

ERDOS V. UNITED STATES: EXPANSION OF EXTRATERRITORIALITY AND REVIVAL OF EXTERRITORIALITY

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*The following comment discusses the opinion rendered by the United States District Court for the Eastern District of Virginia, per Judge Oren R. Lewis, in the case of United States v. Erdos** in which the defendant, the United States chargé d'affaires to the Republic of Equatorial Guinea, killed a fellow employee on the United States embassy premises in that country. The case turned primarily on whether the federal courts have jurisdiction over crimes committed within United States embassies abroad. The district court asserted jurisdiction and a jury verdict of voluntary manslaughter was returned against the defendant.*

Since this comment was written, the Fourth Circuit Court of Appeals has affirmed both the assertion of jurisdiction and the defendant's conviction. After making a preliminary determination that the federal courts can exercise only the jurisdiction specifically conferred on them by Congress, the circuit court held that 18 U.S.C. § 1112 conferred subject matter jurisdiction on the federal courts with respect to manslaughter committed "within the special maritime and territorial jurisdiction of the United States." The much more difficult question, however, was whether U.S. embassies abroad are within this special territorial jurisdiction. 18 U.S.C. § 7 includes in the term "special maritime and territorial jurisdiction of the United States":

.....
(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The defendant contended that section 7 was intended to apply only to areas within the geographical boundaries of the United States and could not be given extraterritorial effect. The circuit court admitted that section 7 was vague on this point and said the section's legislative history was

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**United States v. Erdos, No. 72-1328 (4th Cir., decided Feb. 14, 1973).

too unclear to provide any help in construction. The circuit court then undertook to construe section 7, limiting its inquiry to the terms of the statute itself.

The circuit court felt that the first two phrases of section 7(3) were broad enough to permit extraterritorial assertion of jurisdiction over U.S. embassies abroad, but it was troubled by the more narrowly written language of phrase three which necessarily limited jurisdiction to areas within the geographical boundaries of the United States. The court disposed of this problem, however, by pointing out that phrase three was separated from the first two phrases by the disjunctive "or"; hence the first two phrases stand independently of the third and are not limited or modified by it. In response to the defendant's contention that any statute which would confer criminal jurisdiction should be strictly construed, the court said that it perceived no duty to construe a statute narrowly where the congressional power was clear and the language of its exercise was broad.

*The circuit court further held that it makes no difference whether the United States owns its embassy absolutely in fee simple or owns some lesser interest. In the instant case the United States leased the embassy premises from a private citizen of the Republic of Equatorial Guinea. To buttress this conclusion, the circuit court cited the thirty year-old district court opinion of *United States v. Archer*, 51 F. Supp. 708, 709 (1943), which involved a false declaration before the American consul in Mexico City. There the court said:*

A consulate is, ordinarily, a building owned by the Government of the United States. And although it be not owned by the United States, it is a part of the territory of the United States of America.

*The Archer case was governed, however, by a statute which in its own terms expressly conferred federal jurisdiction over embassies, consulates, and legations for the offense involved. Both the district and circuit courts which passed on the question in *Erdos*, however, took, it upon themselves to read into the proffered jurisdictional statute a congressional intent that was hardly manifest in the language of the statute itself. Whether the courts have exceeded the bounds of statutory construction and have indulged in an exercise of judicial law-making is a question which would be best resolved by the Supreme Court. The defendant has filed a petition for certiorari.*

The author's scrutinizing appraisal of the District Court's opinion points out the major issues to be considered in relation to this petition.

Defendant Erdos, the American chargé d'affaires to Equatorial Guinea was charged in Federal district court with the murder of his

American administrative assistant within the confines of the United States Embassy at Santa Isabel, Equatorial Guinea in violation of 18 U.S.C. § 1111(b). The statute prohibits the crime of murder "[w]ithin the special maritime and territorial jurisdiction of the United States." Read with 18 U.S.C. § 7(3) the jurisdiction includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof. . . ." Defendant moved to dismiss the case for lack of jurisdiction.¹ Judge Oren Lewis of the United States District Court for the Eastern District of Virginia denied the motion holding that under 18 U.S.C. § 7(3) a Federal district court may exercise jurisdiction over an American diplomat charged with the murder of another American diplomat on the premises of an American embassy located in a foreign nation.²

It is clear that principles of international law form a part of the law of the United States.³ International law recognizes five basic principles for the assertion of penal jurisdiction.⁴ The best established of these principles is the *territorial* principle under which the right to exercise jurisdiction is determined by reference to the locus of the crime. Early United States recognition of this principle came during a period pervaded by international jurisdictional issues when Chief Justice Marshall declared that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute."⁵ All legislation is presumptively of a territorial nature⁶ with the legality or illegality of an act being determined by the law of the country in which the act is done.⁷ The underlying premise of this principle is found in the concept of sovereignty: "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts . . . would be an interference with the authority of

¹Defendant's additional motion to dismiss for lack of venue was denied. Venue was predicated upon 18 U.S.C. § 3238 which grants venue to the court in the district "in which the offender . . . is arrested or is first brought. . . ." Erdos was arrested upon debarking from an airplane at Dulles International Airport which is located within the Eastern District of Virginia. The significant issue in this case, however, concerns jurisdiction rather than venue. Once it is determined that jurisdiction exists it would probably follow that venue is proper. *See United States v. Bowman*, 260 U.S. 94 (1922); *Haddad v. United States*, 349 F. 2d 511 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965).

²*Erdos v. United States*, criminal No. 414-71-A (E.D. Va., Jan. 27, 1972). [hereinafter cited as Slip Opinion]. Erdos was convicted of manslaughter and sentenced to ten years imprisonment. *The Washington Post*, March 4, 1972, § B, at 1.

³*The Paquete Habana*, 174 U.S. 677 (1900).

⁴*Harvard Draft Convention on Jurisdiction with Respect to Crimes*, 29 A.J.I.L. 435, 445 (Supp. 1935).

⁵*Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

⁶*American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

⁷*Slater v. Mexican Nat'l R. R.*, 194 U.S. 120 (1904).

another sovereign."⁸ Because this territorial principle was so restrictive the courts have developed new principles to expand jurisdiction in the face of its rigid application.⁹

Under the *nationality* principle, jurisdiction is predicated upon the citizenship of the offender rather than the locus of the crime.¹⁰ By virtue of this principle United States courts have asserted jurisdiction to hold an American citizen subject to the laws of the United States wherever he may be.¹¹

Under the *protective* principle, jurisdiction is determined by reference to the national interest adversely affected by the offense. This principle, also recognized by United States courts, justifies a state's punishment of one who has caused a harmful act outside its jurisdiction if the consequences of such act prove to have a detrimental effect upon the national interest within the jurisdiction.¹²

Under the *passive* nationality principle, jurisdiction is determined by reference to the nationality of the victim of the offense. Although this principle has been accepted by some nations, American courts have opposed it.¹³

Under the *universality* principle, jurisdiction is determined by reference to the authority which maintains the custody of the person who committed the crime. This principle has been recognized in the United States in the case of piracy where jurisdiction is extended to the high

⁸American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

⁹See Berge, Criminal Jurisdiction and the Territorial Principle, 30 MICH. L. REV. 238 (1931).

¹⁰See United States v. Baker, 136 F. Supp. 546, 548 (S.D.N.Y. 1955) (dictum).

¹¹Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Blackmer v. United States, 284 U.S. 521 (1932); United States v. Bowman, 260 U.S. 94 (1922).

¹²Strassheim v. Daily, 221 U.S. 280, 285 (1911); Rocha v. United States, 288 F. 2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961); United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960). But see Chin Bick Wah v. United States, 245 F. 2d 274 (9th Cir. 1957). The protective principle was recognized by the Permanent Court of International Justice in Case of the S.S. Lotus, [1927] P.C.I.J., Ser. A., No. 9. The Court held that Turkey had jurisdiction to try a French ship captain for causing the deaths of Turkish Nationals in a collision with a Turkish vessel in international waters.

The French codification of this principle is as follows:

Any foreigner who, outside the territory of France shall be culpable, either as principal or accomplice of a crime against the security of the state . . . shall be prosecuted and tried according to the provisions of French laws, if he is arrested in France or if the government obtains extradition. CODE D' INSTRUCTION CRIMINELLE art. 7(1) (48 ed. Petits Codes Dalloy 1948).

¹³"Jurisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence. It has been vigorously opposed in Anglo-American countries." *Harvard Draft Convention on Jurisdiction with Respect to Crimes*, supra note 4, at 578-80.

seas.¹⁴ Some authorities have added a sixth principle, the *floating territory* principle. Under this principle special jurisdiction over vessels exists¹⁵ through the application of the rule of international maritime law that the state whose flag the vessel flies is competent to exercise jurisdiction over such vessel.¹⁶

In the *Erdos* decision, the court expressly relied on the protective and nationality principles as the bases for the exercise of its jurisdiction. Explaining its application of the protective principle the court stated:

That principle. . .with respect to the enforcement of criminal laws, provides that a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.¹⁷

The court found a threat to the operation of governmental functions in that “[t]he alleged murder here clearly interfered with the foreign affairs of the United States and its diplomatic relations with Equatorial Guinea”¹⁸ and further that “the United States Embassy at Santa Isabel ceased functioning for a substantial period of time” as a direct result of the incident.¹⁹

Using the nationality principle as further support the court stated that “there is also considerable authority that this court could assume jurisdiction” under this principle.²⁰ The court relied on *Skiriotes v. Florida* in which the Supreme Court stated that the United States may govern the conduct of its citizens in foreign countries when the rights of other nations or their nationals are not infringed.²¹

As the *Erdos* court notes, a United States district court may exercise jurisdiction on the basis of either the protective or the nationality principle. It may not exercise such jurisdiction, however, in the absence of an expression of congressional authorization since the judicial power of the United States is limited and extends only as far as has been explicitly

¹⁴United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820).

¹⁵George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966).

¹⁶See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 584-86 (1953).

¹⁷Slip Opinion, *supra* note 2, at 2. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965).

¹⁸Slip Opinion, *supra* note 2, at 2-3.

¹⁹*Id.* at 3.

²⁰*Id.*

²¹*Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) (sustained criminal conviction for a violation occurring in excess of three miles off the Florida coast.)

provided by congressional legislation.²² It follows, therefore, that a man cannot be tried for a crime in a Federal court unless he has violated a Federal statute.²³

The traditional rule of extraterritorial applicability of legislation which obtains in the United States is that the statutory law applies only to conduct occurring within the territory of the United States unless a contrary intent is clearly indicated by the statute.²⁴ Thus, although Congress may enact statutes with extraterritorial effect,²⁵ if punishment of crimes "is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard."²⁶ Strict adherence to this rule is required in construing criminal statutes because as Chief Justice Marshall declared, "the rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."²⁷

The *Erdos* court found the requisite expression of legislative intent that jurisdiction be exercised extraterritorially under the protective and nationality principles by reading 18 U.S.C. § 7(3) together with 18 U.S.C. § 1111(b).²⁸ 18 U.S.C. § 1111(b) subjects to punishment anyone committing murder "within the special maritime and territorial jurisdiction of the United States." The court held that "the American Embassy at Santa Isabel, Equatorial Guinea, is on lands reserved or acquired for the use of the United States"²⁹ within the meaning of 18 U.S.C. § 7(3) which defines "the special maritime and territorial jurisdiction of the United States" as:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of

²²*Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

²³*Brooks v. Texas*, 256 F. Supp. 807, 811 (N.D. Tex. 1966).

²⁴See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965). See also J. BRIERLY, *THE LAW OF NATIONS* 299 (6th ed. Waldock 1963).

²⁵*Blackmer v. United States*, 284 U.S. 421, 436-38 (1932) (failure of American citizen to return from abroad to testify in federal court held contempt of court); *United States v. Bowman*, 260 U.S. 94 (1922) (defrauding United States while on high seas and in a foreign country); *Rocha v. United States*, 288 F. 2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961) (sham marriages entered into abroad for purposes of defrauding the United States).

²⁶*United States v. Bowman*, 260 U.S. 94, 98 (1922). See *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

²⁷*United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

²⁸Slip Opinion, *supra* note 2, at 1-2.

²⁹*Id.* at 2.

the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The authorization for 18 U.S.C. § 7(3) is found in Article I, Section 8, Clause 17 of the United States Constitution, which provides that Congress shall have the power,

to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

The Framers intended that the first portion of this constitutional provision vest exclusive jurisdiction in the Federal Government over the place to be selected as its seat of government.³⁰ The remaining portion of the provision was designed to vest exclusive jurisdiction in the Federal Government over places acquired from the individual states for the purpose of erecting structures for use by the Federal Government.³¹

The 18 U.S.C. § 7(3) provision was originally § 3 of the Crimes Act of 1790³² which prohibited murder "within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." The present form of the statute with the exclusion of the words "or concurrent" first appeared in the Criminal Code of 1909.³³ The insertion of the clause "on any land reserved or acquired for the use of the United States," did not extend the original scope of jurisdiction. The purpose of this clause was to codify into one statute various jurisdictional sections which previously appeared in several sections. Senator Heyburn, a sponsor of the bill, stated that the statute was not intended to expand the jurisdiction of United States courts:

[W]e have not attempted to enlarge the jurisdiction of the United States either technically or geographically. We have simply gathered up a large number of existing provisions in the various statutes, the enumeration of the places over which the United States courts should have jurisdiction for the punishment of these offenses—we have gath-

³⁰THE FEDERALIST NO. 43 (J. Madison).

³¹*Id.* 2 THE RECORDS OF THE FEDERAL CONVENTION 117, 127, 321, 325, 505, 506, 510, 570, 609, 656 (M. Farrand ed. 1966); 3 *Id.* at 122, 408.

³²Act of April 30, 1790, ch. 9, § 3, 1 Stat. 113.

³³Act of March 4, 1909, ch. 321, § 272, 35 Stat. 1143.

ered them together in a section at the beginning of this chapter providing for the punishment of these particular offenses in order to avoid the repetition with each separate section of this geographical jurisdiction.³⁴

In 1940, 18 U.S.C. § 7(3) was amended to include the phrase "under the exclusive or concurrent jurisdiction of the United States."³⁵ The purpose of this amendment was to confer concurrent jurisdiction upon the courts over crimes committed on Federal reservations where the Government exercised partial jurisdiction.³⁶ In 1948 the final revision was made and the term "special maritime and territorial jurisdiction" was substituted for "the crimes and offenses defined in [the 1940 Act.]"³⁷ The Revisor's Note to this revision states that despite minor changes "the extent of the special jurisdiction as originally enacted has been carefully followed." Thus, the legislative history of 18 U.S.C. § 7(3) reveals that Congress did not intend the exercise of jurisdiction authorized by the statute to infringe upon the jurisdiction of other sovereign nations. No court decision has ever given the statute this broad reading. As a matter of fact, a number of apposite judicial decisions buttress the conclusion that the intent of Congress was to limit its exercise to areas within the territorial sovereignty of the United States.

In *United States v. Wiltberger*³⁸ Chief Justice Marshall construed the former version of 18 U.S.C. § 7(1) which extends criminal jurisdiction to the "high seas."³⁹ He refused to find that the jurisdiction intended by the words "high seas" extended to a manslaughter committed on an American vessel in Chinese territory. Declining to fashion a judicial sanction of the exercise of jurisdiction in the absence of proper legislation, the Chief Justice stated:

[T]he power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.⁴⁰

³⁴42 CONG. REC. 1186 (1908) (Remarks of Senator Heyburn).

³⁵Act of June 11, 1940, ch. 323, 54 Stat. 304 (as amending Act of March 4, 1909, ch. 321, § 272, 35 Stat. 1143).

³⁶Congress authorized federal agencies and officers in charge of land to obtain consent to either exclusive or partial jurisdiction over any land deemed desirable. Act of October 9, 1940, ch. 793, § 355, 54 Stat. 1083. The revised version of 18 U.S.C. § 7(3) would thus conform to congressional design to afford government agencies broad discretion in obtaining the necessary jurisdiction.

³⁷Act of June 11, 1940, ch. 323, 54 Stat. 304.

³⁸18 U.S. (5 Wheat.) 76 (1820).

³⁹Act of April 30, 1790, ch. 9, § 12, 1 Stat. 115.

⁴⁰*United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). A related question arose in *United States v. Escamilla*, 467 F. 2d 341 (4th Cir. 1972). *Escamilla* was tried and convicted under

In *United States v. Cordova*⁴¹ the court refused to find that the words "high seas" authorized the exercise of jurisdiction over an individual who assaulted another aboard an American airplane flying over the high seas. The court stated:

The proper approach is . . . to be gathered . . . from *United States v. Wiltberger* . . . The acts for which Cordova stands charged were vicious in the extreme. He jeopardized others on the plane, including a considerable number of infants. But it seems to me clear that those acts have not been denounced by a statute which forbids them when committed on board an American "vessel", or when committed on the "high seas."⁴²

In response to the *Cordova* decision Congress enacted 18 U.S.C. § 7(5) to "plug that gap in the criminal law"⁴³ by extending Federal jurisdiction to crimes committed on an American airplane in flight over the high seas. Congress apparently had previously recognized the limited jurisdictional scope of § 7 of Title 18 when, in 1856, it enacted 18 U.S.C. § 7(4) to extend Federal jurisdiction to the Guano Islands.⁴⁴

Apart from those judicial decisions and congressional enactments additional evidence exists which points to the limited jurisdictional scope of the statute in question. In an 1848 opinion, the Attorney General of the United States stated that the courts of the United States lacked the proper authority to try a captain of a Georgian infantry battalion who was charged with the murder of another American officer. This was true even though the incident took place on Mexican territory which was occupied by American troops and under the authority of a military governor.⁴⁵ The Attorney General was of the opinion that since the offense was not committed in any of the locations enumerated in the Crimes Act of 1790, there was no express legislative provi-

18 U.S.C. § 1112 for involuntary manslaughter allegedly committed while on an unclaimed island of ice floating in the Arctic Ocean. Although the conviction was reversed and the case remanded on the substantive allegations, the evenly-divided court was unable to determine whether jurisdiction had been exercised properly under 18 U.S.C. § 7(1) which extends criminal jurisdiction to the "high seas, any other waters within the admiralty and maritime jurisdiction of the United States"

⁴¹89 F. Supp. 298 (1950).

⁴²*Id.* at 303.

⁴³H.R. REP. NO. 2257, 82d Cong., 2d Sess. 2 (1952).

⁴⁴Act of Aug. 18, 1956, ch. 164, 11 Stat. 119. See Cong. Globe, 34th Cong., 1st Sess. 1697 (1856). See also *Jones v. United States*, 137 U.S. 202 (1890), where defendant's conviction pursuant to 18 U.S.C. § 7(4) was affirmed. The court indicated *id.* at 211, however, that but for the presence of express legislation covering the specific location involved, it would have been improper to exercise jurisdiction.

⁴⁵OP. ATT'Y GEN. 55 (1848).

sion sufficient to confer jurisdiction over the offense.⁴⁶ In 1970 the House Committee on Armed Forces published a report of the Armed Services Investigating Sub-committee inquiry into the My Lai episode. This report recognized that the former servicemen involved in the incident could not be brought to trial because no court had jurisdiction over them.⁴⁷

The National Commission on Reform of Federal Criminal Laws has given special attention to the jurisdictional gaps in 18 U.S.C. § 7(3). The Commission has proposed the enactment of a provision entitled "Extraterritorial Jurisdiction,"⁴⁸ which provides, *inter alia*:

Except as otherwise expressly provided, extraterritorial jurisdiction over an offense exists when the offense is committed by a federal public servant who is outside the territory of the United States because of his official duties or by a member of his household residing abroad or by a person accompanying the military forces of the United States.⁴⁹

The Commission's comment states that "when the crime involves only Americans, the host nation may be reluctant to take action against the perpetrator . . . This paragraph also closes a gap in jurisdiction with regard to diplomatic personnel who have immunity in the host country and yet cannot be prosecuted in the United States for acts abroad."⁵⁰ Citing a specific example in its analysis of the proposed section, the Commission stated that present Federal law does not cover the murder of an American ambassador by his wife or a member of his staff, an area which will be covered by "the proposed redefinition of federal extraterritorial jurisdiction."⁵¹

In the *Erdos* decision, however, Judge Lewis asserted jurisdiction citing the Supreme Court in *Skiriotes v. Florida*.⁵²

the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries . . . with respect to such an authority there is no question of international law, but solely of the purport of the municipal law⁵³

⁴⁶*Id.*

⁴⁷INVESTIGATING SUBCOMM. OF HOUSE COMM. ON ARMED FORCES, 92st Cong., 2d Sess., REPORT ON THE MYLAI INCIDENT 47-48 (Comm. Print 1970).

⁴⁸NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 208 at 18 (1970).

⁴⁹*Id.* § 208(f) at 19.

⁵⁰*Id.* § 208 Comment at 19-20.

⁵¹*Id.* at xxxi.

⁵²313 U.S. 69 (1941).

⁵³Slip Opinion, *supra* note 2, at 4.

Judge Lewis found 18 U.S.C. § 7(3) as the "municipal law" governing the crime in *Erdos*, a construction requiring a clear expression of legislative intent that the statute be applied extraterritorially. It is submitted that 18 U.S.C. § 7(3) is not an expression of such intent and that an analytical examination of the statute reveals a contrary intent.

Implicit in the court's opinion is the recognition that Congress perhaps did not intend that 18 U.S.C. § 7(3) be applied extraterritorially. This implicit recognition appears to stem from the court's finding of an alternative ground for the exercise of its jurisdiction. Quoting from *Wilson's Diplomatic Privileges and Immunities*,⁵⁴ the court stated:

[D]iplomats do not escape the jurisdiction of the courts of their home state. It would appear as if they remain domiciled on the territory of the sending state in matters of civil and criminal jurisdiction.⁵⁵

The court also found that "the United States Embassy . . . is a part of the territory of the United States,"⁵⁶ in effect finding that 18 U.S.C. § 7(3) does not have to be applied extraterritorially since the American Embassy premises are part of the territory of the United States. The court here employed a proposition known as the theory of exterritoriality.⁵⁷ Under this theory, first proposed by Grotius,⁵⁸ diplomatic premises are regarded as foreign soil in the host nation and an extension of the territory of the sending state, although physically a part of the host nation.⁵⁹ The theory of exterritoriality is a legal fiction unsupported by modern international law.⁶⁰ It has been stated that "such a theory may for certain purposes be useful, but it is untrue; in fact, it leads to absurd results and it has now been definitely repudiated by the more modern writers and by decisions of the courts."⁶¹ The *Erdos* court revived the anachronistic doctrine of exterritoriality even though it has been rejected by American courts.⁶² In an action under the Federal Tort Claims Act, which is not applicable to claims arising in a foreign country, the plaintiff contended that his claim did not arise in a foreign country because the significant acts occurred within the confines of the Ameri-

⁵⁴C. WILSON, *DIPLOMATIC PRIVILEGES AND IMMUNITIES* (1967).

⁵⁵*Id.* at 32.

⁵⁶Slip Opinion, *supra* note 2, at 3.

⁵⁷M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 33 at 353 (1970).

⁵⁸C. WILSON, *supra* note 54, at 17.

⁵⁹*Id.* at 6.

⁶⁰7. M. WHITEMAN, *supra* note 57, at 353.

⁶¹C. HURST, *Juridical Basis of Diplomatic Immunities*, in *INTERNATIONAL LAW, THE COLLECTED PAPERS OF SIR CECIL HURST* 195, 199 (1950).

⁶²*But cf.* *United States v. Archer*, 51 F. Supp. 708, 709 (S.D. Cal. 1943).

can Embassy at Bangkok, Thailand.⁶³ The court rejected this contention stating that embassies abroad are not part of the territorial jurisdiction of the United States.⁶⁴ In another case, the defendants, prosecuted for petty larceny committed at the Soviet Embassy in Washington,⁶⁵ moved for a judgment of acquittal on the ground that the embassy was Soviet territory and therefore not within the jurisdiction of the United States. The court concluded that for the purpose of arresting individuals for crimes committed on the premises of the embassy it was a part of the United States.⁶⁶

Although a number of foreign courts have applied the principle of extritoriality,⁶⁷ most have rejected this theory.⁶⁸ It is accepted that criminal acts done within diplomatic premises are acts done within the territory of the host nation, and that consequently the host nation has exclusive jurisdiction over the offender.⁶⁹ If the offender is a diplomat he may be entitled to diplomatic immunity from judicial process of the host nation;⁷⁰ once this immunity is waived by the sending state the applicable local law becomes operative.⁷¹ The rationale for the diplomatic immunity doctrine is that harmonious relations between states is promoted by the avoidance of interference with foreign legations.⁷² Although the effects of extritoriality and diplomatic immunity may coincide they are basically different and should not be confused. Furthermore, the former has been repudiated while the latter continues to be

⁶³*Meredith v. United States*, 330 F. 2d 9 (9th Cir. 1964).

⁶⁴*Id.* at 11.

⁶⁵*United States v. Moore*, Criminal No. 2363-68 (D.C. Ct. Gen. Sess. 1968); *United States v. Harmon*, Criminal No. 2364-68 (D.C. Ct. Gen. Sess. 1968).

⁶⁶*Id.*

⁶⁷*See, e.g., In re Zoltan Sz.*, [1928] 22 BÜNTETOJOGI DÖNTVEYTER No. 4, 4 Int'l L. Rep. 372 (Sup. Ct. Hung. 1928). Here the defendant fraudulently induced the Hungarian Legation in Vienna to issue a passport to him. In ruling on the issue as to the location of the offense, the court stated:

[T]he offense was committed not abroad but on the territory of the Hungarian state. The premises of the Royal Hungarian Legation which enjoyed the privileges of extraterritoriality must be regarded as Hungarian territory. Accordingly, all acts committed therein must be judged according to the rules of Hungarian criminal law. *Id.* at 373.

⁶⁸*See, e.g.,* Judgement of April 30, 1954, [1955] e Pasicrisie Belge 112, 21 Int'l L. Rep. 249 (Belg. 1954). Belgian law provided for reparations for damage caused by war on Belgian territory. The premises of the Belgian Embassy in Berlin were held not to be Belgian territory.

⁶⁹*See* *Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968), where the court held that the Republic of Korea had exclusive jurisdiction over a U.S. serviceman charged with committing murder in Korea.

⁷⁰*Arcaya v. Paez*, 145 F. Supp. 464 (S.D.N.Y. 1956). *See* M. OGDON, *JUDICIAL BASES OF DIPLOMATIC IMMUNITY* (1936); 25 CHI.-KENT L. REV. 329.

⁷¹M. HARDY, *MODERN DIPLOMATIC LAW* 63-64 (1968).

⁷²*See e.g.,* *Ghosh v. D'Rozario*, [1962] 2 All E.R. 640, 644 (C.A.).

viable.⁷³ Exterritoriality should also not be confused with inviolability. Embassy premises are inviolable, that is, they cannot be entered, searched, or detained by the local authorities, even under process of law.⁷⁴ On the other hand, "the inviolability of diplomatic premises does not mean that they are to be considered altogether outside the application of the law of the receiving state—a foreign enclave within its territory. . . ."⁷⁵

In reviving exterritoriality the *Erdos* court, as previously stated, quoted Wilson's *Diplomatic Privileges and Immunities*. It is submitted that the court's quotation from Wilson is out of context. Wilson states that it would appear that diplomats remained domiciled on the territory of the sending state only because the doctrine of diplomatic immunity provides them with jurisdictional immunity.⁷⁷ The court fails to note that Wilson continues:

The fiction of exterritoriality has been discredited and nationality normally would be considered as the legal basis for jurisdiction by the sending state.⁷⁸

But as we have seen, Congress has not yet enacted extraterritorial legislation under the nationality principle to cover crimes on diplomatic premises.

Finally the *Erdos* court relies on Article 3(4) of the Vienna Convention on Diplomatic Relations⁷⁹ which states:

The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

This principle is well accepted but, again, Congress has not conferred

⁷³Oppenheim favors the term "exterritoriality" because it demonstrates that the diplomat enjoying diplomatic immunity is treated as though he were not within the territory of the receiving state. I L. OPPENHEIM, *INTERNATIONAL LAW* 711 (7th Lauterpacht ed. 1948).

Incorrect use of the term has created so much criticism that perhaps it should be abandoned completely. See Preuss, *Capacity for Legation and the Theoretical Basis of Diplomatic Immunities*, 10 N.Y.U.L. REV. 170 (1932):

In the interest of accuracy of thought and expression, it is desirable that the word "exterritoriality" be dropped from the language of international law. A term which is susceptible of so many diverse connotations cannot serve the purposes of precise juristic terminology. *Id.* at 187.

⁷⁴2 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES* 1271 (2d ed. 1951).

⁷⁵J. BRIERLY, *supra* note 24, at 260.

⁷⁶See *supra* note 24, at 260.

⁷⁷See *supra* note 55 and accompanying text.

⁷⁸C. WILSON, *supra* note 54, at 32.

⁷⁹*Id.*

upon the Federal courts this category of jurisdiction. The court also stated that "the defendant was not arrested in Equatorial Guinea—to the contrary, he was allowed to leave that country."⁸⁰ This fact did not vest the court with jurisdiction:

[T]he foreign nation has the exclusive jurisdiction to punish the offender . . . under international law the United States has no authority to infringe upon the jurisdiction of a sovereign nation by dictating to that nation the procedure to be followed by that nation in the exercise of its primary jurisdiction over alleged violators of its criminal laws.⁸¹

Congress alone possesses the authority to confer jurisdiction upon the Federal courts by enacting extraterritorial legislation, premised on the protective and the nationality principles to prohibit crimes by American nationals in American embassies abroad. It has not yet done so and in the absence of such legislation a court should not exercise improper jurisdiction, upon the basis of a legislative intent which does not exist and a tenuous legal theory, to punish a crime which has been left unpunished due to imperfect legislation. Such a precedent might produce ominous legal consequences. It is suggested that Congress adopt the proposed legislation of the National Commission on Reform of the Federal Criminal Code to extend jurisdiction to crimes committed by American diplomats abroad. Moreover, in order to regulate the conduct of American citizens abroad in the broadest possible manner so as to avoid future gaps in the proposed statute, it is suggested that Congress enact the following statute:

All offenses committed in a foreign nation or in any place outside the territorial limits of the United States by an American citizen which would be prohibited if committed within the United States shall be subject to punishment as if committed in the United States if they have not been tried elsewhere and if the accused is in the United States voluntarily or as a result of extradition.

The far-reaching implications of the *Erdos* decision arise from the exercise of jurisdiction by the court in the absence of a statute authorizing such jurisdiction. The court has given the United States Government a mandate to apply a statute extraterritorially in the absence of an expression of congressional intent that this be done.

⁸⁰Vienna Convention on Diplomatic Relations, *done* 18 April 1961, 500 U.N.T.S. 96, 112. The United States deposited its accession at Jordan on July 29, 1971. 65 DEP'T STATE BULL. 296 (Sept. 1971).

⁸¹Slip Opinion *supra* note 2.

⁸²*Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968).