical implications for emerging areas of international legal regulation, such as cross-border regulation of the internet or the threat of transboundary environmental harm. Insofar as extraterritorial cyberactivity or environmental contamination is deemed to merit extraterritorial jurisdiction, the reformulated standard would assist with limiting such cross-border regulation to conduct that is specifically linked to a regulating state's national security interests.

The rule would assist with the orderly evolution of international cyberjurisdiction in several ways. First, there are competing notions as to the types of conduct or content that should be lawful on the Internet. Any attempt to restrict such conduct extraterritorially, without prior agreement of affected states, and without a meaningful

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246. Humanitarian giving, charitable aid, and peacebuilding programs have all suffered as a result of material support laws and other counterterrorism measures. See *The Impact of Counterterrorism Measures on Charities and Donors after 9/11*, CHARITY AND SECURITY NETWORK [http://www.charityandsecurity.org/background/The\\_Impact\\_of\\_Counterterrorism\\_Measures\\_on\\_Charities\\_and\\_Donors\\_After\\_9/11](http://www.charityandsecurity.org/background/The_Impact_of_Counterterrorism_Measures_on_Charities_and_Donors_After_9/11) (last visited July 27, 2013).

247. See Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 582 (1983) ("The assertion of jurisdiction to prescribe a rule of law applying to foreign events or persons runs a greater risk of interference with foreign sovereign interests because such assertions by a nation with the vast commercial influence of the United States has a coercive effect on acts abroad by persons or enterprises who might believe themselves likely later to become subject to judicial jurisdiction in United States courts.").

connection to the regulating state, would conflict with each state's sovereign discretion to determine its own approach to cyberpolicy. Unless such regulation is carefully restricted, private actors will likely be subject to myriad, overlapping, and contradictory regulations.<sup>248</sup> In addition, to the extent a greater scope of jurisdiction over cyberactivity is preferred by one or more states, the proposed rule would incentivize agreement to multilateral or bilateral treaties.

The reformulation could also serve to inform the evolution of international law on appropriate state responses to extraterritorial environmental threats. With ever-increasing industrialization across the globe, international conflicts resulting from cross-border contamination of shared natural resources will likely multiply.<sup>249</sup> For example, the European Union has recently enacted extraterritorial regulations that hold non-E.U. airlines liable for emissions over non-E.U. territory, which has triggered an international dispute regarding extraterritorial jurisdiction.<sup>250</sup> Though numerous international instruments deal with transboundary environmental harm,<sup>251</sup> including the ILC's 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities,<sup>252</sup> the international community has not yet coa-

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248. The risk of such an outcome is revealed by the following abusive application of protective jurisdiction to cyberconduct: "The protective principle enables a state to exercise jurisdiction over crimes that are considered to threaten the state's national interests. All states have an interest in prosecuting cyberterrorists, as cyberterrorists threaten to undermine the global financial infrastructure and are a threat to national and international security. Thus, each state may consider cyberterrorism as a threat to its national interests and, therefore, exercise protective jurisdiction." Kelly A. Gable, *Cyber-Apocalypse Now: Securing the Internet Against Cyberterrorism and Using Universal Jurisdiction as a Deterrent*, 43 VAND. J. TRANSNAT'L L. 57, 112 (2010).

249. See, e.g., United Nations Environmental Programme, *Transboundary Issues*, UNEP, [http://na.unep.net/atlas/kenya/downloads/chapters/Kenya\\_Screen\\_Chapter3.pdf](http://na.unep.net/atlas/kenya/downloads/chapters/Kenya_Screen_Chapter3.pdf) (last visited Apr. 23, 2014) ("Transboundary issues present unique challenges for a number of reasons. Conflicts can arise when an environmental problem caused in one nation spills over into another.").

250. See Jacques Hartmann, *The European Emissions Trading System and Extraterritorial Jurisdiction*, EJIL: TALK! BLOG (Apr. 23, 2012), <http://www.ejiltalk.org/the-european-emissions-trading-system-and-extraterritorial-jurisdiction/>. Although the contemplated conduct arguably has territorial effects because only flights taking off from or landing in the territory of E.U. member states are regulated, the argument has been made that the European Union could equally invoke protective jurisdiction with respect to the conduct in non-E.U. airspace. *Id.*

251. See, e.g., International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 9, 1969, 1975 U.N.T.S. 77 (providing for action to be taken where there is a threat of pollution to coastal states); UNCLOS, *supra* note 144, art. 234.

252. *Report of the International Law Commission on Its Fifty-Third Session, in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 48* (2001).

lesced around a coherent framework for state responsibility arising from the threat or occurrence of transnational environmental contamination. Instead, states are urged to work cooperatively to prevent such cross-border harm and protect the environment.<sup>253</sup>

Without an applicable international legal framework, it is likely that states will continue to unilaterally invoke protective jurisdiction in response to grave threats of environmental harm emanating from abroad. For example, the U.S. Pollution Act of 1990 asserts protective jurisdiction over foreign ships navigating through its exclusive economic zone when carrying certain types of hazardous materials, even when the ships are not traveling to a U.S. port.<sup>254</sup> And, as discussed previously, Canada invoked protective jurisdiction in response to an environmental threat to its Arctic coastline.<sup>255</sup> As international environmental law develops in this area, the rule proposed here could provide a useful standard for evaluating such protective claims.

#### CONCLUSION

Despite any attempt to keep assertions of protective jurisdiction legally tethered to the necessary protection of essential security interests, a plausible argument can be made that protective legislation would remain ripe for exploitation.<sup>256</sup> Indeed, once protective jurisdiction is accepted as an international legal construct, it is exceedingly difficult to guard against its abuse.<sup>257</sup> In an ideal world, perhaps no such cross-border jurisdictional claims would be acceptable or necessary. But the optimal state of international jurisdiction does not necessarily equate with the de facto reality of international practice. Protective jurisdiction is widely accepted and efforts should thus be

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253. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), U.N. Doc. A/Conf.48/14/Rev. 1 (1973), Principle 24 (providing that international matters concerning environmental protection should be handled in a cooperative spirit); Rio Declaration of Environment and Development and Agenda 21, U.N. Doc. A/Conf.151/26 (Vol. I) (1992) (same).

254. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–62 (West 2014); *see also* MARIA GABUNELE, *FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA* 31 (2007).

255. Canadian Arctic Waters Pollution Prevention Bill, S.C. 1969–70, c. 47 (extending jurisdiction 100 nautical miles into the Beaufort Sea for the purpose of regulating marine jurisdiction). As noted previously, Article 234 of UNCLOS resolved the controversy. *See supra* note 144.

256. *See* García-Mora, *supra* note 7, at 584 (arguing that any definition of the protective principle is too vague to give determinate results).

257. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 50 (1956).

made to regulate its use through an objective, principled rule of international law. The reformulation proposed here would achieve such a rule by standardizing the intended balance between sovereignty and exceptional circumstances precluding wrongfulness.

In doing so, the reformulation offers practical advantages that are in the collective interest of the international community. First and foremost, within the decentralized international legal system, the legitimacy and determinacy of international rules is critical to securing compliance among states.<sup>258</sup> In addition, though it is certainly justifiable to interpret the U.N. Charter as applicable only to forcible self-defense, the inevitable upshot is that the legal framework of Article 51 becomes applicable to a very limited set of cross-border conduct.<sup>259</sup> Meanwhile, the primary threats to international peace and security result increasingly from low-level warfare, non-state violence, and non-violent threats. It is thus imperative for the international community to define the international legal rules applicable to non-Article 51 state responses to extraterritorial threats,<sup>260</sup> and it is posited here that the reformulation would provide one such rule. The proposed rule would usefully recognize a non-forcible method of state protection, while limiting its invocation to circumstances where the regulation is necessary to prevent harm to an essential security interest.

Non-forcible, protective measures invoked in limited circumstances could also represent a welcome, pacific alternative to conventional thinking on international self-defense. By defining the substantive conditions for the unilateral exercise of protective jurisdiction, the reformulation would further incentivize multilateral negotiations on reciprocal criminal jurisdiction. Multilateral treaties already exist as to a variety of cross-border threats, and such *ex ante* cooperation and agreement likely promotes international peace and

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258. See Franck, *supra* note 222, at 706 (“[I]n a community organized around rules, compliance is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed . . . . It becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.”).

259. See Tams, *supra* note 112, at 976 (“While an expansive reading [of Article 51] might have brought [state responses such as security walls] within the scope of Article 51 (and subjected them to the procedural and substantive conditions of that provision), the restrictive reading confirmed by the [ICJ] increases the pressure to recognise further non-written exceptions to Article 2(4) [of the U.N. Charter].”).

260. Roucouas, *supra* note 112, para. 125 (“[I]f the use of force by non-state actors is left outside the Charter, the risk is greater for the victim States to act beyond the principles of necessity and proportionality and for the Security Council to be prevented from exercising its duties and powers.”).

security more than *ex post* or *ad hoc* assertions of extraterritorial jurisdiction. Indeed, collective security regimes, whether responding to environmental threats, terrorism, or otherwise, provide a degree of stability and predictability in the international arena. And where international agreement with respect to certain conduct is not attainable, the rule on protective jurisdiction would guide state practice and provide a principled standard for relevant international disputes.

It is not presumed here that the standard proposed would be immune from difficult interpretive controversies. But it should be forcefully stated that the goal of the rule on protective jurisdiction—as it should be the goal of all international legal rules—is not expedience, but rather a defined standard of conduct that is neutrally defined and neutrally applied. In many cases, the reformulation proposed in this Article would provide a clearer answer as to the international lawfulness of protective regulation. But, more importantly, in all cases, it would provide an objective standard that discards the inequitable reliance on the weighing of states' comparative interests on an *ad hoc* basis. The rule proposed in this Article elaborates a prospective, principled weighing of states' relative interests in accordance with international law. The standard of conduct would reflect that the international community has prospectively determined that in all but exceptional circumstances—i.e., where cross-border regulation is necessary to prevent grave harm—extraterritorial regulation for the purpose of state protection amounts to an international wrong.