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Self-Protection in World Society: Reformulating the Protective Principle in International Law

ABSTRACT. At what point does a state's protection of its interests cross the line? This is the question raised by the protective principle in international law, which permits a state to apply its laws to the conduct of noncitizens—beyond its borders—when such conduct threatens the security or essential interests of the state. Envisioned as a narrow carve-out for governments to regulate grave crimes like espionage and terrorism, the protective principle in recent years has facilitated essentially unbounded jurisdiction "creep." That is, governments have used it to justify the extraterritorial regulation of a broad and growing range of conduct, from drug trafficking to political speech—with steep costs for state sovereignty and individual liberty. To rectify this problem, this Note proposes a reformulation of the protective principle under a two-prong jurisdictional test. This novel prescriptive solution also carries broader implications for the role of self-protection in international law.

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INTRODUCTION

On July 31, 2020, Samuel Chu woke up in his sunny Los Angeles apartment to news that he had been named an international fugitive.[1] According to his arrest warrant, he had violated the 2020 Hong Kong National Security Law, though Chu, who is a U.S. citizen, was not sure how.[2] He had not been to Hong Kong since 2019—months before the law came into force.[3] Yet under Article 38, the law applies "extraterritorially": it reaches Chu from Hong Kong all the way home.[4] This means, of course, that anyone can violate the law from anywhere on earth.

The Chinese government defends the law's extraterritorial reach under the protective principle in international law. According to this theory of jurisdiction,[5] a state can enact laws that regulate the conduct of noncitizens—beyond its territory—when they commit acts against the "security"[6] or "essential interests"[7] of the state. A basis of jurisdiction tracing back to the Italian city-states,[8] the protective principle is playing an important role in Beijing's effort to, in its words, "take up legal weapons" and build an extraterritorial system of law.[9]

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1. Samuel Chu, *Why Is China Coming After Americans Like Me in the U.S.?*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/china-hong-kong-arrest.html [https://perma.cc/7WNN-336Q].

2. *Id.*

3. Samuel Chu (@samuelmchu), X (formerly TWITTER) (Nov. 26, 2023, 7:42 PM), https://x.com/samuelmchu/status/1728937201613066726 [https://perma.cc/X35H-NBMT] ("4 years ago today, I was in Hong Kong for what turned out to be the last time. I remember the smells, the sounds, the chantings, the crowds. What I didn't know then was that I would not be able to return there again without being arrested or jailed.").

4. *See* Chu, *supra* note 1.

5. In this Note, I adopt the terminology of the *Fourth Restatement of Foreign Relations Law* and refer to the "protective principle," the "protective theory of jurisdiction," and "protective jurisdiction" interchangeably. This basis of jurisdiction is part of customary international law and distinct from the doctrine of protective jurisdiction in U.S. law.

6. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 412 (AM. L. INST. 2018).

7. Noah Bialostozky, *Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness*, 52 COLUM. J. TRANSNAT'L L. 617, 625 (2014).

8. *Id.*

9. *See* Cheng Hua'er (程华儿), *Accelerating the Development of Foreign-Related Law* (加快推进涉外法治建设（专题深思)), MINISTRY JUST. PEOPLE'S REPUBLIC CHINA (中华人民共和国司法部) (Oct. 28, 2022, 15:58) (translated by author from Mandarin Chinese) (original and translation on file with author), https://www.moj.gov.cn/pub/sfbgw/zwgkztzl/xxxcgcxjpfzsx/fzsxllqy/202210/t20221028_466241.html [https://perma.cc/YJ6J-6B2Q].

Though novel in the Chinese context,[10] this development is just the latest example of an old problem: the "jurisdiction creep" of criminal law under the protective principle. From 1800s France to post-9/11 America, nations across the globe have enacted statutes that criminalize an increasing breadth of offenses overseas.[11] Because the only limiting principle of protective jurisdiction is a state's essential interests, the more broadly a state defines these interests, the more widely its laws will reach. The conceptual expansion of security in the twenty-first century has further facilitated this trend.[12]

Without limits, the reach of criminal law across borders comes with costs for the interests of both states and individuals, as the Permanent Court of International Justice (PCIJ) first noted in the landmark *Lotus* case.[13] When the court handed down this decision in 1927, it affirmed that jurisdiction to enact statutes represents a core right of state sovereignty: the right of a nation to build a rule of law, within its borders, to the "exclusion" of other states.[14] This interest is undermined when a government reaches its statutes into the territory of other nations, especially when these statutes conflict—and they often do—with the other states' senses of justice. Laws that apply everywhere also subject individuals to criminal penalties of which they have no knowledge and to the authority of governments with which they have no ties.[15]

Even more fundamentally, the impulse to criminalize conduct thousands of miles from home threatens to tear at the fabric of "[w]orld [s]ociety."[16] That is, in a pluralistic legal order where states maintain bitter disagreements about how to govern and which laws to pass, coexistence depends on the observance of

10. *See infra* Section II.B.

11. *See, e.g.*, KENNETH S. GALLANT, INTERNATIONAL CRIMINAL JURISDICTION: WHOSE LAW MUST WE OBEY? 410-11 (2022); Bialostozky, *supra* note 7, at 625; Craig Martin, Kiobel*, Extraterritoriality, and the "Global War on Terror*,*"* 28 MD. J. INT'L L. 146, 197 (2013). Examples include drug trafficking, corruption, espionage, counterfeit, customs or immigration fraud, and also certain acts of political advocacy, including speech. See Part II, *infra*, for a comprehensive discussion.

12. *See* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1047-48 (2020).

13. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 15, 19, 22 (Sept. 7).

14. *Id.*; *see also* Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) ("The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.").

15. *See* LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 12 (1989); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 11 (1964).

16. 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).

some legal boundaries.[17] Recent bilateral disputes over the scope of extraterritoriality under the protective principle illustrate its destabilizing effects on international relations.[18]

Scholars have taken notice of this issue and considered solutions.[19] Noting that the protective principle is uniquely susceptible to jurisdiction creep, they have proposed new formulations of it. The two primary reformulations in the literature are vulnerable to their own objections, however. The first, springing from an early-twentieth-century effort to codify a treaty on jurisdiction, does not account for states' modern uses of the protective principle.[20] The second proposes a framework—rooted in self-defense—that is arguably as manipulable as the current one.[21] Moreover, neither grapples with the sophisticated strategies of some states, including China, to integrate the protective principle throughout their legal systems.[22]

After providing an original analysis of the protective principle, this Note proposes a better way. Specifically, it offers a novel formula to limit states' exercises of protective jurisdiction so that they regulate extraterritorial conduct only when they have a "legitimate interest[]" in self-protection at stake.[23] This change ensures more targeted applications of the protective principle to avoid infringing on states' interests and subjecting individuals to infinite layers of criminal prohibitions.

This formula takes the form of a two-part test. The first part adapts principles developed in the context of international trade law to identify criteria that can suggest whether there is a "sufficient nexus between" the *conduct* a state seeks to regulate and its essential interests.[24] This part relies on an examination of (1)

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17. Of course, international law also poses some universal—*erga omnes*—obligations that are binding upon the international community "as a whole." Int'l L. Comm'n, Fifth Rep. on Peremptory Norms of General International Law (Jus Cogens), at 52, U.N. Doc. A/CN.4/747 (2022).

18. *See infra* Section II.C and accompanying notes.

19. *See, e.g.*, *Draft Convention on Jurisdiction with Respect to Crime*, *in* RESEARCH IN INTERNATIONAL LAW UNDER THE AUSPICES OF THE FACULTY OF THE HARVARD LAW SCHOOL 425, 434-51 (1935) [hereinafter *Draft Convention*], *reprinted in* 29 AM. J. INT'L L. 439 (Supp. 1935); Bialostozky, *supra* note 7, at 628; IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 307-62 (1994).

20. *See Draft Convention*, *supra* note 19, at 540-41 (enumerating domestic-law provisions establishing protective jurisdiction ranging from the late nineteenth to the early twentieth centuries).

21. *See* Bialostozky, *supra* note 7, at 621-22.

22. *See infra* Section II.B and accompanying notes.

23. *See* CAMERON, *supra* note 19, at 328.

24. *See, e.g.*, Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.36, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia Traffic in Transit*].

analogous laws in state practice and (2) the "content" and "structure" of an extraterritorial regulation.[25] The second part of the test considers whether there is a nexus between the state and the *perpetrator* of the act to justify the state's exercise of jurisdiction. It assesses whether the state and the actor have substantial ties — a thick and continuing relationship — that would form an equally necessary connection between the state and the foreign controversy.[26]

As I will explain below, this test is anchored both in the insights of the *Lotus* case — the foundational judgment on extraterritorial jurisdiction — and in the genuine-connection doctrine of customary international law.[27] Admittedly, as there is no treaty or specialized court that regulates states' exercises of jurisdiction, governments would apply the test in a decentralized fashion.[28] Nonetheless, adopting this framework could have immediate effects on states' ability to obtain custody of non-nationals through extradition. Over time it could also become integrated with more formal structures of international law.

This Note proceeds in four Parts. Part I begins with background on the theoretical grounding of the protective principle. It argues that, though "protection of the state" provides a justification for the existence of the protective principle, it is insufficient as a limiting framework. Consequently, the principle allows for essentially unbounded exercises of extraterritoriality. Part II tracks the effects of protective-jurisdiction creep on state sovereignty, individuals' interests, and international relations. I use the Chinese legal system as my main case study because China's widescale use of the protective principle provides the best window into understanding the principle's implications today. The pace with which Beijing has embraced the principle also brings urgency to the development of new jurisdictional limits. Part III then proposes a two-part test to limit states' exercises of protective jurisdiction and applies the test to canonical and emerging instances of extraterritoriality. Finally, Part IV discusses the implications of this framework for broader issues in international law.

As I note in Part IV, the implications of this framework extend beyond the protective principle. They get at central questions in international law: what a state can do — and how far it can go — to protect its interests, and how its interests interact with those of all other states. Deriving broader principles from this study of protective jurisdiction, this Part argues that now more than ever, our answers to these questions must grapple with the fact that as nations have faced

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25. *See infra* Section III.A.1.

26. *See* García-Mora, *supra* note 16, at 569-70.

27. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407 (AM. L. INST. 2018).

28. *See* Omri Sender & Michael Woods, *Extraterritorial Jurisdiction and the Limits of Customary International Law*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW 31, 35 (Austen Parrish & Cedric Ryngaert eds., 2023).

challenges of an increasingly global nature, their interests have become more intertwined—and their "self-protection" has, too. This calls for a reconceptualization of the role of unilateral protective measures in international law.

I. THE PROTECTIVE PRINCIPLE IN INTERNATIONAL LAW

This Part tracks the development of the protective principle in international law. It argues that though "protection of the state" can serve as a theoretical justification for protective jurisdiction, state protection fails as a limiting principle. This results in expansive exercises of jurisdiction that fall short of the legal standards established by the *Lotus* case and customary international law.

A. S.S. Lotus *and the Emerging Law of Jurisdiction*

A basic premise of international law is that states, as a matter of right, can regulate acts that occur within their territory.[29] Territoriality thus serves as the primary basis of jurisdiction. By contrast, *extra*territoriality refers to the regulation of conduct beyond a state's territory. How and when a state can regulate acts beyond its borders is a question of the international rules of jurisdiction.[30]

I refer here to legislative, or "prescriptive," jurisdiction, which governs when states can enact statutes regulating foreign acts.[31] While governments anticipate the future litigation of their laws in courts, international law prohibits a state's extraterritorial *enforcement* of its laws (i.e., the use of police power in a foreign state).[32] This "enforcement problem" creates obstacles for a state when it seeks to prosecute an individual who is outside its territory.[33] Governments, however, can work around this obstacle by requesting the extradition of alleged criminals, as I will show in the next Part. In general, the most heated disputes over prescriptive jurisdiction occur when a state has obtained custody of and prosecuted a noncitizen.

The landmark *S.S. Lotus* case, handed down in 1927, centered on just such a dispute.[34] While *Lotus* has been surpassed by more recent developments in international law, it remains an important starting point for any discussion of

29. Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

30. *See* Mann, *supra* note 15, at 17.

31. *See* BRILMAYER, *supra* note 15, at 13-14 (describing "legislative jurisdiction" as the "right to apply one's rule of law").

32. *See* Bialostozky, *supra* note 7, at 623.

33. *See* GALLANT, *supra* note 11, at 410.

34. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 275, 278 (1989).

international jurisdiction because of its foundational influence on the field and, as I will show, its enduring relevance.[35] *Lotus* discussed whether Turkey could exercise criminal jurisdiction over a French national for a crime committed on the high seas.[36] Turkey asserted that it could; France fervently disagreed.[37] In a compromise, the two sides submitted the case to the PCIJ.[38]

In a seven-to-six split, the court ruled in favor of Turkey, finding that it could legally exercise jurisdiction over the French national.[39] The court's holding, which remains good law, turned on the idea that the crime in question was *effected* on a Turkish ship. A ship flying the Turkish flag, the court held, fell under the territorial jurisdiction of Turkey.[40]

Yet, in coming to this conclusion, the court made several controversial statements that have made the case infamous in international law.[41] For the purposes of this Note, it is unnecessary to delve into the case's controversial legacy fully; rather, it is enough to note here that the opinion remains useful at the outset of a study on extraterritoriality because it aptly identified what is at stake in a state's exercise of extraterritorial jurisdiction. Specifically, the *Lotus* court identified the two classes of interests at the heart of any controversy over extraterritorial jurisdiction: the interests and rights of states and of individuals. And these stakes—

35. *Cf.* Cedric Ryngaert & Austen Parrish, *Introduction to* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW, *supra* note 28, at 1, 4 ("Still, *Lotus* has cast a long shadow in the law of jurisdiction . . . .").

36. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 5 (Sept. 7).

37. *Id.* at 6.

38. Douglas Guilfoyle, *SS Lotus (France v Turkey) (1927)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 89, 89-90 (Eirik Bjorge & Cameron Miles eds., 2017). The Permanent Court of International Justice (PCIJ) is the predecessor to the International Court of Justice (ICJ).

39. *S.S. Lotus*, 1927 P.C.I.J at 31-33.

40. *Id.* at 23.

41. The decision is controversial for laying down the "*Lotus* principle"—which essentially holds that states may do anything under international law that is not expressly prohibited. *See, e.g.*, An Hertogen, *Letting* Lotus *Bloom*, 26 EUR. J. INT'L L. 901, 902 (2015). This principle has been widely criticized by scholars, mainly for espousing an overly permissive view of international law. *See, e.g.*, Guilfoyle, *supra* note 38, at 90; Mann, *supra* note 15, at 35. Indeed, some later ICJ judges have questioned whether the principle can be considered good law. *See, e.g.*, Hertogen, *supra*, at 914 ("The most common response to the unwanted implications of the *Lotus* principle is to discard the *Lotus* judgment as a precedent. . . . [In Judge Simma's declaration attached to the *Kosovo* advisory opinion], Judge Simma criticized the ICJ's focus on whether international law prohibited Kosovo's declaration of upholding the *Lotus* principle . . . ."). As noted, it is unnecessary for the purposes of this Note to weigh in on the debate on the *Lotus* principle. In part, this is because states have moved beyond it. As I will show in Section I.B, state practice has coalesced around five *permissive* rules of prescriptive jurisdiction, suggesting that state practice on prescriptive jurisdiction does not accord with the *Lotus* principle. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407 (AM. L. INST. 2018).

for states and individuals—have only risen in the decades since *Lotus*, as the number of transnational controversies continues to grow.[42]

For states, the judgment clarified that jurisdiction, representing the "apportionment of power" in international law,[43] bears directly on how states can exercise a central aspect of their sovereignty—the creation and application of law.[44] As the court put it, within international legal limits, a state's "title to exercise jurisdiction rests in its sovereignty."[45] Sovereign states have the right to legislate according to their vision of "public order."[46] The right to create and apply law is both a positive and a negative right. Positively, it reflects a state's political independence, for a state that lacks its own law—and merely absorbs that of others—is a legal vassal. As a negative right, it reflects the idea that a state can create law within its borders and apply that law to its citizens, perhaps not wholly but largely "to the exclusion of all other States."[47]

Intertwined with those of states, the interests and rights of individuals also arise in the *Lotus* judgment. After espousing a number of arguments about civil jurisdiction, the court considered whether the legal dynamic changed given the "especial importance of criminal jurisdiction from *the point of view of the individual*."[48] While the *Lotus* court did not elaborate on what it meant by the "especial importance" of the criminal law for an individual, it is easy to imagine what it had in mind. Scholars have raised concerns about the extraterritorial application of criminal law to persons who may not be on notice, who have "no stake in a state's governance" and "no opportunity to participate in its lawmaking," and who do not receive protection of their interests from the state.[49] As J.L. Brierly put it in his classic analysis of *Lotus*: "[T]he suggestion that every individual is

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42. Extraterritoriality and Conflicts of Jurisdiction, 2005 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 15, § A(2), at 790 ("These new realities strain the ability of the law to protect our citizens, regulate our economies, and respond effectively to international crime, including terrorism. Internationally, there is naturally a rise in the number of conflicts of jurisdiction and controversies about jurisdiction.").

43. *See* BRILMAYER, *supra* note 15, at 15.

44. *See* Hertogen, *supra* note 41, at 902-03.

45. *S.S. Lotus*, 1927 P.C.I.J. at 18.

46. *See Draft Convention*, *supra* note 19, at 541 ("This sovereignty includes the right to legislate, each State assessing for itself the elements, conditions and modalities of its social order, for which it is responsible, and freely enacting the legislative provisions, of a civil, administrative, penal or other nature, which it considers necessary for the protection of its interests and its public order in the broadest sense of the word." (translated by author from French) (quoting A. Mercier, *Le Conflit de Lois Pénales en Matière de Compétence*, 58 REV. DROIT INT'L ET LEGIS. COMP. 439, 464 (1931))).

47. Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 831, 838 (Perm. Ct. Arb. 1928).

48. *S.S. Lotus*, 1927 P.C.I.J. at 20 (emphasis added).

49. *See* GALLANT, *supra* note 11, at 422.

or may be made subject to the laws of every State at all times and in all places is intolerable."[50]

B. Modern International Rules of Jurisdiction

Lotus provided the two sets of interests—state and individual—that form the beginning, and the lodestars, of any inquiry into jurisdiction. Alone, however, they cannot dispose of jurisdictional inquiries. This is because almost all exercises of jurisdiction implicate the interests of other states and their citizens. As Professor Lea Brilmayer points out, in a globalized world, almost everything causes international effects—"intervening" into the affairs of other states and their citizens.[51] Thus, we must distinguish between intervention we can live with and intervention that is precluded by international law.[52]

To draw this distinction, governments need an additional lens through which to evaluate exercises of jurisdiction. There is no treaty that governs this field, so states must rely on unwritten, or "customary," international law. Customary international law currently supplies two additional frameworks: the five bases of jurisdiction and the genuine-connection doctrine. I combine the insights of these two frameworks to illustrate that the current formulation of the protective principle leads to what should be considered *impermissible* exercises of extraterritorial jurisdiction in international law.

1. Bases of Jurisdiction

The five bases of jurisdiction determine when a state can exercise jurisdiction based on the location of the act, the identity of the actors involved, and the nature of the act.[53] These bases were crystallized in the 1930s when a group of international lawyers convened the Harvard Research Project to discuss increasingly heated disputes over jurisdiction.[54] In its Draft Convention, the Project proposed five permissive rules of jurisdiction, which are still accepted today: territoriality,

50. J.L. Brierly, *The* Lotus *Case*, 44 LAW Q. REV. 154, 162 (1928).

51. *See* BRILMAYER, *supra* note 15, at 107.

52. *See id.*

53. Cedric Ryngaert, *International Jurisdiction Law*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW, *supra* note 28, at 13-14.

54. Henry S. Fraser, *The Research in International Law—Third Phase*, 29 AM. BAR ASS'N J. 728, 728-79 (1935).

nationality (active personality), passive personality, universality, and protection.[55]

FIGURE 1. BASES OF PRESCRIPTIVE JURISDICTION IN INTERNATIONAL LAW

Basis	Definition	Examples of Conduct
Territorial	Regulation of acts performed within a state's borders, or performed outside a state's borders but that produce effects within them	Any
Nationality (Active Personality)	Regulation of acts performed by a state's citizens	Any
Passive Personality	Regulation of acts directed against a state's citizens	Murder, terrorism
Universal	Regulation of acts that are universally condemned	Genocide, crimes against humanity, war crimes
Protective	Regulation of acts directed against a state's security or essential interests	Murder of government officials, acts of terrorism on government property, espionage

The protective basis of jurisdiction, the subject of this Note, permits a state to regulate conduct that threatens the state itself. It includes acts that implicate a state's "essential interests"—its sovereignty, political independence, and

55. Ryngaert, *supra* note 53, at 13-14; *see Draft Convention*, *supra* note 19, at 431 (listing and briefly explaining the five principles). Though this Note focuses on the protective basis of jurisdiction, I will briefly describe the other four here. First, territoriality, the primary basis of jurisdiction, justifies the application of law to acts committed within, or producing effects within, a state's borders. *See Draft Convention*, *supra* note 19, at 431. Next, the nationality (or active personality) principle justifies a state's application of law to its citizens. *See id.* The "passive personality" principle, by contrast, justifies a state's regulation of acts that *target* its citizens, even if perpetrated by noncitizens. *See id.*; Ryngaert, *supra* note 53, at 20. The final two bases—universal and protective—are unique in that they permit regulation of certain kinds of conduct due to their *nature*. The universality principle justifies a state's exercise of jurisdiction over acts that are "universally" condemned, so heinous that any state can prosecute their perpetrators wherever they are found. *See* Ryngaert, *supra* note 53, at 23. The protective principle is further described in the main text.

governmental functions.[56] Because these interests are so paramount, the theory goes, a state may criminalize acts that threaten them, wherever they may occur.[57]

For as long as protective jurisdiction has existed, there has been disagreement about its scope. Governments have not yet come to a consensus on the specific interests the principle protects or the offenses it can be used to regulate. The *Fourth Restatement of Foreign Relations* provides a list of crimes falling under the protective principle, including "espionage, certain acts of terrorism, murder of government officials, counterfeiting of the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws."[58] However, this list is not exhaustive, and states have regulated other acts—at times, *many* other acts—in their criminal codes.[59] Through statutory interpretation, moreover, American courts have upheld extraterritorial regulation of a range of other crimes under the protective principle.[60] As I will show below, this lack of clear limits on what protective jurisdiction can and cannot cover has facilitated its slow but decisive expansion.

2. *The Genuine-Connection Doctrine*

The legal argument for why these five bases of jurisdiction justify the application of a state's law to a controversy is that they indicate a state has a "valid

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56. *See, e.g.*, CAMERON, *supra* note 19, at 2 (defining the protective principle as "the principle of international criminal jurisdiction permitting a state to grant extraterritorial effect to legislation criminalizing conduct damaging to national security or other central state interests").

57. *Draft Convention*, *supra* note 19, at 538.

58. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 412 (AM. L. INST. 2018).

59. *See* GALLANT, *supra* note 11, at 422-24. The protective principle has also been included as a basis of jurisdiction in several transnational-crime conventions, including for corruption. *Id.* at 436. While not the subject of this Note, there are a limited number of protective-principle applications in a noncriminal context. *See* Ryngaert, *supra* note 53, at 22 ("Most observers would consider the protective principle to be applicable in a non-criminal context as well, notably where States enact national security-based administrative regulations with an extraterritorial dimension.").

60. *See, e.g.*, United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985) (holding that the protective principle justifies regulation of marijuana possession within the "customs waters" of the United States); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056-57 (3d Cir. 1993) (holding that the protective principle justifies extraterritorial regulation of drug trafficking); United States v. Banjoko, 590 F.3d 1278, 1281 (11th Cir. 2009) (per curiam) (holding that the protective principle justifies regulation of attempts to enter the United States as a "stowaway[]"); United States v. Campbell, 798 F. Supp. 2d 293, 308-09 (D.D.C. 2011) (holding that the protective principle justifies extraterritorial regulation of bribery).

interest" in the controversy.[61] In other words, these bases suggest that a state has a legally cognizable connection to the person or act to which it seeks to apply its law. This idea is encapsulated within the genuine-connection doctrine of customary international law, which provides an additional lens on states' exercise of jurisdiction.

According to this doctrine, international law requires the existence of a "genuine or sufficiently close connection to justify or make reasonable" a state's exercise of jurisdiction.[62] Paired with the genuine-connection doctrine, the five bases of jurisdiction can be thought of as supplying the criteria for what constitutes a genuine connection between a state and controversy.[63] To be sure, the precise relationship between the genuine-connection doctrine and the five bases of jurisdiction is somewhat unsettled.[64] But increasingly—and intuitively—the five bases and the genuine-connection doctrine have been thought to work in tandem, such that each basis of jurisdiction "provides evidence of a genuine connection."[65] Thus, if a state claims it has a genuine connection to a certain act, it must point to interests rooted in one of the bases of jurisdiction to justify that claim. A saturation of interests identified in each of the five bases—territorial, protective, or otherwise—creates a genuine link.[66]

Before the protective principle expanded to what it is today, international lawyers traditionally justified paradigmatic exercises of protective jurisdiction as consistent with the genuine-connection doctrine. These canonical acts encompassed under protective jurisdiction—such as violence against government officials—are widely understood to create a genuine connection between the author

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61. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 412 (AM. L. INST. 2018) ("The common element underlying the various principles . . . is the valid interest of the State in asserting its jurisdiction in such a case on the basis of a sufficient connection to the persons, property or acts concerned.").

62. *Id.* § 407 reporters' notes at 190 n.2.

63. The exception is universal jurisdiction, which requires no link. *Id.* at 191 n.2.

64. *Id.* at 190 n.2.

65. *Id.* at 192 n.2.

66. Yet international law is constantly evolving, and the genuine-connection doctrine also supports exercises of jurisdiction (like emerging uses) that do not fit "neatly" within the five bases but that a state is otherwise justified in regulating. *Id.* § 407(c) ("Some accepted exercises of jurisdiction that rest on a genuine connection, such as jurisdiction over aircraft and ships, do not fit neatly within [the five bases]."). In this sense, the genuine-connection doctrine both provides a normative gloss on the existing five bases and encompasses an underlying principle that is broader than them. Because the genuine-connection doctrine transcends the five bases of jurisdiction, it provides a blueprint, which this Note builds on in Part III, to help discipline more controversial exercises of jurisdiction under the protective principle.

of the act and the regulating state.[67] These acts, which truly and undeniably target the security or survival of the state, link the author of the act to the threatened state. Consequently, the threatened state has a legitimate interest in protecting itself from the conduct.[68]

Taking the argument a step further, advocates of the protective principle would note that though states have all kinds of interests in all kinds of acts—and the existence of a state's interests alone may not justify the application of its law—a state's interest in self-protection is a special one. Both conventional and customary international law expressly recognize a state's interest, and indeed right, to take certain acts to protect itself. Article 51 of the United Nations (U.N.) Charter, the foundational document of modern international law, even acknowledges that a state's need for protection may be so grave that it can justify the *physical* intervention into another state's territory, as in self-defense.[69]

Though it long predates the U.N. Charter, the protective principle has historically been justified by loose analogy to self-defense or necessity, and it is fair to evaluate it on these terms.[70] As reflecting a limited right or privilege of self-protection, the principle justifies a state's regulation of acts committed "against the social existence of the state."[71] Such regulation may be especially justified in

67. *See* James Crawford, Brownlie's Principles of Public International Law 462 (8th ed. 2012) ("Nearly all states assume jurisdiction over aliens for acts done abroad which affect the internal or external security or other key interests of the state . . . ."); *see also* Restatement (Fourth) of Foreign Rels. L. § 412 (Am. L. Inst. 2018) ("There is general agreement that prescriptive jurisdiction based on the protective principle covers conduct such as espionage, certain acts of terrorism, murder of government officials, counterfeiting the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws.")

68. *Draft Convention*, *supra* note 19, at 541.

69. U.N. Charter art. 51.

70. For example, the first nation to codify protective jurisdiction within its criminal code, Napoleonic France, defended the basis of jurisdiction on grounds of "*légitime défense*." *See* H. Donnedieu de Vabres, Les Principes Modernes du Droit Pénal International 87 (1928); *see also* García-Mora, *supra* note 16, at 579 (discussing protective jurisdiction's historical origins in self-defense); Bialostozky, *supra* note 7, at 622 ("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.").

71. Comm. of Experts for the Progressive Codification of Int'l L., Rep. on Criminal Competence of States in Respect of Offences Committed Outside Their Territory, at 4, League of Nations Doc. C.50M.27 1926 V (1926), *reprinted in* 20 Am. J. Int'l L. 252 (Supp. 1926).

cases in which the state at the situs of the act supports or even facilitates the threatening activity (e.g., state-sponsored cybertheft).[72]

To be sure, the protective principle does not deny that the extraterritorial application of another state's law implicates, and even infringes on, the territorial state's sovereignty. But it recognizes a narrow carve-out where a threatened state's interests are privileged over an affected state's sovereignty. As an early League of Nations report put it, a state cannot "abandon to another the task of dealing with and punishing acts susceptible of causing injury to its essential interests."[73] And for some of the traditional offenses falling under the protective principle, this makes good sense. For example, in the case of a violent attack against a government's officials, which could compromise a state's interests in a fundamental way—the ability of its government to function—a state has a valid interest in criminalizing the behavior, wherever it happens.[74]

C. The Inadequacy of "Protection" as a Limit on Extraterritorial Jurisdiction

Yet even if "protection of the state" justifies the regulation of certain extraterritorial acts, that criterion alone does not provide adequate limits on extraterritorial regulation. As I will show below, the protective principle has expanded beyond a limited set of offenses to cover a seemingly infinite range of extraterritorial activities. Moreover, the principle lacks other jurisdictional constraints that could otherwise restrict states' applications of it. In effect, what was meant to be a narrow carve-out for defense against discrete threats has become a broad grant of extraterritorial jurisdiction, putting the protective principle in tension with the genuine-connection doctrine and the jurisdictional standards outlined in *Lotus*.

First, the conceptual unsettledness of the idea of state protection, while not necessarily problematic in itself, significantly weakens the role protection can play as a limiting principle. States today seek refuge not only from traditional threats, such as attacks by other states' militaries, but also from attacks by

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72. *See* Harold G. Maier, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 64, 69 (Karl M. Meessen ed., 1996) (defending the use of the protective principle to regulate an act in a state whose government does not itself regulate the act because "[t]o 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"); *see also* Gabriella Blum & John C.P. Goldberg, *The Unable or Unwilling Doctrine: A View from Private Law*, 63 HARV. INT'L L.J. 63, 63-68 (2021) (discussing the (controversial) "Unable or Unwilling Doctrine," which, in this rendering, is justified under "principles of *necessity*" in international law).

73. *See* Comm. of Experts for the Progressive Codification of Int'l L., *supra* note 71, at 7.

74. *See* GALLANT, *supra* note 11, at 425-28.

nonstate actors, cyberterrorism, environmental harms, the proliferation of new weapons, violations of international law, human-rights abuses, and economic losses, to name just a few.[75] This broad conceptual reach also opens the protective principle to abuse by states with sprawling—and deeply problematic—conceptions of threat. During World War II, for example, a court in Nazi Germany convicted a non-German Jewish individual for having sexual intercourse with a German woman in Czechoslovakia, on grounds that his act threatened the "racial purity of the German nation."[76] Just years later, Czechoslovakia convicted an American for promoting democratic values as a broadcaster for Radio Free Europe.[77]

Today, autocratic governments are again at the forefront of expansive threat conception. In particular, as Part II will demonstrate, they have pushed the bounds by equating national security with *regime* security, meaning that any threat to the regime—and potentially even criticism of the regime—is framed as an existential threat to the state.[78] Moreover, the Chinese government, which has become one of the fastest movers in protective jurisdiction, has coupled its advancement of the protective principle with a "comprehensive national security" campaign, which commits it to protecting China's national security in a growing number of categories.[79] These include both traditional defense interests and more obscure interests like "cultural security" and "polar security," illustrating how far afield the concept of state interests can go.[80]

Additionally, the protective theory of jurisdiction lacks other constraints that, in the absence of a limiting definition of state protection, could help restrict governments' application of it. According to some state practice and scholarly opinion, states have full discretion to define the essential interests protected by the principle themselves.[81] This means that if one state objects to the interest

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75. *See* Heath, *supra* note 12, at 1024.

76. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 158 (1973).

77. *Id.*

78. Zhengxin Huo & Man Yip, *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, 9 CHINESE J. COMP. L. 328, 338 (2021) ("Given that the [Chinese Communist Party] attaches paramount importance to the political security of its regime, it is unsurprising that extraterritorial jurisdiction based on the protective principle has been incorporated into various Chinese legislations. . . . China has enacted a number of laws to safeguard its national security (political security of the regime in particular) in the last five years . . . .").

79. *See* Katja Drinhausen & Helena Legarda, *"Comprehensive National Security" Unleashed: How Xi's Approach Shapes China's Policies at Home and Abroad*, MERCATOR INST. FOR CHINA STUD. 5 (Sept. 15, 2022), https://merics.org/sites/default/files/2023-02/Merics%20China%20Monitor%2075%20National%20Security_final.pdf [https://perma.cc/6J6L-3YWX].

80. *Id.* at 11 exhibit 4.

81. *See supra* text accompanying notes 55-56.

another government uses the protective principle to advance, the regulating government can claim that only it has the right under international law to make such a determination. This "self-judging" aspect dramatically minimizes the space where international law can operate.[82] In other contexts, scholars have referred to states' discretion to define their own interests as an "unaccountable sovereign domain."[83]

Finally, unlike territorial theories of jurisdiction, the protective principle does not require a state to demonstrate that the conduct it seeks to regulate has produced or could produce effects within its territory.[84] Thus, in the example above, a state could prosecute the American radio broadcaster without proving that individuals within its territory had access to the broadcast.

In sum, as it is currently formulated, the protective principle turns on a manipulable conception of a state's essential interests. It also lacks other jurisdictional constraints like an effects requirement. As I will show further in Part II, governments have taken advantage of these aspects to apply the protective principle expansively. But make no mistake: that states can use the protective principle to support sweeping exercises of jurisdiction does not make these exercises lawful. As Part II will argue, expansive assertions of the protective principle are inconsistent with both the genuine-connection doctrine and the framework presented in *Lotus*.

II. THE PROTECTIVE PRINCIPLE AS A LEGAL WEAPON

Around the world, examples of expansive applications of the protective principle abound. In this Part, I trace some of these exercises of protective jurisdiction: first, to illustrate their impact on state sovereignty, individuals' interests, and international relations; and second, to support my argument that they are inconsistent with international legal standards.

In particular, sweeping applications of the protective principle have come to life within recent developments in Chinese law.[85] The scale of the principle's rise within the Chinese legal system is unique, and it helps demonstrate what is at stake in aggressive applications of protective jurisdiction. Thus, I use China as this Part's primary case study, for it provides the best window into

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82. *See* GALLANT, *supra* note 11, at 409; Ryngaert, *supra* note 53, at 22 ("In essence, international law leaves this to States, as in the exercise of their sovereignty, they should be allowed to define national security for themselves.").

83. *See* Heath, *supra* note 12, at 1050 (quoting Roger P. Alford, *The Self-Judging WTO Exception*, 2011 UTAH L. REV. 697, 699).

84. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 412 (AM. L. INST. 2018).

85. *See infra* Section II.B and accompanying notes.

understanding the implications of protective jurisdiction today, and one that remains relatively unexplored in the literature.

A. Gradual Expansion

Formulations of protective jurisdiction existed as early as the thirteenth and fourteenth centuries.[86] Yet its most controversial uses did not begin until centuries later.[87] When lawyers met in 1935 for the Harvard Research Project — a global effort to produce a draft convention on international jurisdiction — they noted the troubling trend of using protective jurisdiction to clamp down on individual liberties around the world.[88]

The Project likely had several examples in mind. In 1890, Germany convicted a French national of sedition for shouting "Vive la France" while *in* France, in part because the shout could be "heard" in Germany.[89] After World War I, French courts found noncitizens guilty for "correspondence" with enemy states during the war, meaning that these individuals had simply supported their own governments, in whose territory they resided, during the war.[90] And among other similar provisions across Europe, Italy's Penal Code of 1930 "criminalized speech that in any way injured Italy's interests wherever globally it occurred," and however Italy defined these interests.[91]

Ideological conceptions of threat that took hold during World War II and the Cold War further undergirded fascist and socialist states' application of the principle.[92] During the Cold War, Eastern Bloc governments even exercised a kind of vicarious protective jurisdiction, applying the protective principle to defend the interests of brethren states across the communist world.[93] The Soviet Union, for example, claimed jurisdiction over any activity that it deemed to be "injurious to the security of other communist states."[94]

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86. *See* Bialostozky, *supra* note 7, at 625.

87. *See id.* at 631.

88. *See Draft Convention*, *supra* note 19, at 539, 541.

89. GALLANT, *supra* note 11, at 412 n.22.

90. *Id.* at 433.

91. Bialostozky, *supra* note 7, at 631-32, 632 n.55.

92. *See* Akehurst, *supra* note 76, at 158.

93. *See id.* at 158-59 ("Communist countries claim jurisdiction over offences against the security of other Communist countries, and in 1958 the Supreme Court of Bavaria upheld a conviction for revealing (in a foreign country) secrets about allied forces stationed in West Germany. The rationale for this jurisdiction is that the interests of the members of an alliance are so united that an act which threatens one threatens all.").

94. Bialostozky, *supra* note 7, at 660.

In the twenty-first century, governments have applied protective jurisdiction to regulate a menu of new threats—some real, some more attenuated. The conceptual ballooning of security interests in the aftermath of the September 11, 2001, attacks has facilitated the rise of these new uses of protective jurisdiction.[95]

For example, the United States has justified its extensive antiterrorism laws under the protective principle. These laws criminalize the act of providing funding to foreign terrorist organizations (FTOs), and also, as the U.N. lawyer Noah Bialostozky has observed, offenses like training members of FTOs to "use international law to resolve disputes peacefully" or "petition the United Nations . . . for relief."[96] What is troubling about such applications of extraterritoriality is that the United States has also gone to great lengths to enforce them, using "renditions" to gain custody of foreign nationals—a means similar to extradition but without many of the legal protections.[97]

Even more recently, the United States has defended the application of far-reaching economic sanctions—against both target states *and* third-party actors—under the protective principle. So-called "secondary sanctions" have become prevalent since the development of the sanctions regime against Iran, and they now serve as "one of the main sources of pressure against nations such as Cuba, North Korea, Russia, and Venezuela."[98] Under these sanctions regimes, the United States not only targets the state whose behavior it seeks to change through the sanctions, but it also requires other governments to embargo the target state as well.[99] And the U.S. government is willing to enforce these

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95. Bruno Simma & Andreas Th. Müller, *Exercise and Limits of Jurisdiction*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 134, 144 (James Crawford & Martti Koskenniemi eds., 2012).

96. *See* Bialostozky, *supra* note 7, at 634. As Noah Bialostozky notes, United Nations Security Council Resolution 1373 (discussed further in Part IV) authorizes the criminalization of the provision of material resources to foreign terrorist organizations "within" the United States, but it does not on its own authorize extraterritorial criminalization. *Id.* at 634 n.66.

97. Simma & Müller, *supra* note 95, at 154; *see also* Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RSRV. J. INT'L L. 309, 317 (2006) ("[E]xtralegal means of detention and expulsion are deeply problematic outside the normal processes of immigration or U.S. extradition law."); Sadat, *supra*, at 322 ("[T]he seizure and rendition of suspects may be characterized as a 'forced disappearance' under international human rights law, by which an individual is abducted by persons acting on behalf of or with the acquiescence of the State, followed by a denial (or obfuscation) of information or other forms of accountability by State authorities.").

98. Pardis Gheibi, *The Rise and Fall of U.S. Secondary Sanctions: The Iran Outcasting and Re-Outcasting Regime*, 50 GA. J. INT'L & COMPAR. L. 389, 391 (2022).

99. *See* Patrick C.R. Terry, *Enforcing U.S. Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?*, 30 WASH. INT'L L.J. 1, 5 (2022) ("Unilateral secondary sanctions differ from unilateral primary sanctions in that secondary sanctions are not

requirements through its criminal-justice system. In 2016, the United States arrested a Turkish national vacationing in Florida for being involved in a business deal with Iran—business he conducted while in Turkey and in accordance with Turkish law.[100]

Many governments believe the United States's secondary-sanctions regimes go too far. In the Iran case, governments have criticized the reapplication of sanctions in 2018, when the United States imposed them in defiance of a multilateral agreement it had helped negotiate just years before.[101] And when the United States threatened sanctions on foreign companies participating in a Nord Stream 2 project, European governments issued a clear statement of protest: "We cannot accept the threat of extraterritorial sanctions, illegal under international law, against European companies that participate in developing European energy supplies."[102]

Controversial extensions of protective jurisdiction go beyond counterterrorism and sanctions measures. In Europe, for example, Germany has prosecuted the narcotics trade outside of its borders.[103] Some U.S. courts, likewise, have applied antidrug statutes extraterritorially to non-American vessels on the high seas, based on the notion that drug trafficking outside U.S. waters threatens U.S.

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directed against the target state but rather against individuals and businesses in third states (and possibly now also third states themselves) that continue to trade with the primary target state.").

100. *See id.* at 6-7.

101. *See id.* at 22-23 ("This tendency to interfere in other States' foreign policies is also evident in the case of Iran: all the other signatories of the JCPOA [Joint Comprehensive Plan of Action] wish to uphold the agreement, which the United States has renounced. Therefore, the United Kingdom, Germany, France, the European Union, China, and Russia are encouraging their business communities to strengthen commercial ties with Iran in order to ensure Iran's continuing compliance with the agreement. Meanwhile, the United States is attempting to undermine these States' foreign policy choices by threatening their businesses and citizens with the prosecution, forcing them to comply with U.S. policy decisions." (footnotes omitted)).

102. *Id.* at 18. Even prominent American lawyers, such as Jeffrey A. Meyer (who later became a district-court judge), have noted that the American government is "prone to exaggerated claims that sanctions measures can be justified" by protective-jurisdictional theories, "even when these measures aim to redress non-military human rights abuses or other anti-democratic conduct that occurs in distant lands and that has no real prospect of jeopardizing the safety or of causing any substantial effect in the United States." Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 909 (2009). Judge Meyer served as a district-court judge in Connecticut from 2014 until his death in 2025, though he wrote this article before he was appointed to the bench.

103. *See* Bialostozky, *supra* note 7, at 632 (citing Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 72, at 103, 108).

security.[104] Similarly, in a high-profile case in 2010, the U.S. Department of Justice obtained extradition of a Russian national on extraterritorial drug charges, despite the case's strained connection to America—the defendant's detention in Connecticut being the first time he had stepped foot on American soil.[105]

Across the world, Russia's modern criminal code, echoing similar statutes during the Cold War, subjects foreign citizens to criminal responsibility for any foreign act that could harm Russian interests.[106] And recently, in January 2024, the Thai Constitutional Court ruled unconstitutional efforts to amend Thailand's "lèse majesté" law, which criminalizes criticism of the Thai Crown wherever it is levied and by whomever levies it.[107] Not merely dead-letter law, Thailand has prosecuted non-nationals, including U.S. citizens, for violating it within their *own* countries.[108]

B. The Protective Principle in Chinese Law

The Chinese government has watched these international uses of protective jurisdiction closely.[109] Seeking to build on them, it has begun to invoke systematically the protective principle in a growing number of statutes. Professors Man Yip and Zhengxin Huo, legal scholars in Singapore and China, respectively,

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104. *See, e.g.*, United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993); United States v. Vilches-Navarrete, 523 F.3d 1, 21-22 (1st Cir. 2008) (Lynch & Howard, JJ., opinion of the court in part and concurring in part) ("Under the 'protective principle' of international law, Congress can punish crimes committed on the high seas regardless of whether a vessel is subject to the jurisdiction of the United States."); *cf.* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (applying weapons-trafficking statutes extraterritorially).

105. United States v. Umeh, 762 F. Supp. 2d 658, 660-61, 666 (S.D.N.Y. 2011), *aff'd*, 527 F. App'x 57 (2d Cir. 2013).

106. GALLANT, *supra* note 11, at 412 ("Today, Russia purports to treat all crimes against Russian interests or the interests of its nationals as subject to its jurisdiction, no matter where they occur. The statute treats all interests protected by Russia's domestic criminal law as protected against foreigners acting outside the country through the protective principle." (footnote omitted)).

107. *See* Panu Wongcha-um & Panarat Thepgumpanat, *Thai Court Orders Election Winners to Abandon Plan to Change Royal Insults Law*, REUTERS (Jan. 31, 2024, 6:02 AM EST), https://www.reuters.com/world/asia-pacific/thai-court-rule-election-winners-bid-change-royal-insults-law-2024-01-31 [https://perma.cc/6U7H-STF9].

108. *See Joe Gordon, American Citizen, Sentenced in Thailand for Defaming Royal Family*, ABC 7 NEWS (July 12, 2015, 6:37 PM), https://wjla.com/news/nation-world/joe-gordon-american-citizen-sentenced-in-thailand-for-defaming-royal-family-70079 [https://perma.cc/CD68-5P8K].

109. *See, e.g.*, Press Release, Gov't of the H.K. Special Admin. Region, The Jurisdiction of Hong Kong National Security Law Accords with International Norms and Double-Standard Criticisms Are for an Ulterior Motive (July 6, 2023, 11:29 PM HKT), https://www.info.gov.hk/gia/general/202307/06/P2023070600680.htm [https://perma.cc/ZUX3-C58P].

described the trend bluntly: "[N]otwithstanding its vociferous protests against the USA, China is . . . extending its domestic laws over territorial borders, tracing the steps of the USA."[110] The effect has been to create an integrated system of protective jurisdiction with a scope that is unparalleled in the world, and which illustrates the costs of aggressive extraterritoriality.[111]

Notably, the Chinese government's applications of the protective principle have occurred against the backdrop of its broader push, since 2019, to develop an extraterritorial system of law.[112] This effort reflects Beijing's desire to use law as an instrument in its foreign-policy arsenal to protect Chinese interests in a destabilized world. As the Chinese foreign minister, Wang Yi, put it: "[W]e must . . . dare to fight . . . including by [use] of legal weapons, constantly enriching and improving the legal 'toolbox' for our external struggles" and "safeguarding national interests through legal means . . . ."[113]

As the People's Republic of China (PRC) has developed extraterritorial provisions in its laws, scholarly and policy communities have taken notice.[114] Yet no

110. *See* Zhengxin Huo & Man Yip, *supra* note 78, at 330.

111. The closest in scale is probably the American legal system. One difference, however, is that U.S. courts tend to apply the protective principle to statutes on an ad hoc basis. *Cf.* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (demonstrating the ad hoc nature of U.S. extraterritorial jurisdiction by discussing the existence of a circuit split between the Ninth Circuit and the Third Circuit on their approaches to extraterritorial application of the Maritime Drug Law Enforcement Act). In China, by contrast, the legislature has written the protective principle into statutes explicitly, and it has done so in seemingly relentless succession since 2019. *See* Rsch. Off. of the Legal Affs. Comm. of the Standing Comm. of the Nat'l People's Cong., *Strengthening Legislation in Foreign-Related Fields Accelerate the Construction of a Complete, Coherent, and Supporting Foreign-Related Legal and Regulatory System*, NAT'L PEOPLE'S CONG. PEOPLE'S REPUBLIC CHINA (June 1, 2023) (translated by author from Mandarin Chinese) (original and translation on file with author), https://www.npc.gov.cn/c2/c30834/202306/t20230601_429815.html [https://perma.cc/22S4-YWX5]; *see also* Jacques deLisle, *The Chinese Model of Law, China's Agenda in International Law, and Implications for Democracy in Asia and Beyond*, *in* DEMOCRATIZATION, NATIONAL IDENTITY AND FOREIGN POLICY IN ASIA 38, 50 (2021) (discussing China's adoption of a National Security Law in Hong Kong).

112. *See* Rsch. Off. of the Legal Affs. Comm. of the Standing Comm. of the Nat'l People's Cong., *supra* note 111. *See generally* deLisle, *supra* note 111 (discussing developments in Chinese foreign-relations law).

113. *See* Wang Yi, *Implementing the Foreign Relations Law, Providing a Strong Legal Foundation for Great-Power Diplomacy with Chinese Characteristics in the New Era*, POL. PEOPLE (June 29, 2023, 6:01 AM) (translated by author from Chinese) (original and translation on file with author), https://politics.people.com.cn/n1/2023/0629/c1001-40023485.html [https://perma.cc/U7EP-8F4C].

114. The U.S. Economic and Security Review Commission released a report detailing many of China's recently promulgated extraterritorial provisions. *See 2023 Report to Congress*, U.S.-CHINA ECON. & SEC. REV. COMM'N 175-77 (Nov. 2023), https://www.uscc.gov/sites/default

study has taken a comprehensive look at how the Chinese government justifies its extraterritorial laws under the protective principle.[115] This is despite the fact that the Chinese government has identified the protective principle as a critical part of its legal arsenal.[116] One Chinese scholar called it the "best legal tool" for China to advance its interests.[117]

Accordingly, the Chinese government has engaged in a flurry of activity to create law that is extraterritorially applicable under protective jurisdiction. To date, China's legislature has enacted at least twelve such statutes, most since 2019. These include Article Eight of the Chinese Criminal Code (amended in 2021),[118] the Hong Kong National Security Law (2020),[119] Anti-Organized Crime Law (2021),[120] Antiterrorism Law (amended in 2018),[121] Cyber Security

/files/2023-11/2023_Annual_Report_to_Congress.pdf [https://perma.cc/X6GJ-7DMK]. Scholars within China have also provided an inside view of the developments. *See, e.g.*, Zhengxin Huo & Man Yip, *supra* note 78, at 328.

115. The closest is an excellent study on extraterritoriality by Professors Zhengxin Huo and Man Yip, but their article devotes just two pages to the protective principle. *See* Zhengxin Huo & Man Yip, *supra* note 78, at 338-39.

116. *See* Rsch. Off. of the Legal Affs. Comm. of the Standing Comm. of the Nat'l People's Cong., *supra* note 111.

117. *See* Wei Leijie, *The Nature, Manifestations, and Countermeasures of Legal Imperialism*, PEOPLE'S F. (Aug. 16, 2021) (translated by author from Mandarin Chinese) (original and translation on file with author), https://www.rmlt.com.cn/2021/0816/621978.shtml [https://perma.cc/XHV8-3P28].

118. Criminal Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, rev'd Dec. 26, 2020, effective Mar. 1, 2021), art. 8, https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP]; *see, e.g.*, Lu Zhi'an, *American Spy Sentenced According to Law*, CHINA DAILY (Sept. 11, 2023), https://www.chinadaily.com.cn/a/202309/11/WS64fefe86a310d2dce4bb5236.html [https://perma.cc/2KAS-VA25].

119. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

120. Anti-Organized Crime Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 24, 2021, effective May 1, 2022), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

121. Antiterrorism Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 2015, rev'd Apr. 27, 2018, effective Apr. 27, 2018), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

Law (2017),[122] Export Control Law (2020),[123] Biosafety Law (2020),[124] Personal Information Protection Law (2021),[125] Securities Law (amended in 2019),[126] Counterespionage Law (amended in 2023),[127] and Data Security Law (2021).[128] The newly promulgated Foreign Relations Law, which went into effect in 2023,[129] also codifies the government's legal right to exercise extraterritorial jurisdiction under the protective principle.[130]

Despite efforts by the PRC's academic community to downplay the enforceability of these measures,[131] the Chinese government has announced its intention to apply such laws as widely as it needs and against anyone who violates them.[132] The state has brought the vast majority of prosecutions under these

122. Cyber Security Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 6, 2016, effective June 1, 2017), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

123. Export Control Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective Dec. 1, 2021), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

124. Biosafety Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective Apr. 15, 2021), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

125. Personal Information Protection Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

126. Securities Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1998, rev'd Dec. 28, 2019, effective Mar. 1, 2020), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

127. Counterespionage Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, rev'd Apr. 26, 2023, effective July 1, 2023), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

128. Data Security Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective Sept. 1, 2021), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

129. Foreign Relations Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 2023, effective July 1, 2023), https://flk.npc.gov.cn/fl.html [https://perma.cc/G83T-JDCP].

130. Chen Qingqing & Xing Xiaojing, *China Passes Its First Foreign Relations Law in Key Step to Enrich Legal Toolbox Against Western Hegemony*, GLOB. TIMES (June 28, 2023, 10:38 PM), https://www.globaltimes.cn/page/202306/1293344.shtml [https://perma.cc/2T5S-P5L3].

131. *See, e.g.*, Lam Hing-chau & Qin Jing, *The Protective Jurisdiction Under the Hong Kong National Security Law: Legitimacy and Impact*, 21 CHINESE J. INT'L L. 115, 132 (2022) (sharing the perspective of academics affiliated with and funded by the People's Republic of China that "the practical effect of Article 38 of the HK National Security Law will likely be limited").

132. *See, e.g.*, Press Release, *supra* note 109 ("It is the inherent right and obligation of our Country as a sovereign State to enact the Hong Kong National Security Law as well as to exercise

laws against Chinese citizens on Chinese soil.[133] Yet PRC officials have claimed that activities abroad, such as protesting near the Chinese embassy in London, fall under the jurisdiction of Chinese law.[134] The government has also issued numerous arrest warrants for alleged overseas violators.[135] And the state has not hesitated to arrest those who committed alleged criminal acts abroad and proceeded to visit the mainland.[136] As some observers have noted, the risk of being taken into custody applies not only in China, but in "any country where the rule of law is weak and the government is eager to curry favor with Beijing."[137] These

prescriptive extraterritorial jurisdiction over the relevant offences endangering national security . . . . It is the constitutional duty of the HKSAR to safeguard national security and the HKSAR Government would definitely spare no effort to take all necessary measures in accordance with the law and to pursue the liability of those who have allegedly committed offences under the Hong Kong National Security Law outside Hong Kong.").

133. There is limited data comparing prosecutions brought against citizens versus those brought against individuals acting abroad, but the sheer number of prosecutions that have been brought against Chinese or Hong Kong nationals for their territorial acts suggests that these domestic prosecutions comprise the majority of prosecutions under the extraterritorial laws. *See, e.g.*, James Pomfret & Jessie Pang, *Jailing of 45 Hong Kong Democrats in National Security Trial Draws Criticism*, Reuters (Nov. 19, 2024, 3:35 PM EST), https://www.reuters.com/world/asia-pacific/hundreds-queue-sentencing-47-hong-kong-democrats-2024-11-19 [https://perma.cc/W4MZ-79E9] (describing prosecutions under the 2020 National Security Law).

134. *China's Ambition of Extraterritorial Jurisdiction and the American Response*, Colum. J. Transnat'l L. Bull. (Mar. 4, 2021), https://www.jtl.columbia.edu/bulletin-blog/chinas-ambition-of-extraterritorial-jurisdiction-and-the-american-response [https://perma.cc/X82W-45TR].

135. *See, e.g.*, Tyler Sonnemaker, *A US Citizen Reportedly Had a Warrant Issued for His Arrest by Hong Kong Authorities Under Its Strict New National Security Law*, Bus. Insider (Aug. 2, 2020, 8:34 PM EDT), https://www.businessinsider.com/us-citizen-hong-kong-arrest-warrant-issued-new-security-law-2020-8 [https://perma.cc/2SL9-HJAU]; *Statement on the Arrest Warrant Issued by the Hong Kong Government Against Staff Member Joey Siu,* Nat'l Democratic Inst. (Dec. 14, 2023), https://www.ndi.org/publications/statement-arrest-warrant-issued-hong-kong-government-against-staff-member-joey-siu [https://perma.cc/949S-KF7R]; Lau Siu-kai, *Warrants for Eight Fugitives: The Political Significance*, China Daily (July 4, 2023, 11:14 PM), https://www.chinadailyhk.com/article/339082 [https://perma.cc/QM2Y-KK7J].

136. *See* James Griffiths, *How This Long Island Man Ended Up in Chinese Prison on Espionage Charges*, CNN (June 26, 2020, 5:58 AM EDT), https://www.cnn.com/2020/06/25/asia/us-china-detention-li-kai-intl-hnk/index.html [https://perma.cc/6PH6-6WWT].

137. Sarah Cook, *Analysis: Through Hong Kong, Beijing Funnels Its Repression to the World*, Freedom House: China Media Bull. 2-3 (July 2020), https://freedomhouse.org/sites/default/files/2020-07/Eng_FH_CMB_2020_July_146.pdf [https://perma.cc/D9BV-UBQC]; *see also* Gui Minhai*, The Swedish Publisher Deprived of His Freedom for 3,000 Days*, Reporters Without Borders (Mar. 1, 2024), https://rsf.org/en/gui-minhai-swedish-publisher-deprived-his-freedom-3000-days [https://perma.cc/P76N-Z35M] (providing an example of a Swedish citizen and journalist who was abducted by likely Chinese state actors in Thailand and transported to China based on an alleged extraterritorial violation of Chinese espionage law).

credible threats of enforcement have created "chilling" effects around the world, even for those who have no intention of going to China.[138] Independent of enforceability, the coordinated legal arguments the Chinese government has advanced to justify its use of protective jurisdiction — which have gained support in other countries[139] — should give any international lawyer pause.

Nowhere are the stakes higher than with the Hong Kong National Security Law, which local authorities have enforced in conjunction with the central government in Beijing. The law criminalizes any act of "secession," "subversion," "terrorism," and "collusion with foreign or external forces," each punishable by a maximum sentence of life in prison.[140] Article 38, which has attracted global attention, stipulates that the law applies to offenses committed "from outside the Region by a person who is not a permanent resident of the Region."[141] Hong Kong and central authorities have publicly justified this provision under the protective principle,[142] and they have breathed life into it by taking steps to enforce it against overseas violators.[143]

The National Security Law provides a real-world manifestation of the problematic nature of the protective principle's current formulation, as outlined in Part I: the potentially limitless nature of a state's essential interests, the subjectivity involved in defining such interests, and the lack of an effects requirement. First, the law demonstrates how a state can define its interests to be implicated by an increasing amount of overseas conduct, even that which lacks a clear nexus with the state's protection. Explicitly, officials have defended the application of

138. *See* Javier C. Hernández, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong's Security Law Explained*, N.Y. Times (Oct. 11, 2021), https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html [https://perma.cc/G6TA-NFJP]; Jessie Pang, *Hong Kong Police Expand Dragnet on Overseas Pro-Democracy Activists*, Reuters (Dec. 15, 2023, 2:06 AM EST), https://www.reuters.com/world/china/hong-kong-police-issue-arrest-warrants-5-more-overseas-activists-2023-12-14 [https://perma.cc/C4CE-YRV4].

139. *See* Dave Lawler, *The 53 Countries Supporting China's Crackdown on Hong Kong*, Axios (July 2, 2020), https://www.axios.com/2020/07/02/countries-supporting-china-hong-kong-law [https://perma.cc/DG3K-3P34].

140. *In Full: Official English Translation of the Hong Kong National Security Law*, H.K. Free Press (July 1, 2020), https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law [https://perma.cc/DTP3-5J2M] (providing an English translation of the Hong Kong National Security Law); *Hong Kong National Security Law: What Is It and Is It Worrying?*, BBC (Mar. 18, 2024), https://www.bbc.com/news/world-asia-china-52765838 [https://perma.cc/BPK2-APB8].

141. *Response to Media Query by Spokesperson of Chinese Consulate General in Auckland on Hong Kong Issues*, Consulate-Gen. of the People's Republic of China in Auckland (July 14, 2020) [hereinafter *Spokesperson Response*], https://auckland.china-consulate.gov.cn/eng/zlgxw/202007/t20200714_155061.htm [https://perma.cc/3W6H-EHKS].

142. *See id.*

143. Lau Siu-kai, *supra* note 135.

the protective principle in the National Security Law to advance the interests of "national sovereignty, unity and territorial integrity."[144]

The existing case law, however, suggests that these interests will be interpreted broadly to stretch beyond the outer limits of these categories. In one case, for example, a Hong Kong court convicted a student, Mika Yuen Ching-ting, for posting prodemocracy content on her social media while in Japan.[145] The court admitted the posts could have only a minimal impact on Hong Kong: she had few followers and her posts attracted little attention.[146] Still, it denied her petition for a lighter sentence, reasoning that her posts constituted a threat to "the country's territorial integrity," for they might "subtly incite" those who could or would—at some time in the future—engage in "separatist" activities.[147] Notably, in framing her conduct as a threat to territorial integrity, it did not matter to the court that the risk posed by such separatist activities was hypothetical; territorial integrity was grasping enough an interest to be threatened by potential conduct alone.[148]

Second, the government has argued that it has sole discretion to define the interests it seeks to defend under the National Security Law, a position that further expands the law's reach. Officials have noted that the protective principle allows nations to regulate threats irrespective of whether "such acts are punishable under the domestic law in the place of commission."[149] This includes

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144. *See, e.g.*, *Presentation of Ms. Teresa Cheng, SC Secretary for Justice "Unpacking Hong Kong's National Security Law" Webinar Organised by AAIL and CDRF*, H.K. Dep't of Just. 2 (Sept. 25, 2020), https://www.doj.gov.hk/en/community_engagement/speeches/pdf/sj20200925e1.pdf [https://perma.cc/VV8V-WA95].

145. *See* Jessie Pang, *Hong Kong Student Jailed for 2 Months Under Sedition over Social Media Posts in Japan*, Reuters (Nov. 3, 2023), https://www.reuters.com/world/asia-pacific/hong-kong-student-jailed-2-months-under-sedition-over-social-media-posts-japan-2023-11-03 [https://perma.cc/N4Y5-J5RN].

146. *See id.*

147. Hong Kong v. Yuen Ching-ting (香港特別行政區訴袁靜婷), WKCC 2602/2023, at 6 (W. Kowloon Magis. Ct. Nov. 3, 2023) (Legal Reference System) (H.K.) (translated by author from Mandarin Chinese) (original and translation on file with author).

148. *Id.* The case itself did not end up turning on the extraterritorial nature of Yuen Ching-ting's conduct, for her lawyer did not pursue the arguments about extraterritoriality. Significantly, Mika Yuen Ching-ting is also a citizen of Hong Kong, *see* Pang, *supra* note 145, so presumably, if her lawyer had pursued this line of argument, the court would rely on the nationality principle in addition to the protective principle.

149. H.K. Dep't of Just., *National Security Law Legal Forum: Security Brings Prosperity, Proceedings*, Gov't of H.K. Spec. Admin. Region 252-53 (July 5, 2021), https://www.doj.gov.hk/tc/publications/pdf/NSL_Security_Brings_Prosperity_e_c.pdf [https://perma.cc/X3GE-7GNB] ("That [the protective principle] makes [it so] the acts committed by foreigners against a state's security in a foreign country can be penalised by the infringed state in

instances, in the extreme, where the territorial state "approv[es] or support[s]" the conduct.[150] As Chinese academics have argued, states are "entitled to determine the interests they regard as 'vital,'" for a state cannot look to other governments to do so themselves.[151] In effect, the "unaccountable sovereign domain"[152] of these self-defined interests allows the Chinese government to craft them free from international legal limits.

Third, the lack of an effects requirement contributes to the National Security Law's regulation of extraterritorial conduct with a tenuous connection to China's essential interests. The Chinese government defends its use of the protective principle by noting that it can be applied without needing to prove "actual or intended" effects on its territory.[153] Only without an effects requirement could officials say, for example, that overseas democracy advocates violated the law, without showing that their advocacy could be ascertained by people in Hong Kong.[154] Similarly, the lack of an effects requirement justifies the government's issuing arrest warrants for individuals hundreds of miles from Hong Kong.[155]

Because the Chinese government has defended its practices under international law,[156] this legal guise provides cover for other countries to support Beijing in its efforts to enforce the National Security Law. As one Chinese consulate put it, under the protective principle, it is "consistent with international law as well as the provisions of criminal laws of many countries" for the Chinese government to hold responsible those who "conduct activities that endanger . . . national security . . . no matter where they are."[157] This legal justification may explain why, though the United States and United Kingdom suspended their extradition agreements with Hong Kong after the law took effect, other countries, including Portugal, the Czech Republic, South Korea, India, the Philippines, Singapore, South Africa, and Sri Lanka, have kept theirs in force.[158]

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accordance with its own criminal law, regardless of whether such acts are punishable under the domestic law in the place of commission and without the requirement of double punishability." (statement of Professor Huang Feng)).

150. *Id.* at 252.

151. *See* Lam Hing-chau & Qin Jing, *supra* note 131, at 118, 131.

152. *See* Heath, *supra* note 12, at 1050 (quoting Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 699).

153. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 412 n.1 (AM. L. INST. 2018) (providing support for the Chinese government's position).

154. *See China's Ambition of Extraterritorial Jurisdiction and the American Response*, *supra* note 134.

155. *See, e.g.*, Chu, *supra* note 1.

156. *See, e.g.*, *Spokesperson Response*, *supra* note 141.

157. *Id.*

158. *See No Extradition to Hong Kong*, H.K. WATCH, https://www.hongkongwatch.org/extradition [https://perma.cc/R7BJ-GA7R].

Notably, countries like Cambodia, which have publicly supported the law, have couched their support in legal terms. As Deputy Prime Minister of Cambodia Hor Namhong argued, China has "full legal rights" to legislate to protect China's interests through the National Security Law.[159]

This international support for China's application of the Hong Kong National Security Law belies its tenuous status in international law. One would be hard-pressed to find a lawyer of, say, the International Law Commission or the 1935 Harvard Research Project who would sign off on the law as a permissible application of the protective principle. This case study suggests, however, that there is limited utility in appealing to a subjective standard of self-protection—currently the only limit on the protective principle, and one that governments have discretion to define as they wish—to delineate the protective principle's permissible applications. Certainly, one can object to the National Security Law according to substantive human-rights principles, but governments should also be able to object to it based on the international law of *jurisdiction*.

Additionally, the Hong Kong National Security Law is part of a larger network of laws that the Chinese government applies extraterritorially under the protective principle. Though the National Security Law is unique both in the amount of international attention it has received and in the number of prosecutions it has produced, the way the Chinese government has defended it is not.

Beijing has marshaled similar legal arguments in support of many of its other recently promulgated extraterritorial provisions. When Chinese officials defended the Data Security Law's extraterritorial provision, which imposes strict regulations on how companies manage Chinese state and economic data, they noted that it falls within the "internationally accepted principle of protective jurisdiction."[160] This principle gives China "the right to take measures to safeguard" its interests through international application of its laws.[161] Similarly, Chinese scholars have defended the extraterritorial article of the Anti-Foreign Sanctions Law—which operates as a blocking statute, retaliatory-sanctions law,

159. *See Interview: National Security Law Essential for HK's Prosperity: Cambodian Deputy PM*, Xinhua (May 28, 2020), https://www.xinhuanet.com/english/2020-05/28/c_139094606.htm [https://perma.cc/K9LG-GE7V]; *see also* Jennifer Staats & Rachel Vandenbrink, *Beijing Builds Global Support for Draconian Hong Kong Law*, U.S. Inst. Peace (July 16, 2020), https://www.usip.org/publications/2020/07/beijing-builds-global-support-draconian-hong-kong-law [https://perma.cc/9GEN-2669] (stating that, by July 2020, "more than 70 countries had offered support" for the new Hong Kong law).

160. *See* Trade Policy Review Body, *Trade Policy Review: China, Minutes of the Meeting*, at 18, WTO Doc. No. WT/TPR/M/415/Add.1/Rev.1 (Jan. 17, 2022).

161. *Id.*

and proactive-sanctions law all in one[162]—with reference to the protective principle. They defend the law as necessary to protect China from "restrictive" economic measures viewed as threatening to national interests.[163] Finally, one report justifies the extraterritorial application of China's Securities Law—part of a "zero tolerance" crackdown on "irregularities" in overseas securities markets—in terms of the protective principle,[164] since these financial activities could "disrupt the market order" in China and "damage the legitimate rights and interests" of its investors.[165] In essence, the PRC has transformed the protective principle into a vehicle to internationalize many of its domestic legal commitments.

C. Impact on State Sovereignty, Individual Interests, and International Stability

China's development of the protective principle illustrates the impact aggressive exercises of protective jurisdiction have on state sovereignty, individuals' interests, and international relations. Though the extent to which the Chinese government has exploited the protective principle is unique, the principle would raise similar concerns in the hands of *any* government. The fact that other governments have demonstrated willingness to recognize China's uses of the protective principle also speaks to the real potential that they adopt similar applications, too.[166]

The widespread adoption of these practices threatens to undermine state sovereignty and the liberties of individual citizens, as foreshadowed in Part I. When a state extends its statutes into a foreign state, the right of the foreign state to create its own rule of law is called into question, most dramatically when the foreign state and the territorial state have competing conceptions of justice. For example, where conduct that the foreign state's law prohibits extraterritorially encapsulates a right that the territorial state protects as a cornerstone of its law—such as freedom of speech—the territorial state becomes unable to guarantee a

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162. *See* Katja Drinhausen & Helena Legarda, *China's Anti-Foreign Sanctions Law: A Warning to the World*, MERICS (June 24, 2021), https://merics.org/en/comment/chinas-anti-foreign-sanctions-law-warning-world [https://perma.cc/2544-R3HN].

163. *See, e.g.*, Ziwen Ye, *The Extraterritorial Effect of the Anti-Foreign Sanctions Law on the People's Republic of China*, 12 CHINESE STUD. 169, 170-71 (2023).

164. Allen Fu, Sophia Feng & Hanjie Chen, *China: New Zero-Tolerance Crackdown on Securities Market Crimes and Irregularities*, GLOB. INVESTIGATIONS REV. (Dec. 7, 2023), https://globalinvestigationsreview.com/guide/the-guide-international-enforcement-of-the-securities-laws/third-edition/article/china-new-zero-tolerance-crackdown-securities-market-crimes-and-irregularities [https://perma.cc/34GD-FEDY].

165. *See* Rsch. Off. of the Legal Affs. Comm. of the Standing Comm. of the Nat'l People's Cong., *supra* note 111.

166. *See, e.g.*, Lawler, *supra* note 139.

liberty fundamental to its public order. The conflict between the Hong Kong National Security Law's criminalization of political advocacy, on the one hand, and liberal-democratic states' protection of such advocacy, on the other, provides a vivid example. While states like the United States might simply ignore the application of such laws within its borders, others, particularly ones that depend on the goodwill of the Chinese government, have much less ability to do so. They will thus be incapable of realizing their right to build their own rule of law.[167]

In these cases, states may ultimately be pressured to remake their rule of law to accord with a foreign state's, thereby internalizing the foreign state's domestic commitments. Governments, wary of the fact that their companies and citizens could be at risk of violating an extraterritorial provision in a foreign law, may simply enact the same laws within their territory—a bleak prospect, as noted by the Harvard Research Project, given that some of the laws discussed impose strict limits on individual liberty.[168]

On the other hand, if states do not remake their rules of law to accord with that of a state applying its law extraterritorially, individuals will bear the costs of existing in a complex lattice of disparate legal prohibitions. Samuel Chu, whose arrest warrant for violating the Hong Kong National Security Law was issued while he was in Los Angeles, is just one example.[169] Wherever they go, individuals could find themselves subject to the authority of an ever-growing number of criminal offenses and, if a state insists on enforcement, tied up in international fights over extradition.[170] Scholars have already tracked the rise of "mutual

167. *See* Anthony J. Colangelo, *Extraterritoriality and Conflict of Laws*, 44 U. PA. J. INT'L L. 1, 9-11 (2022) (emphasizing the "genius" of Ulrich Huber's third axiom of conflict of laws, which "countenanced the possibility of foreign law being applied, but left it to the state into whose territory the law was projected whether to apply it").

168. *See* Liao Shiping, *Administrative Law Enforcement from the Perspective of Extraterritorial Applicable Law System of China*, 2 ADMIN. L. REV. 55, 58-59 (2023) (translated by author from Mandarin Chinese) (original and translation on file with author); *see also Draft Convention*, *supra* note 19, at 539 (arguing that opposition to protective-interest legislation stems from "a fear that its practical application will lead to inadmissible results").

169. *See, e.g.*, Chu, *supra* note 1; Nury Turkel (@nuryturkel), X (formerly TWITTER) (Dec. 14, 2023, 5:16 PM), https://twitter.com/nuryturkel/status/1735423666110824465 [https://perma.cc/NYL2-Z55Y] (describing the arrest warrant and cash bounty issued for American Joey Siu by Hong Kong authorities).

170. *See* Tom Ginsburg, *Hong Kong's Crisis and the Turn Toward Extraterritorial Law*, PROMARKET (July 22, 2020), https://www.promarket.org/2020/07/22/hong-kongs-crisis-and-the-turn-toward-extraterritorial-law [https://perma.cc/P48D-SHRW] (noting "China's willingness to seek extradition of violators from foreign countries").

extradition" networks among authoritarian states, which facilitate prosecutions of individuals acting abroad.[171]

Though autocratic states' use of extradition poses unique criminal-justice concerns, the truth is that democratic governments are also guilty of using extradition law to target extraterritorial actors.[172] Take the Meng Wanzhou case. This dispute over the legal status of Huawei's chief financial officer neatly encapsulates the way applications of the protective principle can lead to international friction. Just over four years ago, one such application punctured relations between the United States, China, and Canada.[173] Underscoring the widespread nature of this problem, the culprit of the extraterritorial application was not China this time, but the United States.

The crisis started almost as soon as the American government submitted an extradition request for Meng, when she was in a Vancouver airport transferring planes.[174] The request followed the Department of Justice's formal announcement of financial-fraud charges against Meng for her business activities in China.[175] This allegation was intimately connected with the United States's sanctions regime against Iran—which the United States has defended under the protective principle.[176] When Canada authorized an extradition hearing, a diplomatic fallout ensued. Soon thereafter, the Chinese government retaliated by arresting two Canadians in China, in what some have deemed an act of "hostage

171. *See* Tom Ginsburg, *How Authoritarians Use International Law*, 31 J. DEMOCRACY 44, 50 (2020). Professor Tom Ginsburg has cited these extradition networks as a critical channel for the spread of "authoritarian international law," that is, the use of international legal tools to support authoritarian legal ends. *See* Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 223, 253 (2020).

172. *See, e.g.*, Andy Blatchford & Leah Nylen, *Trump's Comments About Huawei Exec's Arrest to Take Center Stage in Extradition Fight*, POLITICO (June 15, 2020, 11:55 AM EDT), https://www.politico.com/news/2020/06/15/trump-china-trade-deal-huawei-executive-extradition-319642 [https://perma.cc/8TNV-3TND] ("President Donald Trump's musings about a trade deal with China will be under a legal microscope Monday as lawyers for Huawei executive Meng Wanzhou formally allege her extradition case to the U.S. has been tainted by politics.").

173. *See* Mark Landler, Edward Wong & Katie Brenner, *Huawei Executive's Arrest Intensifies Trade War Fears*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2018/12/06/us/politics/huawei-meng-china-iran.html [https://perma.cc/KA45-5BYL].

174. Rhianna Schmunk & Liam Britten, *Huawei CFO Meng Wanzhou to Spend Weekend in Jail After Bail Hearing Adjourns*, CBC NEWS (Dec. 8, 2018), https://www.cbc.ca/news/canada/british-columbia/bail-hearing-huawei-cfo-1.4936150 [https://perma.cc/UQ5K-7A4L].

175. Superseding Indictment at 10-14, United States v. Huawei Techs. Co., No. 18-CR-457 (E.D.N.Y. Jan. 24, 2019).

176. *See* Schmunk & Britten, *supra* note 174; Julian Ku, *The Detention of Huawei's CFO Is Legally Justified. Why Doesn't the U.S. Say So?*, LAWFARE (Dec. 12, 2018, 3:18 PM), https://www.lawfaremedia.org/article/detention-huaweis-cfo-legally-justified-why-doesnt-us-say-so [https://perma.cc/YER6-ZAF8].

diplomacy."[177] The extradition crisis also slowed momentum in what were already tenuous trade talks between Washington and Beijing.[178]

What began as the United States's request to exercise jurisdiction over a nonnational spiraled into a yearslong diplomatic crisis. While it is tempting to view this crisis as exceptional, these tensions are a natural outgrowth of disputes over how a state can exercise its authority under the protective principle—and over whom.[179] As the former International Court of Justice (ICJ) president Judge Rosalyn Higgins put it: "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 rancour and chaos."[180]

D. The Problem in International Law

Of course, protective jurisdiction is understood to exact costs on other states' sovereignty and the liberty of their citizens, even at the risk of "rancour and chaos."[181] The protective principle is justified despite these costs because states have a right under international law to protect themselves from conduct that threatens their essential interests, conduct to which they are "genuinely connected." Accordingly, states' right to self-protection under the protective principle temporarily trumps an affected state's or individual's interests.

The examples in this Part, however, reveal cracks in this logic. Evaluating applications of the protective principle under the relevant standard—whether an extraterritorial activity a state seeks to regulate legitimately threatens its essential interests (thereby creating a "legal link" between the activity and the state)—is subjective. Yet the applications of the principle identified in this Part go beyond what could reasonably be defended as a threat to a state's essential interests. As China's attempts to prosecute individuals for social-media posts and the United

177. James Palmer, *Another Win for China's Hostage Diplomacy*, FOREIGN POL'Y (Sept. 28, 2021, 12:43 PM), https://foreignpolicy.com/2021/09/28/meng-wanzhou-michael-kovrig-spavor-release-china-canada-huawei [https://perma.cc/DRM3-ZEF3].

178. *See* Edward Wong, Katie Benner & Alan Rappeport, *U.S. Will Ask Canada to Extradite Huawei Executive*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/politics/meng-wanzhou-extradition.html [https://perma.cc/587P-S3XA] ("The Chinese Ministry of Foreign Affairs indicated Tuesday that Ms. Meng's fate would be taken into consideration as the trade talks proceed. Asked directly if the extradition would affect the negotiations, Hua Chunying, a spokeswoman for the Foreign Ministry, said, 'This case is a serious mistake and we urge the U.S. to immediately correct its mistake.'").

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

180. *Id.*

181. *Id.*

States's sweeping counterterrorism measures suggest, governments are using protective jurisdiction to regulate offenses that can be understood to threaten their essential interests only when such interests are interpreted in the broadest terms. Arguably, neither the functioning of the state's government nor the ability of the state to secure itself from violent attack is under threat in these examples. The state could survive, and continue to protect itself, even if it did not exercise jurisdiction over the act. In other words, there is no nexus, or genuine connection, between the state's regulation of the extraterritorial activity and the protection of its essential interests.

But this nexus—this genuine connection—is *required* for a state to exercise protective jurisdiction. This nexus represents the idea that the state is regulating extraterritorially out of a cognizable right to protect itself. When states apply the protective principle to regulate conduct with no reasonable connection to their essential interests, they improperly invoke this right,[182] infringing on other states' sovereignty and the liberty of their citizens—the two classes of interests identified in *Lotus*—without legal justification. In the words of *Lotus*, a state lacks "title" to exercise protective jurisdiction in these cases;[183] to return to Professor Brilmayer's framing, these are examples of intervention that we should not live with.[184]

Yet because the protective principle currently lacks an objective standard to evaluate whether a state is legitimately acting in self-protection or not, states—including China and the United States, or the Soviet Union and Nazi Germany decades ago—can continue to invoke it to advance nonessential interests. When they do, the practice of protective jurisdiction becomes increasingly divorced from the underlying logic of jurisdictional standards in international law. To guard against this abuse, the protective principle must be cabined more firmly within international law. The question, which the next Part takes up, is how to do so.

III. REFORMULATING THE PROTECTIVE PRINCIPLE

This Part proposes a prescriptive formula that can better guide states' applications of the protective principle and standardize these applications according to objective legal standards. The formula takes the form of a two-prong test.

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182. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407 (AM. L. INST. 2018).

183. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

184. *See* BRILMAYER, *supra* note 15, at 107-08 ("It cannot be the case that a state is prohibited from engaging in any actions that produce changes in another state, because in an interdependent world, virtually everything that one state does has impacts on the others. . . . [A] definition must specify what sorts of detrimental impact count as impermissible intervention.").

Each prong of the test clarifies both *when* international law should sanction the exercise of protective jurisdiction and *why*.

While proposing a legal test to limit states' exercises of jurisdiction in one of the most sensitive areas of state policy—the protection of states' essential interests—is a complicated undertaking, this test is firmly grounded in existing legal doctrine and theory. First, it builds on the requirement of a genuine connection that already exists in international law and is accepted by a diverse range of governments.[185] This makes the test derivable from existing legal doctrine. Second, the test uses criteria that are well vetted in existing legal tribunals, including the World Trade Organization (WTO) and the ICJ. Finally, as I will show, the proposed test limits protective jurisdiction by channeling the core insights of almost one hundred years of international law on jurisdiction, including from *Lotus* and the genuine-connection doctrine.

A. The Proposed Test

The fundamental goal of the test is to ensure that states exercise protective jurisdiction only when they have "legitimate interests" in self-protection at stake. In other words, the goal is to ensure that states regulate extraterritorial activity when it actively imperils their *essential* interests. Protective jurisdiction developed as a carve-out from territorial jurisdiction for discrete cases when states needed to protect their essential interests in another state, and it is this underlying justification that should determine its outer bounds. A state that exercises protective jurisdiction where there is no genuine connection between the foreign controversy and its essential interests oversteps these bounds.

Each prong of the proposed test puts forth a criterion, capable of being assessed objectively, that can best suggest whether there is a connection between what a state seeks to regulate and its essential interests. The first prong assesses whether there is a nexus between the *conduct* a state seeks to regulate and its essential interests based, primarily, on (1) the treatment of the conduct in other states' regulations[186] and (2) the content and structure of the regulation in question.[187] The second prong assesses whether there is a nexus between the individual *perpetrator* of a crime and the regulating state, according to several

185. *See* Liao Shiping, *The Extraterritorial Effect Clause in Chinese Law and Its Improvement: Basic Concepts and Ideas*, 1 CHINA L. REV. 52, 59 (2022) (translated by author from Mandarin Chinese) (original and translation on file with author) ("Both international practice and authoritative international law doctrines stipulate that the exercise of jurisdiction by a state requires a genuine and reasonable connection between the state and the object under its jurisdiction.").

186. *See Russia Traffic in Transit*, *supra* note 24, at 112 (discussing a case in which the trade panel looked to the practice of "other countries" to determine the legality of restrictions).

187. *See id.* at 32.

international-legal factors.[188] Both prongs of the test, both criteria, must be met in order for a state to exercise jurisdiction.

1. *Nexus Between the Act and the State's Essential Interests*

The first prong asks, *Does the extraterritorial conduct a state seeks to regulate actually pose a threat to its essential interests?*

A state should exercise jurisdiction over extraterritorial conduct only when the *conduct* actually threatens its essential interests—and, as a corollary, when a state's exercise of jurisdiction over a foreign act is "necessary" to protect these interests.[189] The criterion offered here, forming the first prong of the proposed test, provides an objective means to assess the relationship between extraterritorial conduct and a state's interests. It is adapted from international trade law, which has dealt with similar issues in an economic context.

In particular, litigation in the WTO's dispute-settlement body grapples with the relationship between a state's trade measures and its national security. Under the WTO Agreement's "national security exception," parties may implement restrictive trade measures—ordinarily prohibited under the Agreement—if they can prove the restrictive measures are "necessary" for their national security.[190] In evaluating whether the measures are necessary, WTO dispute panels consider whether there is a "nexus" between the restrictive trade measures and a state's national security.[191] The WTO panel asks whether the trade measure a state takes is actually "plausible" as a protection of its security, and specifically, whether there is a "close and genuine relationship of ends and means."[192] A WTO

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188. *See* García-Mora, *supra* note 16, at 569.

189. *See* Mann, *supra* note 15, at 46; García-Mora, *supra* note 16, at 587-88.

190. *See* Mona Pinchis-Paulsen, Kamal Saga & Petros C. Mavroidis, *The National Security Exception at the WTO: Should It Just Be a Matter of* When *Members Can Avail of It? What About* How*?*, 23 World Trade Rev. 271, 272-73 (2024) ("The text of GATT Article XXI states, 'Nothing in this Agreement' prevents a member from acting. The term 'nothing' confirms that members may choose from a wide array of instruments: increased tariffs, banned imports/exports from a specific source, subsidized protection, or exclusion of a particular source from privileges under behind-the-border policies available to its production.").

191. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 292, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) ("This requires that the challenged measure address the particular interest specified . . . and that there be a sufficient nexus between the measure and the interest protected.").

192. *See Russia Traffic in Transit*, *supra* note 24, at 41; Rep. of the Second Session of the Preparatory Comm. of the United Nations Conf. on Trade and Emp., at 20-21, U.N. Doc. E/PC/T/186 (1947). It is worth noting that not all parties to the World Trade Organization (WTO) endorse this review; the United States, for example, opposes it. *See* Report of the Panel, *United*

member fails the review if the restrictive trade measures are "remote from, or unrelated to," an essential interest, including if the measures are overly broad.[193]

When the WTO conducts this review, its panels consider several factors. The panels consider "the structure, content and design of the challenged measures."[194] They have also evaluated the measure in light of global state practice, its causal contribution to the advancement of a state's interests, and the availability of reasonable alternatives.[195]

I propose the adoption of a similar requirement—the requirement of a nexus between the state and the conduct a state seeks to regulate—as the first prong for a test on protective jurisdiction. The state-practice criterion should form the basis for an evaluation of whether there is a nexus between the conduct and a state's interests. According to this criterion, governments would ascertain the necessity of an extraterritorial criminal prohibition for the protection of a state's interests by considering whether other states take the same measure to protect their interests: whether other states criminalize the threatening activity and apply the prohibition extraterritorially.

In a WTO context, the case of *Austria—Penicillin and Other Medicaments* provides the closest analogy. In this dispute, Austria defended its import-licensing restrictions on penicillin as necessary for "defense reasons."[196] Yet when challenged, a review panel recommended their elimination. In defending its recommendation, the panel explicitly invoked state practice, arguing that because "other countries find it possible to do without restrictions," it "should . . . be possible for Austria to do the same."[197] At a later meeting of the panel, a contributing state also noted that "other countries did not find it necessary to maintain" such restrictions "for security or other reasons."[198] Thus, the panel could conclude that

States—Certain Measures on Steel and Aluminium Products, Addendum, ¶ 3.20, WTO Doc. WT/DS564/R/Add.1 (report circulated Dec. 9, 2022) ("The United States argues that the subparagraphs of Article XXI(b) grant total discretion to the regulating Member, because the preceding *chapeau* authorizes a Member to take measures that it 'considers' necessary.").

193. *See Russia Traffic in Transit*, *supra* note 24, at 57.

194. *Id.* at 32.

195. *See, e.g.*, *id.* at 112; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 16, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) (examining reasonable alternatives in the context of the WTO Agreement's health exception); Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 159-64, WTO Doc. DS/161/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea Beef Measures*] (examining the effect of a restrictive trade measure on a state's "common interests or values" to determine whether the measure was necessary).

196. *Russia Traffic in Transit*, *supra* note 24, at 112.

197. *Id.*

198. *Id.*; *see* Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31, 77-78 (1992) (discussing the history of the Group of Three).

Austria's security did not really depend on the trade restrictions; otherwise, other countries would maintain similar restrictions for their security. In other disputes, such as *European Communities v. Argentina*, WTO members have made arguments in the same vein.[199]

Transposed onto a protective-jurisdictional inquiry, the question would become whether the extraterritorial conduct a state seeks to regulate is that which most, or many other, states regulate in protection of their essential interests. This question helps establish the existence of commonly recognized "nexuses" between certain conduct and a state's essential interests. To be sure, one would expect variation and dynamism in the interests that states consider necessary to protect, and in the extraterritorial regulations they enact to protect those interests. However, one would also expect to find some level of commonality among states' laws. These commonalities, used as standards against which to measure other states' conduct, can form the outer bounds of permissible exercises of jurisdiction—similar to the role of "custom" in private-law cases.[200]

Significantly, the global-practice criterion privileges the precedents set by the majority of states, rather than those set by any one state. It is thus an essential way to prevent the protective principle from being overstretched by individual states with disproportionate conceptions of threat. Instead, each state would be permitted to regulate about the same amount of extraterritorial conduct as any other state.[201]

In ascertaining whether there is a widespread state practice, states would pay attention to both the "content" and "structure" of other states' extraterritorial regulations.[202] Similar to the work of WTO dispute-settlement bodies, a state would examine not only whether another state's criminal code or statutes regulate a certain type of crime but also how the state defines the crime and its elements. This inquiry matters because states can define crimes so broadly that,

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199. Specifically, they have pointed to other states' similar practices to support their own restrictions. *See Russia Traffic in Transit*, *supra* note 24, at 114 ("Canada . . . noted that . . . many contracting parties had taken the same or similar actions for political reasons."); *see also* Report of the Panel, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 4.535, WTO Doc. WT/DS291/R (adopted Nov. 21, 2006) ("The level of scientific uncertainty claimed by the European Communities to exist around the risks posed by biotechnology products is . . . inconsistent with . . . the actions of individual government regulatory authorities. . . . In addition, government regulatory authorities with experience in regulating plants produced through modern biotechnology routinely use [an approach different from Europe's]." (statement of the United States)).

200. *See, e.g.*, Richard A. Epstein, *The Path to* The T.J. Hooper*: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4-5 (1992).

201. *See* Maier, *supra* note 72, at 90 (discussing how state practice can be used to shape standards of jurisdiction).

202. *See Russia Traffic in Transit*, *supra* note 24, at 32.

though the category of crime (like terrorism or espionage) is widely recognized, the particular conduct may not be.[203]

Ultimately, this inquiry into state practice would give rise to a spectrum of possible exercises of protective jurisdiction. Where a government's extraterritorial regulation falls on the spectrum determines whether it is permissible. On the far end of the spectrum, where an established practice of regulation clearly exists, one would find the traditionally recognized offenses under the protective principle, including terrorism and violence against government officials.[204] On this side of the spectrum one would also find offenses recognized broadly as crimes under international law, such as war crimes or crimes against humanity. These violations fall within the ambit of both protective and universal theories of jurisdiction, for they give rise to threats that international law recognizes as endangering not only individual states but also the global community in which all states exist.[205]

Moving from the side of the spectrum representing widely accepted crimes under protective jurisdiction, one would find acts that have not reached levels of universal condemnation but are widely criminalized under protective theories of jurisdiction, such as certain acts of espionage or corruption. Accordingly, some international conventions explicitly sanction the exercise of protective jurisdiction for these crimes.[206]

Finally, on the opposite end of the spectrum, one would find crimes that only few states regulate, and revealingly, that some states expressly protect, such as speech or offenses against states' ideological interests.

As states move to regulate conduct in the absence of widespread practice, there should be a presumption against permitting the extraterritorial application of the regulation. This is so for two reasons. First, as mentioned, it becomes doubtful that a state has a legitimate self-protection interest in the regulation of the conduct: if this interest existed, one would expect other states to regulate the same conduct to protect this interest as well.

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203. *Cf. id.* (describing Ukraine's contention that Russia lacks "total discretion" to define what actions it may take to protect its essential security interests). For an example of an offense (espionage) that has been defined broadly, see *China Wants to Mobilise Entire Nation in Counter-Espionage*, Reuters (Aug. 1, 2023, 8:21 PM EDT), https://www.reuters.com/world/china/china-wants-mobilise-entire-nation-counter-espionage-2023-08-01 [https://perma.cc/463Q-SSHE].

204. *See* Restatement (Fourth) of Foreign Rels. L. § 412 (Am. Inst. L. 2018).

205. This reflects the history of the development of protective jurisdiction. In the twentieth century, as governments were constructing the modern-day conception of universal jurisdiction, many considered there to be significant overlap between crimes that fell under universal and protective jurisdiction. *See* Matthew Garrod, *The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality*, 12 Int'l Crim. L. Rev. 763, 766, 809 (2012).

206. *See* Gallant, *supra* note 11, at 436.

Second, critically, widespread state practice indicates that an extraterritorial regulation is less likely to compromise other states' sovereignty interests or the interests of its citizens. For example, one state's regulation of an extraterritorial offense, but which the territorial state also regulates, will be less intrusive than an extraterritorial regulation of an offense that the territorial state does not regulate or regulates in a fundamentally different way. In the latter circumstance, the extraterritorial regulation poses a challenge to the state's ability to build its own rule of law; in the former, the extraterritorial regulation is entirely consistent with the nonterritorial state's rule of law. This distinction also matters for individuals' interests. While J.L. Brierly's suggestion that it would be "intolerable" for individuals to be subject to laws in all places holds true if the laws are different, individuals face much less hardship if the laws are fundamentally similar in all places.[207]

Thus, an analysis of state practice — of global custom — is where states should begin in ascertaining whether an exercise of protective jurisdiction is permissible under international law. But state practice is not a perfect criterion. It may be genuinely mixed on some issues, or not yet in existence, such as if states move to regulate a new threat (e.g., an emerging cyber threat). For cases where state practice would be difficult to demonstrate, there are three additional ways states could defend extraterritorial applications by using similar standards to the WTO. Where establishing state practice is impossible, these additional means can be "proxies" for state practice, as they play a similar role in establishing a nexus between the regulation of conduct and a state's essential interests.

First, exercises of protective jurisdiction might be acceptable in the absence of widespread state practice if they reflect a process of multilateral negotiation and accommodation in the face of a new threat. Historically, states invoking trade restrictions at the WTO have nonetheless left open the possibility of bilateral consultations with contracting parties to decrease the negative effects of the restriction on other states' economies.[208] For protective jurisdiction, states could similarly justify their application of the protective principle if the creation and enforcement of the provision is done through a transparent process that integrates the views of other states. Seeking to apply and enforce an extraterritorial regulation multilaterally also satisfies a state's procedural duty to reach a "mutually acceptable solution" to jurisdictional disputes *prior* to the exercise of jurisdiction.[209] Second, the regulating state could defend its regulation if there is a

207. *See* Brierly, *supra* note 50, at 162.

208. *See Russia Traffic in Transit*, *supra* note 24, at 113 (discussing Communication from Sweden, *Sweden — Import Restrictions on Certain Footwear*, GATT Doc. L/4250 (Nov. 17, 1975)).

209. *See* CAMERON, *supra* note 19, at 324 ("[I]t can be argued that there is a more general duty to notify in advance other states affected by an assertion of jurisdiction and to consult with them in reaching a mutually acceptable solution to any conflicts of interest which may arise.").

close analogy to the new threat (e.g., an emerging cyber threat) that states already extraterritorially regulate (such as terrorism).[210] Third, though a state generally can exercise protective jurisdiction without needing to show that an offense has ascertainable effects on its territory, a demonstration of territorial effects here could support the state's argument that there is a nexus between the proposed regulation and its essential interests.[211]

In sum, a state satisfies the first prong of the proposed test if it can prove that there is an established state practice of regulating the conduct in question. If it cannot point to state practice, the state may rely on the multilateral process by which it seeks to implement its law, reasoning by analogy, and a demonstration of the conduct's effects on its essential interests to prove a nexus between the conduct and its essential interests.

2. Nexus Between the Individual and the State

The second prong asks, *Can the individual perpetrator of the act actually harm, or does the individual seek to harm, the state's essential interests?*

If the first prong of the test ensures that the particular conduct a state seeks to regulate poses a threat to its essential interests, the second prong ensures that there is a connection between the *perpetrator* of the conduct and the state seeking to exercise jurisdiction. This is essential because, in some cases, it would be difficult to conclude that a state has a self-protection interest in the regulation of extraterritorial conduct when the conduct is viewed in isolation—irrespective of whether the perpetrator has any ties with the state, or whether the conduct is aimed at a particular state.

For example, certain canonical crimes to which protective jurisdiction applies (like counterfeiting currency) might pose threats to states' essential interests in the abstract but pose greater or lesser threats to particular states. If conduct occurring in State *A*'s territory is threatening but does not in any way target State *B*, then State *A* and not State *B* is arguably the state suited to exercise jurisdiction over that conduct. An individual who counterfeits French currency in Spain might be prosecuted by France or Spain—but not by Germany. The criminal act

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210. *Cf.* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 21 (Sept. 7) ("And moreover, [the legality of the exercise of jurisdiction] must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear.").

211. As one WTO Panel opinion put it, the more clearly a regulation can contribute to its end, "the more easily [it] might be considered . . . 'necessary.'" *See Korea Beef Measures*, *supra* note 195, at 49.

has generated ties between the perpetrator and France or Spain, but not between the perpetrator and third-party states.

There are different ways these ties between an individual and state can form. An obvious way is if the perpetrator of a crime has a thick, preexisting commitment to a state, such as by residing primarily in or owning property in the state. Ties to a state may also form if an individual has only a limited preexisting connection with the state but commits an act (e.g., immigration fraud) that produces reasonably foreseeable effects within the state. The thicker the connection between an individual, the individual's conduct, and the state, the more justified a state is in exercising jurisdiction.[212] But at a minimum, there must be some nexus between the individual and the state to support the exercise of jurisdiction.

A connection between the state and the individual is important not only because it indicates that a state has a valid interest in asserting jurisdiction over these individuals' actions, but also because the state-individual connection makes the application of a state's law to the defendant, per *Lotus*, justifiable "from the point of view of the individual."[213] An individual with a relationship to a state, or who acts in a way that produces substantial and foreseeable effects within a state, may reasonably be expected to find himself or herself subject to the state's criminal law.

This prong of the test is also well supported in international law, and versions of it characterized common-law jurisprudence on protective jurisdiction for decades. In the common law, a preexisting relationship between the overseas perpetrator of a crime and the state was once a prerequisite to courts' exercise of protective jurisdiction. The essential question courts asked was whether the individual had an "allegiance" to a state that he or she violated when committing a crime against the state abroad.[214]

In these "allegiance theory" cases, courts examined a number of factors to determine whether an individual was close enough to a particular state for it to exercise jurisdiction over the individual. In the 1946 case of *Rex v. Neumann*, for example, a South African Union court established jurisdiction over a German national for extraterritorial conduct because he, though not a citizen of South Africa, permanently resided there.[215] The court noted that the defendant had enlisted in the South African Defense Forces, which involved taking an oath of allegiance to the Crown; that his departure from the country was of a "purely temporary character"; and that he had expressed a "definite intention" to return.[216]

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212. *See infra* notes 215-222 and accompanying text.

213. *S.S. Lotus*, 1927 P.C.I.J. at 20.

214. *See* García-Mora, *supra* note 16, at 569-70.

215. Rex v. Neumann, 16 Ann. Dig. 239, 242 (S. Afr. Spec. Crim. Ct., Transvaal 1946).

216. *Id.* at 243.

These factors made the defendant's act of treason against the state sufficiently targeted to justify the application of its laws when he returned.[217]

Likewise, in *Joyce v. Director of Public Prosecutions*, a British court used similar evidence of a connection between an individual and a state to establish jurisdiction over an American for an extraterritorial crime committed during World War II.[218] Here, the court justified its exercise of jurisdiction on grounds that, prior to leaving Britain, the American had fraudulently obtained a British passport, an act that manifested his "allegiance" to Great Britain.[219] The court noted that while, in general, a noncitizen would "withdraw[] from his allegiance" the moment he left British territory, the defendant in this case continued to obtain "substantial privileges" from his British passport.[220] Thus, British law could apply to him, as to any lawful holder of a British passport.

The broader idea that an individual's conduct can manifest a "link" between the individual and the state—even when the individual is a noncitizen—also finds expression in international legal jurisprudence. In the famous *Nottebohm* case, the ICJ found that, though Friedrich Nottebohm was legally a citizen of Liechtenstein, his "genuine" connections continued to lie with either Germany, where he had just surrendered citizenship, or with Guatemala, where he resided and worked.[221] In coming to this conclusion, the Court considered several factors, including Nottebohm's "participation in public life," the location of his family, his habitual residence, the "attachment shown" for a given country, the degree of weddedness to a nation's "traditions" and "way of life," and the extent of obligations he had assumed for the country.[222] In essence, it suggested that Nottebohm could be considered a subject of a certain state on the basis of his persistent actions toward it.

Nottebohm, *Neumann*, and *Joyce* together provide a breadth of considerations that a state can weigh in determining whether an individual can legitimately be subject to its criminal law. Specifically, these cases suggest that whether individuals maintain substantial business operations in a certain state, whether they have worked for the state or served in its military, whether they reside there for a substantial amount of time, and whether they exercise any of the privileges of citizenship (fraudulently obtained or otherwise) are relevant. If any of these factors hold, the individual in question is not formally a citizen but may be treated as one legally in some cases. If these factors are present, then it is not

217. *Id.* at 243-44.

218. Joyce v. Dir. of Pub. Prosecutions [1946] AC 347 (HL) 365 (appeal taken from Eng.).

219. *Id.* at 350.

220. *Id.* at 370-71.

221. Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 25-26 (Apr. 6).

222. *Id.* at 22-26.

unreasonable to expect that the individual is generally aware of the nation's law, acquainted with its practices, and acquiescent to its authority in some capacity.[223]

3. *Two Nexuses, One Genuine Connection*

Together, the two prongs of the test provide two objective criteria: one rooted in the type of extraterritorial regulation and one in the vertical relationship between a state and individual. Both criteria get to the heart of why an exercise of jurisdiction should be permissible in the first place. If the first prong of the test is met, a state can demonstrate that the conduct it seeks to regulate abroad actually threatens its essential interests. International law has long considered states' essential interests actionable, but not categorically. To meet the standard set by the genuine-connection doctrine, these interests must be *genuinely* at stake in the performance of certain extraterritorial conduct for a state to exercise jurisdiction over it. While "genuinely at stake" is a subjective concept, state practice, or global custom, can help define what the phrase means in international law.

Given that foreign crimes — even those widely recognized as criminal — affect states differently, however, it is also essential to determine the nature of the relationship between the state and the perpetrator of a certain crime. States should exercise jurisdiction only over individuals with a legal link to the state, at a minimum developed through the effects of the individual's conduct in a state, but ideally expressed in close and continuing ties developed over months and years. If such ties exist, the individuals in question are capable of implicating a state's essential interests more than faraway strangers. The state is therefore generally justified in applying its law to such individuals, even when they act in a foreign state.

Ultimately, a state that demonstrates a nexus both between extraterritorial conduct and its essential interests, as well as between it and a foreign individual, demonstrates that it is genuinely connected with a foreign controversy. Thus, the state can exercise jurisdiction over the extraterritorial controversy without needlessly compromising the interests of other states or their citizens.

B. *Alternatives Proposed in the Literature*

Before I apply the test to illustrate how it fares in the context of real-world exercises of jurisdiction, an analysis of proposed alternatives is in order. Two prominent prescriptions in the literature involve limiting protective jurisdiction by way of a precise rule — the creation of an authoritative list of interests and

223. *See, e.g.*, *id.*

offenses the principle can cover—or by analogizing to the right of "self-defense" in international law. In this Section, I consider both.

The first alternative follows the general formula for protective jurisdiction first proposed in the 1935 Harvard Draft Convention. Rather than taking the approach of a dynamic test—which aims to standardize exercises of protective jurisdiction according to fluid international practice—this formulation limits protective jurisdiction by listing specific interests and offenses it can cover. For example, the Draft Convention specifies three protected interests (security, territorial integrity, and political independence) and further stipulates that the protective principle cannot extend to acts performed in the exercise of a positive freedom of the territorial state (for example, freedom of speech).[224] The black letter of the *Fourth Restatement* also reflects this approach by providing an enclosed list of offenses that can be regulated under the principle.[225]

This first set of formulations is vulnerable to both practical and normative objections. On a practical level, the Draft Convention's exception for positive freedoms requires states to remain aware of other states' criminal laws and pass "blocking statutes" to ensure that whatever the other state is criminalizing *is* a positive freedom within its legal system.[226] This may protect violators of extraterritorial speech crimes. Yet whether it would protect offenders of vague "data security" or "biosafety" offenses is much less clear, as a state would be unlikely to pass a law *forbidding* data-security or biosafety provisions, nor should it be required to do so to protect its residents. The "laundry list" approach of the *Restatement* is also flawed because states can, and do, define such crimes (like espionage or terrorism) so expansively that the category of the offense itself may reveal little about the scope of the conduct regulated. As I will discuss further below, the Chinese government defines "espionage" so broadly that it criminalizes purchasing documents or information that are merely "*related to*" national security, whether classified or not.[227]

These issues help illustrate a broader normative objection to this formulation. Unlike the proposed test here, these formulations attempt to provide clear-cut rules for when jurisdiction is permissible, as if such rules could be frozen in time and space. If a state proposes an expansion of the principle in the face of a new threat, neither formulation provides guidance for distinguishing between

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224. *See Draft Convention*, *supra* note 19, at 426.

225. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 412 (AM. L. INST. 2018).

226. *See* Bialostozky, *supra* note 7, at 628-29.

227. As I will discuss further in Section III.C.2, the Chinese government defines "espionage" so broadly that it criminalizes purchasing documents or information that are merely "*related to*" national security, whether classified or not. *See* Laney Zhang & Yuechao Nie, *China: Counter-espionage Law Revised*, LIBR. CONG. (Sept. 22, 2023), https://www.loc.gov/item/global-legal-monitor/2023-09-21/china-counterespionage-law-revised [https://perma.cc/JXT9-6LCZ].

additions that are acceptable and not. In other words, they do not offer criteria by which to evaluate expansions of or variations on the rule. Such strict formulations produce issues in domestic litigation; in a world of diverse states, they are likely to be even less suitable.[228]

The second alternative in the literature proposes framing protective jurisdiction as a "circumstance precluding wrongfulness" under international law, akin to a state of necessity.[229] Alternatively, this proposal would analogize application of the protective principle to a state's inherent right to self-defense.[230] Both the right-of-self-defense and state-of-necessity doctrines specify extenuating circumstances, such as an imminent attack on the state's territory, that permit a state to take otherwise-prohibited actions in other states' territory (such as the use of military force). Here, extraterritorial jurisdiction would be unlawful unless a state could demonstrate, in an extended analogy to self-defense, that it faces a "grave" and "imminent" threat for which the exercise of jurisdiction is a "proportionate" response.[231]

While Bialostozky's "self-defense" formula resembles this Note's proposal to integrate protective jurisdiction with other frameworks of international law, the "self-defense" formulation has serious weaknesses. First, it is questionable that the frameworks of gravity, imminence, and proportionality provide adequate guidance for resolving questions of jurisdiction when governing states' right of self-defense. This is because criteria like "imminence" and "gravity" are arguably as manipulable as the existing requirement of a threat to "essential" interests. In reflection of this fact, it should come as no surprise that governments have attempted to expand the doctrine of "self-defense" itself continuously by stretching the concept of an "imminent" attack, particularly to deal with threats of terrorism.[232] Indeed, such terms, like "security" and "essential interests," are rife with "emotional-historical conceptions" that do not "rationally support" many of the conclusions states use them to reach.[233] Governments—including China's—have also already compared the use of extraterritoriality with self-

228. *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-78 (1987) (discussing "hard-edged" rules in property law and their interaction with "fuzzy, ambiguous" rules).

229. Bialostozky, *supra* note 7, at 621-22.

230. *See id.* at 640.

231. *See id.* at 639.

232. *See, e.g.*, Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 72 (2003) (discussing the notion of "anticipatory self-defence").

233. *See* García-Mora, *supra* note 16, at 579.

defense, suggesting that the analogy not only fails to discipline but may also enable expansive applications of the protective principle.[234]

Second, the right of self-defense (and to a lesser extent, the doctrine of a state of necessity) deals with a fundamentally different realm than that of jurisdiction. At bottom, this Note's proposed test attempts to bring the protective principle in line with standards underlying the broad corpus of international law. While the proposed test recognizes that extraterritorial jurisdiction is an exception to an otherwise-dominant territorial regime, it views properly limited extraterritoriality as compatible with the dominant regime. By contrast, the frameworks of gravity and imminence arise in a state of armed conflict — a legal regime where many peacetime rules and standards are upended. War is first and foremost a state of emergency. Attempting to place the protective principle into a framework of war, then, may move it further from the standards and intuitions underlying the everyday nature of international law.

Admittedly, any test — including the one I propose — that involves the balancing of factors, each with its own inputs, can be manipulated to produce different outcomes. But the question is one of degree: are certain standards more or less manipulable than others?[235] In the following Section, I illustrate how my test succeeds in providing a sufficient degree of objective guidance for real-world edge cases.

C. Application to Current Cases

The application of my proposed test to real-world cases at the boundaries of accepted practice demonstrates how it can help evaluate what should be considered permissible exercises of protective jurisdiction. While, by this point, certain exercises of protective jurisdiction — such as the criminalization of speech overseas — would obviously fail this Note's test and the alternatives discussed above, other cases present tougher calls. In this Section, I apply the test to two of the recently enacted or amended Chinese statutes discussed in Part II. The first concerns espionage, a canonical crime that has fallen under protective jurisdiction for decades. The second pertains to data security, a category of emerging crime. I use each of these examples to illustrate the application of the first prong of the test (to espionage) and the second prong (to data security).

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234. *See* Rsch. Off. of the Legal Affs. Comm. of the Standing Comm. of the Nat'l People's Cong., *supra* note 111.

235. *See* Simma & Müller, *supra* note 95, at 137 (discussing the indeterminacy of what qualifies as substantial or genuine links).

1. *Espionage*

For almost as long as the protective principle has existed, states have used it to criminalize espionage—the act of spying on a state or stealing its secrets—whether such conduct has taken place within a nation's territory or beyond. Espionage is a crime that embodies what the protective principle was created for: an act that can exact grave, irreversible costs on a state's security, but which a state cannot expect—and international law does not require—a foreign state to prohibit.[236] Indeed, foreign states typically sponsor espionage under the auspices of their intelligence organizations.[237]

When espionage arises today, governments generally prosecute perpetrators if they end up on the soil of the country against which they committed the act or on the soil of a country that is willing to extradite the perpetrator.[238] The goal of such prosecutions is arguably not to end the practice of espionage but to limit the freedom and movement of those who are involved.[239]

Reflecting its canonical nature, most states around the world criminalize espionage and regularly enforce laws prohibiting it.[240] Thus, most assertions of espionage under the protective principle would easily meet the first prong of the test, which requires criminalization to be a general state practice. Moreover, because most states criminalizing espionage prohibit it against their nation only, these prohibitions would apply to perpetrators whose actions target a particular state, thereby satisfying the second prong of the test.[241]

China's recently amended Counterespionage Law, however, pushes the boundaries of how espionage is criminalized around the world. Though parts of the law would satisfy the proposed test, others bring it outside the realm of state

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236. *See* Iñaki Navarrete & Russell Buchan, *Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions*, 51 CORNELL INT'L L.J. 897, 899 (2019).

237. *See* Dieter Fleck, *Individual and State Responsibility for Intelligence Gathering*, 28 MICH. J. INT'L L. 687, 689 (2007).

238. *See, e.g.*, Stephen Engelberg, *C.I.A. Clerk and Ghanaian Charged in Espionage Case*, N.Y. TIMES, July 12, 1985, at A13, A13.

239. *Cf.* A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 596, 604 (2007) (noting that a "classic double-standard" lies in the fact that "most states, while they conduct espionage and expect that it will be conducted against them, reserve the right to prosecute" those who commit espionage).

240. *See* Katherine Fang, Paras Shah & Brianna Rosen, *A Right to Spy? The Legality and Morality of Espionage*, JUST SEC. (Mar. 15, 2023), https://www.justsecurity.org/85486/a-right-to-spy-the-legality-and-morality-of-espionage [https://perma.cc/D6NY-8R7C]; Asaf Lubin, *The Liberty to Spy*, 61 HARV. INT'L L.J. 185, 225 (2020).

241. *See, e.g.*, *New Espionage Offences: Factsheet*, U.K. HOME OFF. (Aug. 19, 2024), https://www.gov.uk/government/publications/national-security-bill-factsheets/espionage-etc-national-security-bill-factsheet [https://perma.cc/TS7C-5SNZ].

practice, thereby falling short of the first prong. This becomes clear when one examines the law in a comparative context.[242]

As written, the law defines "acts of espionage" as "[a]ctivities that endanger the national security of the People's Republic of China that are carried out, prompted, or funded by an espionage organization and its agents, *or carried out by agencies, organs, individuals, or other collaborators* domestically or *outside the PRC borders*."[243] The Act continues: "Activities carried out, instigated or funded by foreign institutions, organizations, and individuals *other than* espionage organizations and their representatives . . . to steal, pry into, purchase or illegally provide state secrets, intelligence, *and other documents, data, materials or items related to national security* . . . ."[244] As this last provision makes clear, the law criminalizes not only the theft of "state secrets" and "intelligence"—the bread and butter of counterespionage laws—but also the "purchase" of documents and data that merely "*relate*[]" to national security.[245]

The statute therefore criminalizes far more than espionage as traditionally defined. By its terms, the law prohibits any activity that "endanger[s] the national security of the People's Republic of China," performed by any "agencies, organs, individuals, or other collaborators domestically or" anywhere else.[246] Read plainly, the law implicates a potentially enormous category of conduct, including anything from academic research to the operation of a business in Chinese markets. The statute also does not limit itself to intelligence organizations: it refers broadly to all "agencies, organs, individuals, or other collaborators," so that it applies as easily to spies as to diplomats, corporations, and journalists.[247]

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242. For a discussion of how these factors have served to evaluate the legitimacy of laws with extraterritorial effect, see *Russia Traffic in Transit*, *supra* note 24, at 32; and Mohammad-Ali Bahmaei & Habib Sabzevari, *Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review*, 13 ASIAN J. INT'L L. 97, 98 (2023). As previewed above, this is why a limit on the protective principle concerned only with ensuring that states' applications fall within certain recognized crimes (regardless of how those crimes are defined) would not weed out all questionable exercises of protective jurisdiction.

243. *Counter-Espionage Law of the P.R.C. (2023 ed.)*, CHINA L. TRANSLATE (Apr. 26, 2023), https://www.chinalawtranslate.com/en/counter-espionage-law-2023 [https://perma.cc/3W6H-EHKS] (emphasis added).

244. *Id.* (emphasis added).

245. *Id.* (emphasis added).

246. *Id.*

247. *Id.* Many groups, particularly business groups, have sounded the alarm. For example, firms with subsidiaries in China have raised the concern that the law will potentially criminalize them for abiding by "due diligence" reporting requirements regarding how they process firm information. *See* Jorge Liboreiro, *Why the EU Is So Worried About China's Anti-Espionage Law*,

The existing cases indicate that enforcement of the law will be as aggressive as the statute's language permits. In 2016, citing various espionage charges, Chinese police arrested Kai Li, an American businessman, when he touched down in a Shanghai airport on a routine trip to see family.[248] The Chinese government has kept the case shrouded in secrecy. Yet the existing evidence suggests that Li, who ran a business with no ties to the United States government or any intelligence agency, is unlikely to have committed espionage under the general conception of the crime, for he did not appear to have access to classified materials in China or the United States.[249]

Recall that under the existing formulation of the protective principle, all the Chinese government must do to justify its arrest of Li is to say that his extraterritorial business activities — which it claims constitute espionage — threatened essential Chinese interests. In so arguing, it may define the essential interest at stake however it wants and write its statute criminalizing the threatening act as broadly as it needs.[250]

Yet under this Note's proposed test, this statute, and the way it is enforced against noncitizens for their activities outside China, would not pass muster.

EURONEWS (Nov. 28, 2023, 11:30 AM GMT), https://www.euronews.com/my-europe/2023/11/28/why-the-eu-is-so-worried-about-chinas-anti-espionage-law [https://perma.cc/LQA8-ULCK]; *see also* Minhai, *supra* note 137 (describing a journalist convicted of espionage charges).

248. *See* Griffiths, *supra* note 136.

249. *See* Chris Buckley & Edward Wong, *Family of American Imprisoned on Spy Charge in China Appeals for Help*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/world/asia/china-american-spying-kai-li.html [https://perma.cc/6U6G-EPDR]. Indeed, Kai Li has since been released from prison and permitted to return to the United States, suggesting the absence of legitimate charges against him. *See* Holly Honderich, *US and China Swap Three Prisoners Each in Exchange*, BBC (Nov. 28, 2024), https://www.bbc.com/news/articles/cly2lp75vq4o [https://perma.cc/U5BL-SL8R].

250. *See supra* Section I.C. The alternate proposals discussed in Section III.B do not rectify this problem. Under the Draft Convention's formulation, China's law would be acceptable in any place that has not positively enacted a statute "blocking" the mandate of the law. In this case, that would necessitate a law explicitly framing Li's business activities as an exercise of a "right guaranteed . . . by the law of the place where it was committed." *Draft Convention*, *supra* note 19, at 543. But the right for China to apply its law to Li, or anyone, should not turn on whether the state where Li conducted the activity has enacted a blocking statute. One reason is that formulation puts too much of a burden on busy national legislatures to preemptively pass laws contradicting the mandates of any foreign laws that could be applied extraterritorially. The second formulation, analogizing protective jurisdiction to the right of self-defense or a state of necessity, also does not provide adequate guidance here. It tells us only that China can exercise protective jurisdiction in "proportion" to extraterritorial acts that are sufficiently "grave." *See supra* Section III.B. While likely true that most readers would say the conduct in question is not of sufficient gravity, and that China's response is disproportionate, who can really say? Without some objective measure like state practice, the discussion easily devolves into a circular back-and-forth about what gravity means, and who gets to decide.

While the first prong of the test requires that a state rely on state practice to justify the application of its law under the protective principle—and while state practice supports the criminalization of espionage—the specific provisions of this law bring it outside the bounds of state practice. Even a relatively brief survey of different nations' espionage laws would reveal that there is no widespread custom of criminalizing the purchase of unclassified documents that "relate" to national security, under espionage or any other banner.[251] China's counterespionage law, which manipulates the definition of espionage into something unrecognizable, thus falls short of the standards set by international custom.

Many have raised alarm about the vast reach of China's counterespionage law and the risks it poses for individuals abroad.[252] This alarm reflects intuitions about why such exercises of extraterritoriality are illegitimate and unjustifiable. By viewing the law in the context of the test proposed in this Note, we can thus better articulate these intuitions in the language of international law. We can argue that the law overextends China's protective jurisdiction because it goes further than the laws of other states.

2. Personal-Information Protection

Espionage is a canonical example falling under the realm of states' protective jurisdiction. The second example I explore, data security and personal-information protection, represents an emerging area of regulation. Nonetheless, it has become the focus of a growing number of states' laws. Beginning with the European Union's landmark privacy legislation, other countries have followed suit, including Canada, India, and, in 2023, China.[253] To date, the United Nations estimates that around seventy-one percent of nations have enacted some kind of personal-information-security legislation.[254]

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251. *See, e.g.*, *North-East Asia in Focus: Anti-Espionage Laws*, ECONOMIST INTEL. UNIT (Aug. 3, 2023), https://dev-services.eiu.com/north-east-asia-in-focus-anti-espionage-laws [https://perma.cc/PN49-ADTR] ("China's anti-espionage law also highlights the disparity between legal and regulatory frameworks across North-east Asian states. The law stands out for the extensive scope of its coverage, as well as the vagueness of its definition of 'espionage activities.'").

252. *See, e.g.*, Michael Martina, *US Warns New Chinese Counterespionage Law Puts Companies at Risk*, REUTERS (June 30, 2023, 5:14 PM EDT), https://www.reuters.com/business/us-warns-new-chinese-counterespionage-law-puts-companies-risk-2023-06-30 [https://perma.cc/84TP-97JL].

253. Dan Simmons, *17 Countries with GDPR-like Data Privacy Laws*, COMFORTE (Jan. 13, 2022), https://insights.comforte.com/countries-with-gdpr-like-data-privacy-laws [https://perma.cc/3HUU-K8F4].

254. *See Data Protection and Privacy Legislation Worldwide*, UNCTAD, https://unctad.org/page/data-protection-and-privacy-legislation-worldwide [https://perma.cc/3M37-LA34].

Governments have articulated various reasons for enacting such legislation. The European Union's (EU's) sounded mostly in privacy rights.[255] But other governments, including the United States, have explicitly linked personal-information protections to traditional state-protection interests falling under the protective principle, noting that hostile governments and nonstate actors could "analyze and manipulate bulk sensitive personal data to engage in espionage, influence, kinetic, or cyber operations or to identify other potential strategic advantages."[256] Under the first prong of the proposed test, then, there is clearly a widespread, if recent, state practice of protecting personal information and extending those statutory protections abroad.

The second prong of the proposed test, however, presents more problems for these laws. The cross-border spread of personal information and the sheer number of actors that process it mean that personal-information-protection statutes implicate vast numbers of would-be defendants. Yet under the second prong of this test, states may apply data-security laws only in cases where there exists a thick set of ties between the state exercising jurisdiction and the individual defendant.[257]

Recall that under the current formulation of the protective principle, no particular connection between a defendant and a state is required. Fortunately, some states — though not all — have chosen to limit their laws in ways that loosely track the second prong of the test. For example, China's Personal Information Protection Law applies extraterritorially only when the entity processing the personal information of Chinese citizens "[provides] products or services for people inside China," "analyz[es] or evaluat[es] the behaviors of people within the territory of China," or when extraterritorial application is otherwise provided by law.[258] Likewise, the EU's data-protection law applies extraterritorially only when the controller or processer of the data outside of the EU "demonstrates its intention to offer goods or services to an individual located in the EU."[259]

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255. *See* Ben Wolford, *What Is GDPR, the EU's New Data Protection Law?*, GDPR.EU (May 25, 2018), https://gdpr.eu/what-is-gdpr [https://perma.cc/A4BF-VYRP].

256. Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern, Exec. Order No. 14,117, 89 Fed. Reg. 15421, 15421 (Feb. 28, 2024).

257. *See supra* Section III.A.2.

258. *See* Andrea Tang, *Demystifying China's Personal Information Protection Law: PIPL vs. GDPR*, ISACA (June 3, 2022), https://www.isaca.org/resources/news-and-trends/isaca-now-blog/2022/demystifying-chinas-personal-information-protection-law [https://perma.cc/55TY-MKPK].

259. *See* Wim Nauwelaerts, *The Extra-Territorial Reach of EU Data Protection Law*, SIDLEY (July 2019), https://www.sidley.com/en/insights/publications/2019/07/the-extra-territorial-reach-of-eu-data-protection-law [https://perma.cc/9VWC-LD78].

These governments' statutory guidance provide examples of how a state with extraterritorial data-privacy regulations can ensure their regulations satisfy the second prong of the test. A data processor that provides "products or services for inside China"[260] or that "demonstrates its intention to offer goods or services to an individual located inside the EU"[261] is more likely to have a substantive relationship with China or the EU than a data processor that merely possesses the data of Chinese citizens or Europeans as an intermediary. Meeting this bar—showing that the data processor provides products or goods inside the territorial state—also helps indicate that the data processor's activity is targeted *at* a certain territorial state.

Accordingly, the statutory guidance the Chinese and European governments have adopted to cabin applications of their personal-information protections, if followed faithfully, facilitates what would be permissible applications of the protective principle. Of course, the ultimate determination will turn on the facts of a certain application: the more products or services the data processor or controller provides to individuals within the country, and the more it analyzes the behavior of individuals within the country, the greater the link it has with a state—and the more justified the state is in applying its law to the defendant.

On the other hand, the second prong of the test articulates a legal objection to prosecutions by countries that apply their personal-information protections to foreign defendants indiscriminately. Actors sounding the alarm about the reach of data-security laws may invoke the framework of the second prong of the test to distinguish between individuals and corporations whose activities connect them to a certain state and, on the other hand, those who have no such connection and thus should not be prosecuted.[262] Indeed, the fact that some states have

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260. *See* Tang, *supra* note 258.

261. *See* Nauwelaerts, *supra* note 259.

262. *See* Stephan Kolloßa, *The GDPR's Extra-Territorial Scope: Data Protection in the Context of International Law and Human Rights Law*, 80 ZaöRV 791, 798-805 (2020) (discussing the limits on the GDPR's extraterritorial application). Again, the two existing formulations in the literature, discussed in Section III.B, in no way limit the extraterritorial application of personal-information-protection laws under the protective principle. The Draft Convention's formulation would limit their extraterritorial application only if a state enacted a law positively enshrining the right for data processors/controllers to violate foreign data-protection laws. To date, *no* state has enacted this kind of law. *See A Practical Guide to Data Privacy Laws by Country*, CASEIQ (2024), https://www.caseiq.com/resources/a-practical-guide-to-data-privacy-laws-by-country [https://perma.cc/NSL2-VGM3]. Under the second formulation, which turns on the gravity of the threat to a state's interest and the proportionality of the state's response to it, governments would be limited in applying their personal-information-protection laws to some defendants, presumably, because the defendants' actions did not pose sufficiently grave threats to the state. But we still do not know how to determine whether those defendants' actions did pose sufficiently grave threats or not, and why. By contrast, by examining the

attempted to discipline these laws' extraterritorial application by making similar distinctions between potential defendants demonstrates the intuitive nature of the second prong of the test.

D. Enforcement

Enforcement is often difficult in international law, but the proposed test is also administrable on a global scale. The obvious recommendation would be for states to negotiate a treaty on jurisdiction that codifies the framework, akin to the Harvard Draft Convention.[263] Though past attempts to codify a treaty on jurisdiction have failed,[264] there is some reason to believe the time is ripe for a new one. Recent efforts to codify jurisdictional provisions suggest an appetite to reconsider jurisdiction in legal instruments.[265] Moreover, even if a general treaty on jurisdiction remains out of reach, governments attuned to the dangers of expansive exercises of extraterritoriality could campaign to include protective-jurisdictional tests in treaties that permit protective jurisdiction in discrete subject

nature of the defendants' relationship with the threatened state according to longstanding standards in international law under *Nottebohm*, as well as evidence that the defendant targeted a particular state, we have a clearer sense of how defendants' actions affect states to determine whether they rise to a sufficient level.

263. Admittedly, negotiating any international treaty would be a feat: multilateral treaties face the dual-coordination problem of requiring international actors to agree on a particular vision, and then requiring a multitude of domestic legislatures to ratify the treaty. *See, e.g.*, Katerina Linos & Tom Pegram, *The Language of Compromise in International Agreements*, 70 INT'L ORG. 587, 587 (2016) ("Drafting an international agreement is difficult. Negotiations typically take many years and include representatives from hundreds of states. If an agreement is reached, it often involves major compromises.").

264. For a discussion of attempts to codify international-law principles of extraterritorial jurisdiction, see Sender & Woods, *supra* note 28, at 35-41. *See also generally* Eli Scher-Zagier, Note, *Jurisdictional Creep: The UN Cybercrime Convention and the Expansion of Passive Personality Jurisdiction*, 27 YALE J.L. & TECH. (forthcoming 2025), https://ssrn.com/abstract=4957176 [https://perma.cc/5V5Y-A9CS] (discussing jurisdictional provisions in the U.N. Cybercrime Convention).

265. *See* Summer Walker & Ian Tennant, *The UN Cybercrime Debate Enters a New Phase*, GLOB. INITIATIVE AGAINST TRANSNAT'L ORGANIZED CRIME 24 (Dec. 2021), https://globalinitiative.net/wp-content/uploads/2021/12/UN-Cybercrime-PB-22Dec-web.pdf [https://perma.cc/B7WH-88TB] ("The two-thirds voting structure lends itself to this conclusion, with the resulting convention including substantial compromises on terminology and leaving political issues such as human rights and sovereignty open to interpretation. It would be flexible in how provisions can be adopted domestically. This would likely achieve widespread adoption, following in the footsteps of UNTOC, which is almost universally adopted, flexible and apolitical (but without the tools to monitor whether it is implemented effectively). This could provide guidance for criminalization and agreements on principles such as jurisdiction, and create new guidance for international cooperation.").

areas, like the U.N. Cybercrime Treaty.[266] As an intermediary step between the articulation of the test and a treaty, moreover, states could take up protective jurisdiction as a topic in the International Law Commission, a U.N. body whose mandate is to progressively develop standards in international law.[267]

In the absence of a treaty, decentralized channels of international law will remain open, and indeed, these channels comprise the bulk of international lawmaking and enforcement. The vast majority of international rules come to life through horizontal enforcement mechanisms: in this case, states policing other states' assertions of jurisdiction in an ad hoc, but concerted, fashion.[268] When questions of protective jurisdiction arise in state-to-state interactions as well as in international legal fora, governments would use the opportunity to "build[] consensus" on a new limiting test.[269] Already, governments can point to the genuine-connection doctrine, accepted by the majority of governments, and the *Lotus* case to build the international legal basis for this new framework for protective jurisdiction.

In the short term, using these additional criteria to protest excessive exercises of jurisdiction in international platforms, such as the U.N. General Assembly or the WTO,[270] can cast doubt on their legitimacy and raise costs for governments seeking to enforce them. This could make it more difficult for governments who are willing to cooperate with prosecuting states—under the guise of international law—to do so while remaining politically neutral. After all, if at least some of the support generated for the Hong Kong National Security Law derived from legal arguments the Chinese government marshaled in defense of it, other governments can whittle away at this support by articulating reasons why such examples of extraterritoriality are inconsistent with international law. In other contexts, states' articulation of legal principles in international entities has played a "significant role" in generating widespread condemnation of state practices.[271]

Shaping the tide of international opinion through a newly articulated legal test can also weaken the ability of prosecuting governments to request extradition of non-nationals to their territory. This is significant, since much of the

266. *Id.*

267. *See* Nikolaos Voulgaris, *The International Law Commission and Politics: Taking the Science out of International Law's Progressive Development*, 33 EUR. J. INT'L L. 761, 762 (2022).

268. *See* Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 258-60 (2012).

269. *See* DARYL J. LEVINSON, LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE 37 (2023).

270. *See generally* Trade Policy Review Body, *supra* note 160 (using the WTO format to condemn China's foreign-trade policy for undermining the global rules-based system for trade).

271. *See* Bialostozky, *supra* note 7, at 679.

enforcement of extraterritorial criminal law depends on extradition.[272] In particular, a test centered on objective legal criteria could help a state resist pressure to comply with a controversial extradition request.[273] Indeed, the refusal to cooperate with states asserting illegitimate applications of international law — a practice called "outcasting" — is the "most common method of international law enforcement."[274]

Recent court decisions linking extradition to other state obligations in international law demonstrate the growing momentum to recognize legal objections to states' extradition requests. In 2023, Italy's highest court ruled it illegal to extradite a Chinese national to China out of concern that the individual would face an unjust criminal process.[275] And there have been longstanding debates in Europe about the legality, under the European Convention on Human Rights, of extraditing individuals who may be subject to capital punishment in the United States.[276] While international legal jurisdiction is already a tool used to argue against extradition — and was employed, for example, by Meng Wanzhou's lawyers[277] — coupling general objections with concrete jurisdictional criteria will strengthen and systematize such objections.

In the long term, the development of additional criteria for protective jurisdiction can slow the spread of state practice that could normalize — and eventually "legalize" — such applications. As Professor Kenneth S. Gallant has warned, if states do not oppose excessive claims of protective jurisdiction, they could

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272. *See* Simma & Müller, *supra* note 95, at 154-55; Cedric Ryngaert, *Extraterritorial Enforcement Jurisdiction in Cyberspace: Normative Shifts*, 24 GERMAN L.J. 537, 539 (2023) ("This means that States are in principle not allowed to carry out law-enforcement operations, including criminal investigations, on foreign States' territory. States wishing to obtain custody over a fugitive located abroad need to rely on extradition treaties.").

273. This would help small states susceptible to the economic or political coercion of more powerful ones. *See* Bialostozky, *supra* note 7, at 680-82 ("A more exacting international legal rule on state conduct in this area would likely further protect nationals of comparatively weak states, above and beyond the sovereign discretion states retain by way of any extradition treaty that may be in place.").

274. LEVINSON, *supra* note 269, at 40. *See generally* Hathaway & Shapiro, *supra* note 268 (discussing outcasting).

275. *See Italy's Highest Court Denies China Extradition*, SAFEGUARD DEFS. (Mar. 2, 2023), https://safeguarddefenders.com/en/blog/italys-highest-court-denies-china-extradition [https://perma.cc/UL87-6RYV].

276. *See, e.g.*, Gerald L. Neuman, *Extraterritorial Violations of Human Rights by the United States*, 9 AM. U. INT'L L. REV. 213, 231-33 (1994).

277. *See* Jason Proctor, *Meng Wanzhou Lawyer Says U.S. Should Stick to Its Own Business*, CBC NEWS (Mar. 29, 2021, 7:57 PM EDT), https://www.cbc.ca/news/canada/british-columbia/meng-wanzhou-international-jurisdiction-law-1.5969038 [https://perma.cc/ZRY2-USSL].

become "acceptable state practice."[278] As discussed in Part II, the risk of allowing expansive exercises of protective jurisdiction to become commonplace is that they will lead to more incursions into state sovereignty and individual liberty in the end, further destabilizing an already unstable world as disputes over jurisdiction become more frequent.

This is not only because extraterritoriality leads to friction. It is also because, when applied expansively, extraterritoriality undermines the ideal of sovereign equality on which the modern system of international law is built. Built in the shadow of two world wars, this system reflects a simple but powerful idea: that because I may govern my people in my territory and you may govern your people in yours, we do not need to fight about whose governance is better, or at least not violently.[279] With the U.N. Charter at the centerpiece of the international legal order, each nation has one voice, each governs in its own image, and each accepts certain limits on what it can do to its neighbors.[280]

Unbounded extraterritorial criminal laws undermine this global order, for they prevent states from governing in their own image, in their own borders. Thus, to uphold this system, there must be limits on extraterritoriality: boundaries that mark where one state's laws end and another's begin. Determining these limits is what the *Lotus* court set out to do almost one hundred years ago, and today, the work is much the same. The test I propose is an important beginning in crafting these boundaries for protective jurisdiction.

IV. IMPLICATIONS FOR INTERNATIONAL LAW

This Part contends that the foregoing analysis points toward at least two broader implications for international law. One can draw broader implications from the protective principle because it is not an isolated rule of international law but part of the international legal system, whose "rules rise or fall together" and in which deeper assumptions and normative values are embedded.[281] *When* international law permits states to exercise jurisdiction speaks to *what* it permits

278. GALLANT, *supra* note 11, at 420. Of course, the proposal of a new test may also produce the *opposite* effect, causing some states to begin using the protective principle or to apply it more assertively, if they can justify it on the terms of the test. Because exercises of jurisdiction that comply with the test are unlikely to be extremely controversial, however, this effect is not particularly troubling.

279. *Cf.* George Kaloudis, *The Search for Global Order*, 15 INT'L J. ON WORLD PEACE 3, 10 (1998) (arguing that state sovereignty means states should not interfere in the affairs of other states).

280. *See id.* at 4, 10.

281. *See* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 421 (2017).

them to do, period—as in the case of *Lotus*, where the court's consideration of jurisdictional rules produced a vision of international law writ large.[282]

Specifically, applying the test proposed in Part III, this Part reveals aspects of protective jurisdiction that not only provide additional reasons to limit it, but also carry implications for other, similar tools in international law: in particular, for other unilateral self-protective measures.[283] I draw parallels between the role of protective jurisdiction and "national security exceptions" in international treaties and agreements, which play a roughly analogous self-protective role. As with the protective principle, the stakes here are high. This Part will show that the risk inherent in such exceptions is that the exceptions could become gaping holes in the international legal corpus that, eventually, swallow it whole.[284] The framework I provide to limit protective jurisdiction, then, contributes to the evolving literature on how these other national-security exceptions should be circumscribed within international law.[285]

A. Toward a Community of Interests

As discussed in Part III, the first prong of the protective-jurisdictional test harnesses commonalities among states' regulations and permits exercises of jurisdiction where such commonalities exist; it works because states share some of their interests and enact similar laws to protect them. Yet because states do advance their interests in similar ways, a state that relies on evidence of commonality to defend an exercise of protective jurisdiction, ironically, may not *need* to

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282. Simma & Müller, *supra* note 95, at 147-48.

283. *See infra* Section IV.B and accompanying notes.

284. *Cf.* Heath, *supra* note 12, at 1025-28 (explaining how security exceptions to trade and investment agreements make the latter difficult to maintain).

285. *See* Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1105 (2020) ("[B]oth domestic and international law tend to see traditional ideas of free trade as being in opposition to ideas of security. I argue that there is another way, even if it is handicapped by U.S. judicial doctrines, and that more ought to be done to reconcile concepts of free trade and economic security in the law." (footnote omitted)); Olga Hrynkiv, National Security Exceptions: A Shield or a Weapon? Balancing States' Autonomy to Adopt Security Measures and International Economic Law 14 (2023) (Ph.D. dissertation, Tilburg University), https://research.tilburguniversity.edu/en/publications/national-security-exceptions-a-shield-or-a-weapon-balancing-state [https://perma.cc/93H6-HVC5] ("This dissertation explores how to achieve the balance between states' autonomy to protect national security and binding international law."); Jacob Gladysz, Note, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, 52 GEO. J. INT'L L. 835, 861 (2021) ("In a geopolitical environment where states increasingly see economic concerns wrapped up in national security, it is necessary for the WTO to tread a fine line between deterrence of violation and charges that it is riding roughshod over states' national security concerns, concerns that often lie at the heart of a nation's conceptions of sovereignty.").

exercise jurisdiction once it demonstrates the existence of this commonality. This is because overlapping regulations, providing evidence of shared state practice, would obviate the need for a single state to regulate in another state's territory. Since the territorial state would already regulate the crime, the threatened state's interests would be largely protected by the territorial state's law. For example, a state would not need to exercise protective jurisdiction over a violent crime in a foreign state because the foreign state might already prohibit the crime. The foreign state would criminalize the act perhaps out of respect for the other state—if, say, the violent act was targeted at a particular state's officials—but also because violent crime is threatening anywhere it happens.

Thus, Part III suggests that the more commonality states find between their interests and the laws they enact to protect them, the less any one state will need to exercise protective jurisdiction to regulate extraterritorial conduct itself. This does not do away with the need for the protective principle altogether—there will still be gaps in states' regulations[286]—but it does suggest that exercising protective jurisdiction may be less necessary in a world of shared threats and shared solutions to them.

Presciently, the lawyers of the 1935 Harvard Research Project foresaw the end of the protective principle. Though they noted that the principle found "emphatic expression in the national legislation and jurisprudence of most States," the principle would only be "indispensable unless and until States recognize much more clearly than they do now their obligation to provide a well-defined minimum of protection for the interests of foreign States and take appropriate measures to translate such a recognition of obligation into effective action."[287] When states recognize the overlap between their interests and those of other states, the lawyers reasoned, and then take steps to protect these shared interests, no one state will have to protect itself by applying its laws extraterritorially.

The fact that states' interests are shared, and that states often advance those interests in similar ways, has implications beyond protective jurisdiction. Specifically, this dynamic within protective jurisdiction is mirrored in a category of "exceptions" in international law in which states are permitted to act contrary to a legal obligation when necessary to defend their essential interests, often dubbed "national security exceptions."[288] Protective jurisdiction mirrors the dynamic in these exceptions because it permits states to contravene norms of territoriality—effectively violating other states' sovereignty—when necessary for

286. Espionage is one example. *See supra* Section III.C.1 and accompanying notes for an extended discussion.

287. *See Draft Convention*, *supra* note 19, at 547.

288. *See generally* Hrynkiv, *supra* note 285 (discussing national-security exceptions in international law).

their essential interests. Within the WTO Agreement, likewise, states may impose otherwise-illegal trade restrictions when necessary for their national security.[289] National-security or essential-interest-related carve-outs are also common within international and bilateral treaties.[290]

These exceptions make sense when states' interests are thought of as discrete and independent from those of other states, as states sometimes argue in exercising protective jurisdiction.[291] These exceptions assume that what one state must do to protect its essential interests is the state's own business, and it must do what it needs as long as the threat to these interests is legitimate. The other states in the equation—for example, the states into whose territory another state reaches its laws—are not themselves called upon to help the threatened state.

But what if they were? This is not an untenable possibility. Under this Note's proposed test, when states exercise protective jurisdiction under the first prong of the test, they would do so (in most instances) as an alternative or supplement to the territorial state exercising jurisdiction over the prohibited act in its own territory. In other words, the self-help the protective principle provides would supplement the threatened state's reliance on another state for help; it would not be the state's only option in responding to a threat.

Likewise, when a state under the WTO Agreement or in any bilateral treaty invokes a national-security exception to act unilaterally and extraterritorially in protection of its security, other states may be able to take certain steps themselves to remedy the situation in cooperation with the regulating state. Given that states' interests overlap, a more cooperative solution could both lead to satisfactory outcomes and avoid the costs of excessive unilateralism. As almost four decades of international legal literature and international-relations scholarship suggest, the risk of conflict inheres when states pursue self-protection at the expense of other states.[292] This Note, then, contributes to this literature by highlighting the risks of unilateralism within the protective principle—and providing a specific mechanism to bridge the adoption of multilateral jurisdictional measures.

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289. *See* Pinchis-Paulsen et al., *supra* note 190, at 272-73.

290. *See* Bahmaei & Sabzevari, *supra* note 242, at 97-98.

291. *See* H.K. Dep't of Just., *supra* note 149, at 252 ("[A] state's sovereignty, security and fundamental interests often carry specificity and the protection of such legal interests should not be conditional on whether the act in question is punishable in the state where it was committed." (statement of Professor Huang Feng)).

292. *See, e.g.*, Leonard J. Theberge, *Unilateralism: The Direct Challenge to International Law*, 9 CAL. W. INT'L L.J. 553, 555 (1979); Stephen G. Brooks & William C. Wohlforth, *International Relations Theory and the Case Against Unilateralism*, 3 PERSPS. ON POL. 509, 509-11 (2005).

B. The End of Self-Protection?

A second reason states should be interested in moving beyond certain unilateral self-protective tools is not only because these tools can be costly, but also because in a growing number of cases, they simply will not work. This is true for the protective principle and for national-security exceptions within international treaties: scholars are increasingly documenting the growing necessity of, and urgency for, thick multilateral solutions to increasingly transnational problems.[293] As this literature suggests, unilateral self-protective measures will not work in cases when states face threats of a truly global nature—including climate change, international terrorism, pandemics, or global economic crises.[294] For these threats, a state simply will not be able to rely on self-help to protect itself because the issue is greater than that which can be addressed by any one actor.[295]

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293. *See, e.g.*, Michèle Rioux, *Multilateralism, Interdependence and Globalization*, *in* DOES THE UN MODEL STILL WORK? CHALLENGES AND PROSPECTS FOR THE FUTURE OF MULTILATERALISM 113, 118 (Kim Fontaine-Skronski, Valeriane Thool & Norbert Eschborn eds., 2022) ("The issues of climate change and cybersecurity require a flexible multilateralism that is open to a plurality of actors, where states cooperate to provide global public goods without necessarily creating a rigid framework in terms of national policies."); Anne Krueger, *An Enduring Need: Multilateralism in the Twenty-First Century*, 23 OXFORD REV. ECON. POL'Y 335, 345-46 (2007) ("The very success of the multilateral system over the past six decades is both a cause for celebration and a strong argument for doing all we can to preserve both the system and the benefits it has brought. . . . In addressing the challenges we face, therefore, we must be careful to appreciate the continuing—even growing—importance of the multilateral system, and the need to strengthen it. . . . But as calls are made for them to achieve those objectives, the message should be clear that changing roles are in the context of a multilateral system, and that multilateralism has been a success that must be fought for and preserved."); *Today's Challenges Require More Effective and Inclusive Global Cooperation, Secretary-General Tells Security Council Debate on Multilateralism*, UNITED NATIONS (Dec. 14, 2022), https://press.un.org/en/2022/sc15140.doc.htm [https://perma.cc/SS4N-ALQT] ("Today's global challenges require a revitalized international cooperation that is effective, representative and inclusive.").

294. *See* Will Moreland, *The Purpose of Multilateralism: A Framework for Democracies in a Geopolitically Competitive World*, BROOKINGS (Sept. 2019), https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190923_purpose_of_multilateralism_moreland.pdf [https://perma.cc/N5SL-AQT9]; *see also* Evan J. Criddle & Evan Fox-Decent, *Mandatory Multilateralism*, 113 AM. J. INT'L L. 272, 276 (2019) (noting that international law frequently and necessarily imposes multilateral obligations on states).

295. *See* Criddle & Fox-Decent, *supra* note 294, at 325 ("Likewise, the principle of joint stewardship requires multilateralism when states respond to controversies concerning common resources, threats to international peace and security, or serious breaches of international human rights law and international criminal law. In each of these contexts (and perhaps others we have not identified), mandatory multilateralism obligates states to cooperate with one another by seeking equitable solutions through investigation, consultation, negotiation, and, if necessary, third-party dispute resolution.").

One of the most stunning illustrations of the cooperation states have pursued in recognition of the inferiority of a unilateral tool—in this case, the protective principle—happened in the aftermath of 9/11, with the passage of Security Council Resolution 1373. The Security Council's framework for fighting terrorism required all member states to change some of their domestic laws or promulgate new ones, particularly to criminalize terrorism.[296] Against steep odds, the Security Council's framework was able to prompt these changes in "some of the most sensitive areas" of countries' domestic law, transforming the meaning of the "national" in national-security law.[297] In essence, what states might have been left to handle on their own—through extraterritorial regulation under the protective principle—they addressed through a multilateral process in which governments decided on the terms of the solution in concert. As Professor Kim Lane Scheppele suggested in her study of the Security Council Resolution, governments went this route in recognition that unilateral regulation was insufficient to address the transnational threat posed by terrorism.[298]

This logic applies to other unilateral protective tools, too: if the utility of the protective principle in the context of certain transnational threats is limited (because these threats realistically cannot be addressed by the actions of any one state), the utility of other national-security exceptions is also limited. For threats of a truly global nature, a state will not be able to argue successfully that its protection depends on going it alone; the end it seeks could be better achieved, and may only be achieved, in a multilateral framework, one integrated with the legal order rather than excepted from it. A state that seeks to impose a unilateral trade restriction under the WTO's national-security exception to sanction another state, for example, could instead better deter the state, and protect its own interests, by recruiting other states to implement multilateral sanctions instead.[299]

This observation brings that of the 1935 Harvard Research Project—foreseeing the end of the protective principle—a step further. Then, the drafters predicted the end of the principle to arise when states would eventually appreciate each other's interests sufficiently to protect them within their domestic legislation.[300] This Section suggests that the protective principle might become further circumscribed not just because states begin to protect others' interests but

296. Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L SEC. L. & POL'Y 437, 442-43 (2010).

297. *Id.*

298. *See id.* at 438 (noting that governments passed similar antiterrorism laws contemporaneously).

299. *See* Gheibi, *supra* note 98, at 437 ("Without the legitimization that comes from international law, in the long-run, defiance by other nations and the chilling effect will diminish the power of U.S. secondary sanctions as tools of outcasting.").

300. *See Draft Convention*, *supra* note 19, at 547.

because they realize that protecting other states' interests, in some cases, is necessary to protect their own — that they are made safer from a transnational threat when other nations are safe from it, too.

By proposing a limiting framework for the protective principle — one that helps illustrate the limited cases in which the principle would be effective for a state's protection — this Note also highlights where it should end: where the principle would be neither necessary nor sufficient to protect a state's interests. And if the scenarios where the protective principle "ends" also apply to other self-protective measures, this Note considers their outer bounds, too. For when one nation develops a weapon that could threaten anyone, a pandemic spreads across borders, or an economic crisis sends international markets reeling, there is only so much one state can do. States can and will take self-protective measures. But when these run out, they must turn to each other in recognition of the fact that self-protection in "world society" depends on the protection of all members, and on the protection of the society itself.[301]

CONCLUSION

The current formulation of the protective principle allows states to exercise extraterritorial jurisdiction as a "legal weapon" and in the absence of the genuine connection that is ordinarily necessary to justify the application of a state's law. This problem comes to life within the systematic expansion of protective jurisdiction in Chinese law. Yet it has also arisen and continues to manifest in other legal systems across the world. These applications of the protective principle undermine states' and individuals' interests and threaten to ignite escalatory disputes over jurisdiction.

This Note proposes a two-part test that requires states to demonstrate a sufficient nexus between what they seek to regulate, whom they seek to regulate, and their essential interests. This proposal builds on existing jurisprudence of analogous national-security exceptions in international law. At the same time, it sheds light on what the relationship of such exceptions should be with the rest of the global legal order. My hope is this framework will facilitate exercises of protective jurisdiction that protect the two classes of interests identified in *Lotus* and further the dual goals of international law.

In the famous *Lotus* case, the PCIJ defined the goals of international law as being the regulation of relations between "co-existing independent communities" and cooperation to achieve "common aims."[302] The court received criticism for appearing to prioritize coexistence — or what some deem "mere

301. *See* García-Mora, *supra* note 16, at 568.

302. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

coexistence"[303] — over cooperation. But the *Lotus* court was getting at something important: the idea that coexistence must precede cooperation. The achievement of common aims first requires that states learn to exist side by side; that they share some principles despite their fundamental differences; and that they pursue diplomacy when otherwise tempted to turn their weapons, or their laws as weapons, against each other. The work does not end with coexistence. But, as this Note has attempted to show, it is where the work must begin.

303. *See* Guilfoyle, *supra* note 38, at 107.