State Jurisdiction in the Area of International Criminal Law

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Introduction:

State jurisdiction is one of the most important and ongoing topics of contemporary international law. The significance of this issue and its direct effect in the international relations has increased international interest in state jurisdiction. Moreover, this increment of interest has created a new and modern understanding of each principle of state jurisdiction reflecting universal character rather than national peculiarity.

Historically, it is clear that the existence of state jurisdiction in its basic utilization represented by territoriality was concurrent with the emergence of international law in its classic concept. Furthermore, since it was necessary for the neonate international law to earn its credibility and support in states, it had to prove its effectiveness as the regime looking after international relations and emphasize its ability to provide stability and safety. Therefore, it was the main and most significant policy beyond the establishment of classic international law to provide the states with the elements that were necessary for their existences and securities. Moreover, in order to reach this goal classic international law recognized and granted two principles for all states that were members of international society as the most significant and fundamental principles of international law. These two principles are the principal of sovereignty and the principle of equality.¹ According to the principle of sovereignty, within its territory the state has the legal capacity to enact and enforce any law that is necessary for its existence and safety and prosecute who violates these laws.² The principle of equality obligates the state during its practice of such rights to respect the sovereignty of other state and to guarantee the equal

² Id.
rights to do the same. Accordingly, it can be concluded that classic international law recognized territoriality as the basis of state jurisdiction by providing states with the legal tools that could justify the application of territoriality as a domestic matter. In other words, classic international law did not provide any regulation or legal project to organize the application of state jurisdiction, and it considered state jurisdiction a national affair governed by domestic laws. However, this nature of state jurisdiction had to change to meet new conditions in the international society. The most important of these conditions includes change in the nature of incriminating activities nature and the existence of domestic or international non-governmental organizations (NGO) concerning human rights.

Even though the classic understanding and use of state jurisdiction was effective against simple crimes in which all the elements of the incriminating action take place in one territory, this classic concept of state jurisdiction created many legal problems because of its narrow application. Improvement in the communications’ methods and the creation of more rapid means of transportation engendered new type of crimes taking place in more than one territory. These kinds of crimes are called transboundary offenses, and it is impossible to prosecute them by applying territoriality in its basic concept.

The main problem that may occur as a result of narrow application of state jurisdiction is the legal conflict between two or more jurisdictions. This conflict can be either positive or negative. On the one hand, positive conflict appears when two or more states assume jurisdictions over the same crime. On the other hands, negative conflict can

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3 ROTHMAN, Supra note 1, at 52.
4 Id. at 51.
5 ELLEN S. PODGOR, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 95 (Lexis Nexis) (1st ed).
occur when none of the involved states practices its right and assert jurisdiction to prosecute the criminals.

Also, the importance of state jurisdiction principles can be explained by examining two other respects related to the individuals involved in the crime, the criminal and the victim. These two respects can be linked to the existence of international organizations.

Determining which law should be applied is a significant consideration for the criminal being prosecuted for two reasons. First, knowing the law that governs the offender’s action helps him to recognize the gravity of his act. Second, deciding the governing law according to state jurisdiction rule allows the criminal to know the legal tools that are available for him to defend himself. Using state jurisdiction to decide the applicable law is a considerable subject for the states and some international organizations willing to know whether they have the legal capacities to enforce their laws over illegal activities. In other words, determining the applicable law according to state jurisdiction rules is a very important step in order to allow international society’s members to enjoy one of the most fundamental rights granted by international law the right of full sovereignty over individuals or territories. For these reasons, it is clear that in order to gain the maximum possible benefit of the state jurisdiction it was very important to consider the universal need for more cooperation in order to establish clear rules of its application. Even though the necessity of determining state jurisdiction has been recognized by international society, the practical applications of its principles have been a serious universal legal problem. This problem always results from the modern

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6 ROTHMAN, Supra note 1, at 51.
state jurisdictions’ principles’ generality and the ambiguity between their functions and applications’ limits.

In attempts to analyze these concerns this thesis discusses each principle, territoriality, nationality, protective principle, and universality, separately as well as the differences and similarities between each. Also, it will focus on the most recent problems resulting from the lack of these principles to satisfy the modern needs of the society leading to legal conflicts between states’ jurisdictions. Then, each section will conclude with an explanation of the unclear parts of each state jurisdiction’s principles with some suggestions that can make the applications of these principles easier and more effective as they gain cooperation between states. This task will be accomplished by reviewing some of the previously suggested successful attempts used in the other branches of international law.

All these goals will be reached by giving clear idea about the territoriality and its two modern concepts, the subjective territoriality and the objective territoriality. Also, part one will focus on the immunities that can be used to waive the application of territoriality. After completing the analysis and emphasizing the universal affect in its interpretation and application, this thesis will review the second principle considered to complement the principle of territoriality the nationality principle. This evaluation will consist of detailed information regarding positive or passive nationality. Then, part three of this thesis will discuss the protective principle and its special nature that results from the policy beyond its creation. Finally, part four will evaluate the universal principle and its international usage.
SECTION ONE:

TERRITORIAL JURISDICTION

1-1 TERRITORIAL JURISDICTION (Scope):

Basically, it can be stated that the territorial principle, especially in its traditional application, is the most respected and accepted basis for a state’s jurisdiction. This credibility and trust can be justified through two main traditional principles of international law utilized to establish the territoriality in its initial application. These two principles are: the principle of sovereignty and the principle of equality. According to the principle of sovereignty, the state is authorized to enact laws that are necessary for its existence in order to organize the activities within its borders. According to the equality principle, a state is obligated to conform to other states’ territorial sovereignty while exercising its sovereignty by enacting its domestic laws. As a result, the principle of territoriality can be defined as an absolute right which allows states to prosecute crimes starting and producing their effects within the states’ territories. Therefore, it can be concluded that in order to assume jurisdiction, according to the territoriality, all the crimes’ elements must occur within the claimant state’s territory. Even though the strict interpretation of territoriality has been used as an effective method to prevent crimes in

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7 ROTHMAN, Supra note 1, at 51.
8 Id.
10 Id.
their simple structure, it evacuated the principle from its privileges in facing some modern crimes.

Accordingly, states found it necessary to create new concepts of territoriality that fill in the gap resulting from the classic concept of the territoriality and to also provide them with extra legal methods which fit the states’ needs. The most important and recent concepts of the territoriality that have been highly respected and applied by the society include subjective territoriality and objective territoriality.

1-2: SUBJECTIVE TERRITORIALITY:

One of the most important developmental aspects of territoriality in its traditional meaning is subjective territoriality which resulted from society’s efforts to extend the states’ jurisdictions in order to reach two goals. The first of these goals is to emphasize the idea of sovereignty and territorial integrity. This could be achieved by providing the states with a legal method to assume jurisdiction over offenses that may affect the states’ interests and cannot be prosecuted by applying the strict interpretation of territoriality. The second goal is to obligate the states by inviting them to enter into treaties to participate in the security of international society against modern organized crimes in which the criminal conduct breaks down into many portions, each one of them taking place in different territories. Therefore, according to the subjective territoriality principle a state has the legal capacity in reliance on its sovereignty and international law to assert jurisdiction over crime when the incriminating action starts within its territory,

11 ROTHMAN, Supra note 1, at 51.
12 Id. at 52.
regardless of the criminal consequence’s place.\textsuperscript{14} As a result, in response to the policy beyond the creation of this principle and the special nature of the organized crimes, the scope of subjective territoriality does not limit itself to the situation where the criminal action is committed in the prosecuting state. Rather, it can be utilized to institute jurisdiction for every state in which part of the incriminated action takes place.

However, applying the subjective territoriality, according to this broad universal interpretation, could cause conflicts between two or more jurisdictions. This conflict could be negative or positive.

On the one hand, negative conflict could exist when the criminal conduct breaks down into many small parts, none of which cause any harm to the state in which it appears, and as a result does not bring the state’s attention and interest in prosecution.\textsuperscript{15} However, when it is considered as one entity, this kind of crime could cause serious to international society. Therefore, it is essential to create legal methods that encourage the states to participate in the protection of the international society as a whole and maintain the primary principles of international law.

In order to decrease the possibility of negative conflict, this issue had to bring to the states’ attention the enormous risk resulting from overlooking the application of their jurisdictions. In addition, while processing this project, the drafters had to consider the nature of the international community and states’ concerns about their sovereignty and equality.\textsuperscript{16} Therefore, the only way to put this legal project in process was to invite the states to enter into treaties tending specific kinds of crimes in which the risk that can

\textsuperscript{14} Lori F. Damrosch et al., International Law Case and Materials 1095 (West Group 2001) (1980).
\textsuperscript{15} Rothman, Supra note 1, at 54.
\textsuperscript{16} Id. at 51.
affect the society can be shown in greater and clearer ways.\textsuperscript{17} Thus, the subjective territoriality has been instituted and universally recognized through two treaties, the Geneva Convention for the Suppression of Counterfeiting Currency (1929) and the Geneva Convention for the Suppression of the Illicit Drug Traffic (1936).\textsuperscript{18}

According to these two treaties all contracting states obligated themselves to extend their jurisdiction to prosecute criminal actions affecting national security and to prosecute incriminating conduct affecting peace and security within the international society.\textsuperscript{19} Even though giving states the authority to extend their jurisdictions could contribute to the security of the international society against crimes and decrease negative conflict, it could also create many legal problems.

One of the most important arguments against subjective territoriality is that since it provides the states with legal extension of their jurisdiction, it can be used as a rule of extraterritorial jurisdiction more than a rule of territorial jurisdiction.\textsuperscript{20} This extraterritoriality could create positive conflict which may occur when two or more states where different parts of the incriminating action take place, both assume jurisdiction regarding the same offense. Therefore, states found it very important for their sovereignty and national privacy to establish boundaries for the application of subjective territoriality in a way that does not evacuate it from its special characteristic nor and defend states’ sovereignty over their territories.

It is undeniable that according to the basic principles of international law, all states

\textsuperscript{17} CARTER, Supra note 13, at 651.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} BANTEKAS, Supra note 9, at 146.
recognized as members of the international society are considered equal entities having the same rights and obligations.\textsuperscript{21} One of the most important rights that is guaranteed for all states is the right of full sovereignty over their territories and citizens.\textsuperscript{22} However, it should be understood that the states’ rights on full sovereignty are restricted by an equivalent obligation assimilate on their respect of other states’ sovereignty resultant from the principle of equality.\textsuperscript{23} Therefore, states in practicing their sovereignties by enacting laws and applying them over crimes are obligated by the principle of equality not to extend their application in a manner that disrupts public order or depreciates the sovereignties of other states.\textsuperscript{24} Even though the principles of sovereignty and equality are recognized and accepted by the states, voluntarily complementary application of them by the states is rare due to the special nature of the international society.

Many international experts agree that the greatest difficulty holding back an active and smooth application of international law similar to that of domestic laws is the absence of a high authority with the power to enforce the laws.\textsuperscript{25} Accordingly, even though states participate in the legislation of international law by suggesting legal solutions or a validating legal project recommended by other members in the international society, states are not typically bound to comply with these rules. However, states usually try to show moral respect to these rules, especially in the area of jurisdiction when there is a conflict between two states’ interests in order to guarantee

\textsuperscript{21} \textsc{Rothman}, supra note 1, at 51.
\textsuperscript{22} \textit{Id}.
\textsuperscript{23} \textit{Id}.
\textsuperscript{24} \textit{Id.} at 52.
\textsuperscript{25} \textsc{Carter}, supra note 13, at 26.
similar treatment from other states in other situations. Furthermore, this function can be reached through the application of the comity principle.\textsuperscript{26} 

International Comity is the most suggested and expected principle utilized to solve existing legal disputes or to avoid an expected dispute. Moreover, international comity can be defined as an honorary disclaimer from one state to another regarding the same lawful right that both of them are pretending.\textsuperscript{27} Therefore, it is obvious that International Comity can be a useful method to solve any positive conflict resulting from the application of subjective territoriality. Furthermore, this usage of International Comity can be explained when one of the states in which two of the incriminating action occur forfeits its right to the other state to assert its jurisdiction.\textsuperscript{28} However, in order to guarantee satisfactory abidance of International Comity in solving any positive conflicts, it should be widely interpreted so it may be recognized by all authorities in the state.\textsuperscript{29} 

The most respective application of International Comity that has been recognized domestically by the authorities in many states is what is so called the comity of court.\textsuperscript{30} According to the court comity, positive conflict can be solved when the judge refuses to decide the case before him assuming that the delivery of this case before another court in a different country could provide more justice.\textsuperscript{31} Even though the considering International Comity could avoid existing conflict between two

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\begin{itemize}
  \item \textsuperscript{26} DAMROSCH, \textit{Supra} note 14, at 1104.
  \item \textsuperscript{27} \textit{Id.}
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{29} \textit{Id.} at 1100.
  \item \textsuperscript{30} \textit{Id.} at 1104.
  \item \textsuperscript{31} \textit{Id.} at 1100.
\end{itemize}
jurisdictions, the International Comity can be utilized, also, to avoid the initial occurrence of the disputes.

It is clear that when the states relied on International Comity to solve positive conflicts occurring between jurisdictions, they did not mean to limit its application to solve existing conflicts, but rather they meant to decrease the possibility of the existence of these conflicts. Thus, in response to this policy, it will be legitimate to extend its use to the court comity, as well as to the law’s enactment and interpretative process. However, even though drafters in all states agree on enacting laws consistent with their national interests, they dissent in their evaluation of the limit of their jurisdictions and the conditions satisfied to put their laws in process. For instance, in some jurisdictions, legislators provide the existence of two factors in order to allow prosecuting a crime according to subjective territoriality. First, the part of incriminating action appearing in the territory of the prosecuting state should play an important and effective part in the crime. Hence, according to this condition a state cannot assume jurisdiction over weightless actions unless it is obligated by international law to prosecute. Second, there should be a legitimate and direct relationship between the portion occurring in the territory and the state assuming jurisdiction. As a result, a state does not have a lawful right to assert jurisdiction over an offense when the conduct that the state is willing to

32 ROTHMAN, Supra note 1, at 55.
33 DAMROSCH, Supra note 14, at 1100.
34 BANTEKAS, Supra note 9, at 145.
35 Id.
36 Id.
37 CARTER, Supra at 651. It has been previously explained that states are obligated by international law to extend their jurisdiction not only to prosecute the criminal actions affecting their national security but also to prosecute the conduct affecting the peace and the security of the society.
38 BANTEKAS, Supra note 9, at 145.
prosecute is additional and does not institute the fundamental element of the offense. However, that does not mean that the state will not be able to assert jurisdiction over this act according to the protective principle when its conditions exist.39

In addition, according to subjective territoriality, a state will not be eligible to apply its laws over an action when the causation between this action and the crime was disconnected. For example, if an individual made a poison in state A and sent it to another person who had the intent to use it to kill a person in state B but the portion was not enough to kill the victim who later died as a result of the gunshot in state C, state B will not be able to prosecute this conduct as a part of the slaughter crime since there is no link between the conduct and the criminal result. However, it should be understood that state B could apply its criminal law to prosecute the action as a part of attempted murder. One other hand, drafters in other states formulated the conditions of applying their laws according to the subjective territoriality, on one general principle the affection of the public order.40 This principle links the application of national laws on the convulsing the public order.41 However, it should be noticed that this theory is too broad: it can be affected by the political and economic situations in each state.

Even though the application of subjective territoriality could cause many legal problems and disputes between states as a legitimate result of the uncertain requirements of its application, it cloud be used to serve many positive purposes. First, it is agreed that subjective territoriality is a useful method allowing the states to extend their jurisdiction to prosecute crimes that harm their security and interests and cannot be prosecuted by

39 This principle is going to be discussed later in section 3.
40 ROTHMAN, Supra note 1, at 52.
41 Id.
applying the territoriality in its strictest interpretation.\(^\text{42}\) Second, applying subjective territoriality is an effective way to assert jurisdiction over some conducts having been incriminating universally when the criminal results of this conduct takes place in states that do not criminate these offenses such as sex-related crimes in third world countries.\(^\text{43}\) On the other hand, the arguments having been made against subjective territoriality focusing on its week points that may cause whether positive or negative conflicts can be avoided or at least decreased by following two suggested solutions. First, the positive conflict that may exist as a result of the use of overly wide measures or conditions to apply subjective territoriality by each national legislator can be avoided by globalizing the conditions of the subjective territoriality’ applications. This globalization of territoriality’ use can be reached by inviting states to join multilateral treaties that agree on universal conditions of the subjective territoriality and its applications. Since the agreement on this universal measure may fail as a result of the states’ interest in enjoying full use of their sovereignty, international society should find a reasonable way to obligate, or at least, encourage the state to remise some of their rights in full sovereignty. The most appropriate solution to reach this goal is to require the validation of this treaty, instituting the universal application of subjective territoriality, as a binding condition that satisfies eligibility for the enjoyment of more international rights or the participation of specific international organizations. This legal technique has been successfully used to force the states to ratify TRIPS agreement as a mandatory procedure to join WTO.\(^\text{44}\) Second, the negative conflict that may result from the states’ failure to apply domestic

\(^{42}\) **ROTHMAN**, *Supra* note 1, at 53.  
\(^{43}\) **BANTEKAS**, *Supra* note 9, at 145.  
laws to some international offenses can be solved in two ways. The first way to fill in this
gap is to invite states to join more treaties incriminating more international crimes and
obligating the states to apply their national laws over these illegal activities, even if there
is no clear public interest. Secondly, in an advanced level, the states can be invited to
establish international committees, consisting of experts linked directly to Security
Council, to create a list of these international crimes and to be authorized to update it
when needed. In order to reach the maximum benefit of this project, the states have to
oblige themselves to apply this list domestically without any modifications. At the
present time, it is undeniable that International Comity plays an important role in the area
of legal conflicts especially when the comity is applied with the reciprocity.\footnote{Dinwoodie, \textit{supra} note 44, at 45.}

In conclusion, though all those arguments that have been taken against the
application of the territoriality in its subjective territoriality, the practical situation makes
it clear that subjective territoriality is the best method available to improve the traditional
meaning of territoriality in a way that fits states’ needs without real violation of
international law.

1-3: OBJECTIVE TERRITORIALITY:

It has been explained before that the policy beyond the creation of the subjective
territoriality was to fill in the gap that could occur as a result of the strict application of
the territoriality and to convoy the improvements and needs in international society.
However, it should be noticed that even though subjective territoriality provides the states
and international society with extra protection, the principle overlooking the criminal consequence’s location creates some legal problems.\textsuperscript{46} One of the most important problems can be explained when the state in which the crime was conducted does not apply its criminal law either because this conduct is not incriminating or because it does not create real risk to national security. As a result, in this situation criminals could escape liability, and the state where the consequence takes place may suffer because it is unable to protect its interests. Therefore, national legislators found it essential to develop a new concept of territoriality that can complement the subjective territoriality and fill in the gaps occurring in their domestic legal systems. This legal project is called objective territoriality.\textsuperscript{47}

According to objective territoriality, a state has a lawful right to apply its domestic laws to a crime when the criminal consequence takes place within its territory even if the incriminated conduct is completed in a different state.\textsuperscript{48} However, it should be considered that in their efforts to show their sincerity and respect to other states’ sovereignty and interest’s drafters in many states tried to create boundaries for the applications of objective territoriality. Furthermore, these boundaries have been drawn by requiring certain degrees of gravity that have to exist in order to apply domestic laws.\textsuperscript{49} However, even though this condition has been expressed in different ways in many domestic laws, all drafters agreed on formulating this principle in a general way that allows broad interpretation of objective territoriality.\textsuperscript{50}

\textsuperscript{46} BANTEKAS, \textit{Supra} note 9, at 146.
\textsuperscript{47} DAMROSC, \textit{Supra} note 14, at 1095.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} BANTEKAS, \textit{Supra} note 9, at 146.
\textsuperscript{50} \textit{Id.} Recurring a certain degree of gravity to apply the objective territoriality is similar to requiring the destruction of public order to apply subjective territoriality.
One of the most recent and wide interpretations of objective territoriality is the so-called “effective doctrine” which was created by the federal court in the United States. The main goal of this doctrine was to extend court authority to apply its laws when an additional effect of the crime takes place directly in the United States territory. Moreover, the clearest application of this doctrine could be found in the U.S antitrust laws where the courts assert jurisdiction over crimes because negative economic consequences occurs within American territory. However, it should be noticed that this broad interpenetration of the objective territoriality through the creation of the effect doctrine has been denied by other states. Furthermore, this declination has been expressed by arguing that this illegitimate and wide application of objective territoriality would make it rule of the extraterritoriality rather than territoriality. Even though the unreasonable application of the objective territoriality may cause disputes between states practice proves that objective territoriality is an effective weapon to face some illegal activities committed by neither natural persons nor legal persons.

The necessary use of the objective territoriality can appear when a state tries to prosecute crimes committed by agents or modern technology. In theses kinds of offenses the incriminating conduct is usually prepared outside the territory and carried to the territory by a third party or modern communication methods such as phones, fax, or internet. Hence, in this situation the only way not to allow the criminals to escape liability is to allow the application of territoriality in its objective meaning.

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51 BANTEKAS, *Supra* note 9, at 146.
52 Id.
53 DAMROSCH, *Supra* note 14, at 1100.
54 BANTEKAS, *Supra* note 9, at 146.
55 Id.
In addition, objective territoriality can be utilized as a positive method to prevent some categories of legal persons from escaping liability by taking advantage of their special structures. Moreover, the most apparent example of these legal persons is multinational firms. By nature, the multinational companies are operated in many states. Accordingly, if the state in which each branch of the firm is operated insists on applying the strict interpretation of territoriality, each state will be eligible to regulate the activities of the branch operated within its territory. As a result, a state will not be authorized to prosecute an offense when the illegal conduct committed by other branches located in other states takes place within its territory and risks its national interest. The situation worsen and produce increased risk to international society when the actions are not forbidden in the states where they were committed when they are taken separately; however, it can create serious problems when taken as one entity. Therefore, the application of objective territoriality is the most suitable method to avoid the existence of negative conflict allowing violated companies to escape liability.

However, the special nature of objective territoriality resulting from its concern about the criminal consequence as a basis for its application could make legitimate arguments that objective territoriality is just a different interpretation of the protective principle. This argument can be retorted by setting forth an important fact. Even though, both principles adopt their validity from the principle of sovereignty, they are difference in their ambiots over criminals. This diversity can be explained by stating that

56 CARTER, Supra note 13, at 652.
57 Id.
58 Id.
59 BANTEKAS, Supra note 9, at 146.
60 Id.
61 ROTHMAN, Supra note 1, at 53.
since the objective territoriality is part of the territorial principle, the appearance of the
criminal in the territory of the claimant state is an essential requirement for this principle.
A state will be able to prosecute a crime according to the protective principle even if the
criminals are outside its territory.

Finally, even though it is undeniable that objective territoriality differs from the
protective principle and, therefore, has its own independent characteristic and application,
it is not as accepted and respected as neither the protective principle nor the subjective
territoriality. As such, there is a significant reason that can be stated to justify this
rejection.

It is agreed that the protective principle and subjective territoriality earn their
credibility and acceptance from the universal nature of their creations. On one hand,
international law authorizes states to indirectly or directly apply their national laws to
the subjective territoriality. The indirect authorization emerges through the principle of
sovereignty allowing states to prosecute crimes that may hurt public interest, and the
principle of equality insuring reasonable application of the sovereignty principle.\textsuperscript{62} The
direct guarantee is instituted by treaties that obligate states to apply their domestic laws
over certain crimes which may affect international security.\textsuperscript{63} On the other hand, the
protective principle is fully established and recognized by international law.\textsuperscript{64} In contrast,
it is agreed that the objective territoriality is the fruit of national legislators’ efforts to
extend their domestic laws, and there is no proof that objective territoriality has been

\textsuperscript{62} ROTHMAN, \textit{Supra} note 1, at 51.
\textsuperscript{63} CARTER, \textit{Supra} note 13, at 651.
recognized internationally.\textsuperscript{65} Hence, the state is not required by any international agreement or custom to obey other states’ interpretations of their national laws when there is no international interest.

1-4: IMMUNITY FROM JURISDICTION:

1-4-A: INTRODUCTION:

Even though it is undeniable that states have the capacity to assume jurisdiction over individuals and articles located within their territories, nations agree that considering some exceptions regarding certain people and property is necessary. The main purpose beyond making these immunities is to improve relationships between the states. Moreover, this improvement of relationships can be explained by stating that forbidding the authorities from applying national laws to certain people or articles belonging to another state shows the state’s respect for other states’ sovereignties and privacies. The respect of other states’ sovereignties can be explained by clarifying that a state waiving its right of asserting jurisdiction allows other states to exercise extended sovereignties by applying local laws over their national citizens and properties located overseas. Second, the consideration of other states’ privacies can be shown by stating that making an exception from jurisdiction over certain people belonging to other states will allow them

\textsuperscript{65} BANTEKAS, \textit{Supra} note 9, at 146.
to perform their functions with more freedom and confidence. The immunities should not be extended over the policies beyond their creations: there are three immunities that can be considered the most respected and recognized exceptions from the traditional concept of territoriality: the immunity of diplomatic envoys, consular immunity, and immunity for international organizations.

1-4-B: THE DIPLOMATIC ENVOYS IMMUNITY:

It is legitimate to state that states are not bound to establish any kind of relations with each other. However, when states involve in political relations with each other and confirm that by exchanging diplomatic envoys, the receiving states are bound by international law to respect the general rules of diplomatic relations. The most significant rule of diplomatic relations, having been created and recognized by customary international law is the rule that grants immunity from jurisdiction for diplomatic envoys. According to this rule diplomats are immune from the host state’s jurisdiction. However, it should be noticed that the enjoyment of this immunity is regulated by many terms.

One of the most important regulative terms created to is the term that determines the period of time in which the immunity remains effective. In reliance on the Vienna Convention on Diplomatic Relations, diplomatic immunity starts to be in effect since the diplomat gets into the territory of the host state, and it remains in effect until the sending

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66 BANTEKAS, Supra note 9, at 174.
67 EPPS, Supra note 64, at 142.
68 Id.
69 EPPS, Supra note 64, at 143.
70 Id.
state expresses its desire to terminate this immunity.\textsuperscript{71} It should be noticed that even after
the sending state terminates the diplomatic immunity, immunity is still valid to cover the
diplomatic activities having been performed by the diplomat while he was recognized by
his country as an official representative.\textsuperscript{72} In order to protect the host state from being
harmed by the unlawful use of this immunity by the diplomat the Vienna Convention
provides legal solutions to ensure safe utilization of this immunity. The first solution can
be considered as a positive obligation for the diplomat. The second solution can be
considered as a possible legal weapon used by the host state to protect its national interest
from being harmed by illegal or extended usage of diplomatic immunity.

It is undeniable that the main purpose beyond the creation of the diplomat
immunity is to provide diplomats with extra protection allowing them to perform their
functions independently.\textsuperscript{73} As a result, the usage of diplomat immunity should be limited
to the purpose of its creation.\textsuperscript{74} Thus, in order to apply this immunity to the diplomat’s
activities, it should be easy to prove that the activities are related to the official
diplomatic job performed in the mission. As a result, it will be reasonable to conclude
that the diplomat will not enjoy the exception, provided by Vienna Convention, when he
performs personal or commercial actions unrelated to his official function in the
mission.\textsuperscript{75}

In addition to the term limiting the application of diplomatic immunity over the
official activities the Vienna Convention created a positive obligation for the diplomat to
decrease the possibility of unlawful use of this exception. According to Art 41 (1) of the

\begin{flushright}
\textsuperscript{71} BANTEKAS, Supra note 9, at 174.
\textsuperscript{72} EPPS, Supra note 64 at 143.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} CARTER, Supra note 13, at 609.
\end{flushright}
Vienna Convention, the diplomat is bound to show extreme respect and obey the national
laws of the receiving state.\textsuperscript{76} Even though the limitation of the immunity and the
obligation created on the diplomat’s burden help to direct the use of this, the possibility
of illegal use of this immunity by the diplomat is still present. This possibility can be
clearly explained when the diplomat intents to shift on the laws by pretending that he
performs official activities in order to spy on the host state in favor of the sending state.
Therefore, the Vienna Convention found it essential to provide the host state with legal
methods to protect its national interest from harm.

According to the Vienna Convention, the host state is authorized by international
law to notify the diplomat that he is unwelcome to continue performing his official
function in the receiving state’s territory.\textsuperscript{77} Moreover, in order to set forth the good faith,
the host state is required by the main principle of international law to allow the diplomat
reasonable time to get ready and leave the host State’s territory.\textsuperscript{78} One the other hand, the
sending state will have to choose one out of two legal choices. First, it could call in the
diplomat.\textsuperscript{79} Second, it could suspend the diplomat’s authority to officially represent the
sending State.\textsuperscript{80}

\textbf{1-4-C: CONSULAR IMMUNITY:}

The primary difference between the diplomat and the consular is that while the
diplomat is responsible for the political matters in the relationship between the host state

\textsuperscript{76} EPPS, \textit{Supra} note 64, at 143.
\textsuperscript{77} BANTEKAS, \textit{Supra} note 9, at 174.
\textsuperscript{78} EPPS, \textit{Supra} note 64, at 143.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
and the sending state, the consular is in charge of the related administrative and commercial issues.\textsuperscript{81} Thus, according to this difference, it will be reasonable to conclude that the degree of privacy and freedom that the consular needs to perform his official job is less than that the diplomat needs. The immunity from the national jurisdiction that is granted to the consular, according to the Vienna Convention on the consular relations, is more limited than that which is granted to the diplomat according to the Vienna Convention.\textsuperscript{82}

In accordance with the Vienna Convention, regulating the consular relations, the consular does not have the right to claim immunity from jurisdiction unless he can prove that the illegal act for which he is seeking immunity results from an official act related to his job as a consular.\textsuperscript{83} In contrast, the host state is able to arrest and prosecute the consular for the incriminating actions committed outside the official ambit of the consular function.

1-4-D: IMMUNITY FOR INTERNATIONAL ORGANIZATION:

It is agreed that the main purpose beyond the foundation of international organizations is to represent specific parts of international law and create the tools that helps the states better respect and adhere to these parts. Moreover, in order to allow the international organization to perform this function and earn the states’ trust, international organizations should be provided with certain degree of independence and authority. Therefore, it is legitimate to conclude the necessity for immunity for international organizations.

\textsuperscript{81} EPPS, Supra note 64, at 150.

\textsuperscript{82} BANTEKAS, Supra note 9, at 175.

\textsuperscript{83} Id.
organization’s representatives from the national jurisdiction of the state in which the International Organization performs its function.

It is logical to state that when a state agrees to allow an International Organization to perform its function within the state’s territory, it abandons part of its sovereignty. The most important part of this sovereignty is the state’s right to apply its laws and prosecute individuals for committing illegal activities within the state’s territory. However, it should be understood that the ambit of this immunity is left to the intent of parties, the host state and the international organization’s representatives.

THE END OF SECTION ONE

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84 EPPS, Supra note 64, at 166.
SECTION TWO:

NATIONALITY PRINCIPLE

2-1: THE NATIONALITY PRINCIPLE (SCOPE):

It has been explained that a strict application of territoriality could create gaps in the legal system of states causing negative conflicts that may affect the security of international society.\(^{85}\) Also, extreme interpretation of territoriality could make the territorial principle basis of extraterritoriality rather than basis of territoriality resulting international political or legal disputes between states.\(^{86}\) As a result, states recognized the necessity of creating a new and independent basis of jurisdiction that could supplement territoriality by providing them with extra legal tools allowing states to exercise their sovereignty, and protect their territories and citizens.\(^{87}\)

By utilizing the idea of territorial security\(^ {88}\) and assuming full interpretation of sovereignty that enables the states absolute legal rights over their territories and their citizens, states announced nationality as a new rule of jurisdiction.\(^ {89}\) Moreover, as a response to the mutual relationship between the states and their citizens which institutes rights and duties on both sides, the principle of nationality has been extended to allow broad application according to two bases, the active personality and the passive personality.\(^ {90}\)

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\(^{85}\) ROTHMAN, *Supra* note 1, at 54.
\(^{86}\) BANTEKAS, *Supra* note 9, at 146.
\(^{87}\) ROTHMAN, *Supra* note 1, at 61.
\(^{88}\) Id. at 55.
\(^{89}\) Id. at 61.
\(^{90}\) Id.
2-2 THE ACTIVE PERSONALITY (NATIONALITY):

According to the active personality principle, a state has a fundamental right to apply its laws to prosecute illegal conduct committed by its citizens overseas.\(^9\) This positive concept of the personality taking the nationality of the criminal as a basis for its application has been clearly recognized by international law. This recognition was done by encouraging the states to enter into multilateral treaties.\(^9\) The main policy beyond this invitation to covenant was to obligate states to participate in international society’s efforts to contend the existence of the negative conflict that may allow criminals to escape liability.\(^9\) This negative conflict could clearly occur when an individual commits a crime in an area that is not governed by any authority such as the high seas area.\(^9\) In this situation, the criminal cannot be prosecuted according to territoriality since none of the crime’s elements takes place in the governed land. Thus, the only way to bring the criminal before justice is to allow the state to which the criminal belongs to prosecute him. It is clear, then, even though states have no direct national interests to try their citizens for offenses committed in ungoverned areas, there is obvious interest that the states can earn from the application of the active nationality which will improve their reputation and creditability in international society. However, it should be understood that active nationality can also be used to indirectly protect states’ national interests.

Besides the international interest beyond the foundation of active nationality, there are two other purposes that can justify the states’ support of this principle. First,
allowing the states to apply their laws over their citizens abroad confirms the idea of states’ sovereignty not only over their territories, but also over their citizens.  
Second, this application helps to emphasize the importance of territorial integrity by allowing states to maintain their interests and prevent any unlawful action that can be taken against them by persons overseas. As a result of the international nature of the active personality’s creation, it was reasonable for the states to formulate the active nationality’s general principle taken from treaties in a way that serves their national interests. On the one hand, some drafters formulated the active personality to provide national authorities with new legal tools in order to defend the state’s territory and national interests from being attacked by persons overseas. On the other hand, other legislators extended their formulations of the active personality to allow extreme application of the sovereignty principle.

It is undeniable that the most respected and common use of the active personality, having been traditionally recognized by states, is to apply it to provide the state’s with extra protection from attack by persons overseas. The classic example of this application is to utilize the active personality to assert jurisdiction over treason. This can be justified when the acts instituting the crime are considered legal activities in the states in which they were committed. In this situation, the state in which these acts are committed has no strong interest to apply its laws over the crime, and the only way to

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95 ROTHMAN, Supra note 1, at 61.  
96 Id. at 52.  
97 BANTEKAS, Supra note 9, at 152.  
98 Id.  
99 ROTHMAN, Supra note 1, at 54.
prosecute is to allow the harmed state to assume jurisdiction according to active nationality.

In addition to the traditional application of active nationality over treason and in reliance on the main policy justifying this application, some states extended their interpretations along with the territorial integrity principle to justify the legal application of nationality over other crimes. For example, in the United Kingdom, active personality can be utilized to assert jurisdiction not only over treason, as agreed in many jurisdictions, but also over other crimes specified in domestic criminal law such as homicide, perjury and bigamy.\footnote{ROTHMAN, Supra note 1, at 54.} Besides this usage the active nationality has been utilized to confirm the idea of full sovereignty.

Drafters in other states, during their formulation of active nationality, found it important not only to apply active nationality to protect their territories and national securities, but also to emphasize the concept of sovereignty. This application authorizes states to apply their laws not only to the offenses committed by their citizens which affect the security of the states, but also over any crimes committed by the states’ citizens abroad without regard of the crimes’ gravity.\footnote{BANTEKAS, Supra note 9, at 152.} However, it should be noticed that states differ from each other in their determination of the boundaries of the principle’s application and the methods being used to draw these boundaries.

In many modern societies the sovereignty concept has been used to interpret the active nationality in order to insure a certain degree of respect for international human rights. This application of active nationality has recently been increased by the states as a

\footnote{ROTHMAN, Supra note 1, at 54.}
\footnote{BANTEKAS, Supra note 9, at 152.}
result of international society’s efforts to generalize principles of human rights. However, it should be understood that the consideration of human rights during the application of active nationality modified the traditional function of this principle from being a method of punishment to a method of protection. This modern concept of the active personality states intent to prosecute their nationals for illegal activities committed in different territories when it is possible that trying the criminal before the locus crime’s courts could be in violation of international human rights. However, since the human rights principles have been generally adopted a wide interpretation of them by some states is possible in order to avoid the application of foreign laws over their citizens. Therefore, it should be required, in order to justify the use of human rights as a basis to apply the active nationality, a degree of human rights’ violation which can cause injustice during the investigation or the trial. Moreover, this violation should be measured according to the international principles and not according to the strict interpretation of the criminal’s country.

Many states made their rights to prosecute nationals according to the nationality principle an absolute right. This absolute right has been instituted by not extraditing their citizens. A strong relationship between the active nationality principle and the extradition agreements could be made between states. This link can be clearly explained when a citizen of state A commits a crime in state B and escapes to his country. In this situation state B in which the crime is prepared will not be able to prosecute the criminal according to the territoriality principle unless the state A accepts to extradite its

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102 BANTEKAS, Supra note 9, at 152.
103 Id.
104 ROTHMAN, Supra note 1, at 62.
105 BANTEKAS, Supra note 9, at 152.
106 CARTER, Supra note 13, at 653.
citizen to be tried before state B’s court. However, it should be understood that states are not obligated, according to international law, to extradite their nationals unless they bind themselves by entering multilateral or bilateral international agreement regulating the extradition process.\textsuperscript{107} Furthermore, even if a state binds itself to extradite criminals, it can still escape liability of respecting its obligation.\textsuperscript{108} A state can refuse to extradite, even after joining an agreement, if it can prove that prosecuting the criminal before the foreign court may be in violation of one of the main principles of international law. In this situation, in order to show good faith, the state having the criminal in its territory can negotiate with the requesting state to reach a reasonable solution insuring a fair trial that complies with international law.\textsuperscript{109}

In many non-common law jurisdictions, the prevention of extradition is constitutional matter.\textsuperscript{110} Accordingly, it can be assumed that these states obligated themselves before the international society to apply the active nationality absolutely. For instance, in France, the court has the power to try an individual for committing a crime overseas when a crime has a certain degree of gravity.\textsuperscript{111} Even though this concept of active nationality created by non-common law legislators complies with the international society’ concern about international human rights and the concept of a state’s full sovereignty over its citizens, this unique idea could create many legal problems.

It is agreed that the main policy beyond the creation of active nationality is to encourage states to participate in the security of society. Moreover, the main goal beyond

\textsuperscript{107} S. PODGOR, \textit{supra} note 5, at 95.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} BANTEKAS, \textit{Supra} note 9, at 152.
\textsuperscript{111} DAMROSCH, \textit{Supra} note 14, at 1115.
this participation is to decrease the possibility of negative conflict.\textsuperscript{112} Therefore, it will be illegitimate to use active nationality to protect criminals from being punished for offenses they commit. This situation, creating negative conflict, could exist when the criminal’s state refuses to extradite him to the locus crime’s state, while also not prosecuting him according to its own laws. This situation may exist when the action having been committed by the criminal is not considered as incriminating conduct according to the criminal’s state’s laws. Even if the criminal’s state, refusing to extradite its citizen, decides to try its citizen for this crime, this trial may not provide the expected justice for many reasons. First, the intent of the criminal’s state to prosecute its citizen according to the active personality could be the result of the state application of the international comity or its concern about international reputation constituting an imaginary trial. Second, even if the state is willing to try its citizen according to the active nationality principle, this application could cause injustice whether for the criminal or the locus crime’s state. This injustice could exist as a result of the differences between the states in their estimation of the punishments for the crimes’ gravity. As a result a crime could be considered as a felony in a state and delinquency in another state resulting in two different punishments for the same crime in each jurisdiction. In addition, injustice may occur from the difficulty of obtaining the evidence and the witnesses since the crime produces all its elements in different state.\textsuperscript{113} Also, there are more unreasonable and wider applications of this principle.

The extreme and unreasonable use of active nationality can be shown by exploring two different uses in many jurisdictions. First, in some states active personality

\textsuperscript{112} DAMROSCH, Supra note 14, at 1104.
\textsuperscript{113} ROTHMAN, Supra note 1, at 52.
is used to assume jurisdiction over crimes committed not only by nationals, but also by individuals with special residency statues even if they committed crimes abroad.\textsuperscript{114} However, this broad interpretation of the nationality principle is debatable because that the right to apply active personality has been given to states to allow them to exercise full sovereignty over their citizens. Therefore, giving individuals some legal rights cannot excuse a full use of sovereignty for two reasons. First, this application will violate the nature of sovereignty that can be concluded from its definition as a legal right given to states by international law to utilize it over their territories and citizens. Second, authorizing the states to assert jurisdiction over persons with residency rights would violate the main legal principle which requires equality between the rights and obligations in any legal relationship. In addition, that application will create injustice in the states’ treatment of their citizens on one hand, and their treatment of the persons of special residency statues on the other hand. Thus, it will be legitimate to claim that a state can only prosecute an individual with special residency rights committing a crime aboard according to the protective principle.\textsuperscript{115}

The second extreme use of active personality can be shown by exploring the American courts’ interpretation of this principle. According to the American courts, the court has the legal power not only to prosecute their nationals for committing crimes abroad, but also to obligate them to show up before the national courts as witnesses when their testimonies are needed.\textsuperscript{116} However, even though this use could decrease the possibility of injustice, it should be understood that this application would be valid solution only when the witnesses are citizens of the state in which the trial takes place.

\textsuperscript{114} BANTEKAS, \textit{Supra} note 9, at 151.
\textsuperscript{115} \textit{Id.} at 154.
\textsuperscript{116} DAMROSCH, \textit{Supra} note 14, at 1115.
This rule can be concluded from the fact that states do not have sovereignties over other states’ citizens. In addition to the possibility of the negative conflict that may exist as a result of the states’ persistence to use active nationality, an extreme application of this principle could cause positive conflict resulting double punishment.

The states’ insistence to apply their domestic laws over their citizens according to active nationality may create positive conflicts with the locus crime state assuming jurisdiction according to territoriality or with another state assuming jurisdiction according to active nationality. On the one hand, the conflict between active nationality and territoriality can exist when the action committed by the criminal is considered as a crime in both his state and the locus crime state. On the other hand, there is a possibility of a positive conflict that could exist between two jurisdictions as a result of their intent to apply domestic laws, according to the active nationality, over the same crime and the same criminal. This conflict could occur when the criminal has the nationality of two states, and the action he commits is considered a crime according to the domestic laws of both states. This positive conflict may cause injustice for the criminal by resulting double punishment for one crime.

Finally, it can be concluded that even though active nationality was created by international society to provide the world with extra protection by permitting the application of domestic laws to crimes committed in ungoverned areas, the unreasonable interpretations of this principle by some states made active nationality stray from its main purpose. Therefore, in order to guarantee positive application of active nationality two

117 ROTHMAN, Supra note 1, at 65.
118 Id.
119 Id.
120 Id.
points should be considered. First, a state, when applying active nationality resulting from its sovereignty, should consider other states sovereignties and their interests in prosecuting the same crime. Second, the state willing to apply its laws, in reliance on the active personality, should consider its citizens’ interests and which is better for those being prosecuted according to the locus crime’s state laws or its country laws. Third, states should consider which may insure more justice for all parties during the trials: trying the criminals before their courts or giving up this right and allowing their citizens to be prosecuted before foreign courts which have more knowledge of the crime history and the necessary elements to reach a fair decision. In order to reach an effective result, active nationality ought to be applied in conjunction with the International Comity previously explained.\textsuperscript{121}

\textbf{2-3 THE PASSIVE PERSONALITY (NATIONALITY):}

It is legitimate to conclude that since the individual is obligated to obey the domestic laws of his country while he is abroad, according to the active nationality, he has the right to be protected by these laws when he is harmed overseas.\textsuperscript{122} In short, the citizen’s duty to respect his national laws produces a corresponding duty on his country to apply the same laws to defend him against any risk. This mutual relationship between the states and their citizens was the basis used by domestic legislators to excuse the creation of the nationality principle in its passive concept. Accordingly, passive

\textsuperscript{121} \textsc{DAMROSCH, Supra note 14, at 1104.}  
\textsuperscript{122} \textsc{ROTHMAN, Supra note 1, at 61.}
personality can be defined as a legal method created by national drifters to allow the state to assume jurisdiction over a crime committed against its citizen overseas.\textsuperscript{123} From the definition it is clear that passive nationality has a unique nature that completely differs from the nature of other principles and the policies beyond their creations.

This special nature of the passive nationality was a reason for many states to reject this principle.\textsuperscript{124} This rejection was a normal reaction to the passive nationality violation of two main principles of international law, territorial sovereignty and the equality of states.\textsuperscript{125} The intent to apply domestic laws over foreigners committing crime on their territories regardless of the prosecuting states’ interests violates the main policy beyond providing the states with the sovereignty concept. This main policy is to provide the states with extra legal power to face any risk that may affect their existence.\textsuperscript{126} Thus, assuming jurisdiction according to passive nationality violate the principle of equality between all states since its application may conclude extending the sovereignty over other states and interfering in their national affairs.

Finally, it should be understood that asserting jurisdiction according to passive nationality cannot be instituted on protective basis for two reasons. First, national laws can be applied on the protective basis when the crime produces its effects within the

\begin{flushleft}
\textsuperscript{123} BANTEKAS, \textit{Supra} note 9, at 152.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} ROTHMAN, \textit{Supra} note 1, at 52.
\textsuperscript{126} \textit{Id.}
\end{flushleft}
precutting state’s territory.127 Second, lawful application of domestic laws over foreigners committing these kinds of crimes requires a certain degree of gravity in the illegal action that affects national interest.128

THE END OF SECTION TWO

127 BANTEKAS, Supra note 9, at 154.
128 Id.
SECTION THREE

THE PROTECTIVE PRINCIPLE:

It has been explained that the most significant factor required to guarantee active application of territoriality is the appearance of the criminal in the prosecuting state’s territory when he commits the crime.\textsuperscript{129} Thus, in order to assume jurisdiction over an offense, whether biased on the subjective or the objective concept the prosecuting state has to be able to arrest the criminal or extradite him if he escapes. Even though the nationality principle has been created to complement territoriality by providing the states with new legal tools that allow the application of domestic laws over individuals committing crimes abroad,\textsuperscript{130} its special nature which limits its application to the states nationals decreases the effective use of the nationality principle. Accordingly, state A will not be able to assert jurisdiction in the situation where the criminal committing the crime starts and finishes his illegal action in a different state even if his action produces its effects on state A. Therefore, it was essential to create a new principle which enables states to protect their nations and citizens from being harmed by new criminal conduct that cannot be controlled by applying neither territoriality nor the nationality.

As a result of improvement in communications’ methods and the creation of efficient transportation, the possibility of committing crimes across borders has been

\textsuperscript{129} \textit{ROTHMAN, Supra} note 1, at 53.
\textsuperscript{130} \textit{BANTEKAS, Supra} note 9, at 151.
increased. Criminals perform their incriminating projects in different territories in order to take advantage of the legal gap that could occur from the strict application of the territoriality and the nationality principle.\textsuperscript{131} States identified this risk and the necessity for more protection. As a result, international law provided states with a legal right to insure more protection and safety for their nationals and territories. This legal right is formulated in the protective principle which explains that a state has the capacity in reliance on international law to take legal action against any harmful conduct committed by foreign individuals abroad.\textsuperscript{132} From its definition, it is clear that the protective principle has been formulated in a very wide way that may create some ambiguity during its application. Even though it is agreed that the policy beyond the creation of the protective principle is to provide the states with extra protection that cannot be provided by applying the territoriality or the nationality principles, it is important to understand the general bases that were considered during the foundation of this principle. This consideration will allow for drawing the boundaries of the protective principle and decreasing any possibility of legal disputes between the states.

It can be stated that the protective principle is concluded from territoriality.\textsuperscript{133} This conclusion can be justified by analyzing the fundamental utilization of the protective principle. The main application of the protective principle in its basic concept is to offer lawful application of the domestic laws over crimes committed overseas and produce their effects, usually indirectly, within the territory of the prosecuting state. Accordingly, it will be legitimate to consider not only the goal from the creation of the protective principle.

\textsuperscript{131} BANTEKAS, \textit{Supra} note 9, at 154.
\textsuperscript{132} EPPS, \textit{Supra} note 64, at 122.
\textsuperscript{133} ROTHMAN, \textit{Supra} note 1, at 67.
principle, which is to secure the national interest of the state, but also the general principles supporting the application of territoriality in its traditional meaning. Thus, it can be said that there are two traditional principles of international law that justify the application of the protective principle, the principle of sovereignty\textsuperscript{134} and the principle of territorial integrity. Furthermore, in order to reach a reasonable application of the protective principle that applies the state’s needs with no harm to others, the principles of sovereignty and territorial integrity should be combined.

Traditionally, the protective principle was used alone with the classic concept of domestic criminal law.\textsuperscript{135} According to this classic theory, a state has the legal right in reliance on the traditional principles of international law to apply its criminal law as long as it is essential for its security, even if this application contains extraterritoriality.\textsuperscript{136} This wide concept of protective principle was a result of the absolute right of self-defense given to all states according to the principles of classic international law.\textsuperscript{137} However, even though this classic and broad usage of the protective principle was once considered as a legitimate and lawful argument, the application of the protective principle according to this traditional interpretation may violate the general principles of modern international law.\textsuperscript{138} As a result of the improvement in the relationship between the states, it has been essential to modify the old concept in classic international law and to create new principles that fit society’s needs.

As a first step, modern international law modified the principle of sovereignty by stating that states are not free in their application of the principle of sovereignty, and they

\textsuperscript{134} BANTEKAS, Supra note 9, at 154.  
\textsuperscript{135} ROTHMAN, Supra note 1, at 68.  
\textsuperscript{136} Id.  
\textsuperscript{137} Id.  
\textsuperscript{138} Id.
are obligated by international law to respect other states’ sovereignties while they are practicing their rights.\textsuperscript{139} Furthermore, this modern idea has been confirmed by the equality principle.\textsuperscript{140} According to the equality principle all states have the same rights and obligations. This new theory of sovereignty created by international law in its modern concept, forced some domestic scholars to come up with another legal basis that can be used to excuse the application of the protective principle. This basis is known as territorial integrity.

Finally, it should be understood that even though the creation of the protective principle was a result of international society’s desire and even though this principle was recognized by international law, the application and the interpretation of this principle is completely domestic matter. Therefore, states differ from each other in the methods that they use to draw the boundaries of the protective principle.\textsuperscript{141} As a result, it is essential, again, to consult the international comity in order to insure safe and peaceful application of this principle that does not create any legal dispute between states or violate the general principles of international law.\textsuperscript{142} Also, states should always show good faith in their relations with each other by allowing other state to prosecute the crime according to one of the two agreed principles, the territoriality or nationality when there is a chance to do this.

THE END OF SECTION THREE

\textsuperscript{139} ROTHMAN, Supra note 1, at 52.
\textsuperscript{140} Id.
\textsuperscript{141} BANTEKAS, Supra note 9, at 154.
\textsuperscript{142} DAMROSCH, Supra note 14, at 1100.
SECTION FOUR
THE UNIVERSAL PRINCIPLE

As a result of international crimes outbreak and the increment of the states’ violations of general principles of human rights and wars, international society found it important to extend the states’ authorities in order to provide extra protection. This protection has been granted by the creation of a new principle the universal principle. According to the universal principle, a state has the capacity, as a representative of international society, to prosecute crimes committed by foreigners outside its territory. From this definition, there are two clear facts that can be concluded. First, universality has its special structure making it different from other principles that have been discussed above. This difference can be shown through the fact that in order to assume jurisdiction according to the universality the state is not obligated by international law to prove any relationship between the offence and its territory or nationals. Second, the universal principle has been formulated in a general way that could cause extreme application of the universality creating some ambiguity. Therefore, in order to insure safe and effective application of universality, it was essential to institute some legal methods drawing the boundaries of the universality’s applications.

Practically, it can be concluded that there are three agreed usages of universality. First, the universality is used to justify asserting jurisdiction over a certain
number of crimes regardless of where they are committed.\textsuperscript{148} Second, universality can be utilized to excuse the application of national or international laws over foreigners committing offenses in ungoverned areas.\textsuperscript{149} Third, the universal principle may be used to authorize a state to enforce international law, as a representative of the society, over crimes committed by other states whether against their citizens or against other states.\textsuperscript{150}

Since universality has been fundamentally created through broad and general rules, the possibility of using universality to justify extreme and unreasonable extension of the territoriability is expected.\textsuperscript{151} Moreover, to decrease the possibility of the illegitimate utilization of universality, the international community found it suitable to limit the application of this principle over a certain number of crimes.\textsuperscript{152} This method has been confirmed by inviting the states to enter into treaties organizing the application of domestic or international laws over these crimes.\textsuperscript{153} By joining those treaties, the contracting states not only have the legal capacity to assume jurisdiction over the stated offenses, but they are obligated by international law to prosecute them. For example, states are obligated to apply their laws, according to the universal principle, over certain crimes such as slave trade, piracy, war crimes, and genocide.\textsuperscript{154} By studying these crimes, it is easy to conclude that there are two main policies beyond obligating the states to prosecute. First is to protect the society by preventing the existence of any negative conflict.\textsuperscript{155} Second includes expressing the international community’s objection against

\textsuperscript{148} EPPS, \textit{Supra} note 64, at 123.
\textsuperscript{149} DAMROSCH, \textit{Supra} note 14, at 1136.
\textsuperscript{150} BANTEKAS, \textit{Supra} note 9, at 156.
\textsuperscript{151} Id.
\textsuperscript{152} EPPS, \textit{Supra} note 64, at 123.
\textsuperscript{153} BANTEKAS, \textit{Supra} note 9, at 156.
\textsuperscript{154} EPPS, \textit{Supra} note 64, at 123.
\textsuperscript{155} BANTEKAS, \textit{Supra} note 9, at 156.
certain kinds of crimes in which the gravity of the actions is so extreme that it creates a
direct violation of the general principles of international law.\textsuperscript{156} As a result, it will be legitimate to state that the application of universality should be extended where one or both of these policies is present and not only to assert jurisdiction over a limited number of crimes mentioned in treaties.

One of the most undeniable and effective applications of universality is to use the universal principle to assume lawful application of domestic or international laws over foreign criminals committing crimes in areas that are not governed by any state.\textsuperscript{157} Even though this application has been traditionally accepted by all states, this use of universality may create some confusion with the fundamental utilization of active nationality allowing a state to apply its national laws to prosecute its nationals for committing offenses in areas not controlled by any state.\textsuperscript{158} Although it can be said that active nationality and universality share the same policy excusing this application which is decreasing the possibility of negative conflicts allowing criminals to escape liability contain many differences.

One of the most logical differences between active nationality and universality is the legal basis that the prosecuting state is relying on in order to excuse it application. For instance, the international principle that a state relies on to justify its application of active nationality is the principle of sovereignty giving a state an absolute right over its citizens and territory.\textsuperscript{159} States earn their powers to apply their national laws from the treaties that

\textsuperscript{156} BANTEKAS, Supra note 9, at 156.
\textsuperscript{157} DAMROSCH, Supra note 14, at 1136.
\textsuperscript{158} Id. at 1104.
\textsuperscript{159} CARTER, Supra note 13, at 653.
obligate the contracting states to respect their rules. In short, treaties and international customary law are the legal bases that excuse the application of national laws according to universality.

The second main difference between universality and active nationality is the ambit of their applications. Even though the active personality and universality agree that they allow applications of domestic laws over individuals regardless of the individuals’ locations while committing their offenses, the ambit of each principle is entirely different from the other. For example, since the main legal principle justifying the application of domestic laws according to the nationality principle is the principle of sovereignty, a state can only assume jurisdiction over its citizens or over those individuals with special residency rights. Since the states are authorized to apply their domestic laws, according to the universality, by treaties and international customary law, they have wider right to apply their laws over foreigners committing crimes in areas lacking any authorities.

On the other hand, the general formulation of universality may create some confusion between its application and the application of territoriality according to its objective meaning. This ambiguity can be waived by stating the fact that in order to assume jurisdiction the crime committed overseas has to result in reasonable effects within the prosecuting state’s territory. However, an application of universality does not require proving any relationship between the prosecuting state and the offense.

160 BANTEKAS, Supra note 9, at 157.
161 Id. at 151.
162 DAMROSCH, Supra note 14, at 1136.
163 BANTEKAS, Supra note 9, at 146.
164 Id. at 156.
As a result of the improvement in communication methods and the use of
efficient transportation, the possibility of committing international crimes has
increased.\textsuperscript{165} As a consequence of the improvement in the international law’s structure
limiting the states’ ability to act freely whether in their relationship with other states or
with their citizens, the violations of international law by states has notably increased.
Accordingly, the international community had to find a legal solution that guarantees
reasonable degree of respect of international law by the states. Furthermore, since it has
been explained that the international community suffers from the absence of a high
authority with the power to enforce laws,\textsuperscript{166} it had to authorize states to act on behalf of
international society to enforce international law. This legal solution has been performed
through the principle of universality. However, in order to insure a reasonable application
of universality in a manner that does not conflict with the principles of sovereignty and
the equality of states, there are two factors which should be considered by the prosecuting
state. First, the incriminating action must consist of direct and clear violation of a general
principle of international law such as the violation of the general principle of
humanitarian law.\textsuperscript{167} Second, the prosecuting state should prove that the state in which
the crime is committed does not take any action to prosecute criminals or to start political
negotiations with the harmed state to peacefully solve the dispute.

Finally, since universality has been generally formulated, there are many facts
that should be respected to decrease the possibility of any conflict between the
universality and other forms of jurisdiction. First, the criminal should be present in the

\textsuperscript{165}BANTEKAS, \textit{Supra} note 9, at 156.
\textsuperscript{166}CARTER, \textit{Supra} note 13, at 26.
\textsuperscript{167}BANTEKAS, \textit{Supra} note 9, at 156.
prosecuting state’s territory or in a place lacking any authority. Second, the criminal does not have to be extradited to another state to be prosecuted according to territoriality or the active nationality, unless the constitutional law of the prosecuting state forbids the extradition. Third, the crime should be committed in a grave manner that affecting the peace and order of the international community.

THE END OF SECTION FOURE