

# TERRITORIAL JURISDICTION OF THE U.S. DOES NOT EXIST ON THE OUTER CONTINENTAL SHELF OR IN SUPERJACENT WATERS

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This essay addresses the question regarding whether U.S. territorial jurisdiction exists over an outer continental shelf of the United States or in superjacent waters. In particular, this essay will revisit 18 U.S.C. § 7(3) to consider whether the special territorial jurisdiction addressed therein can reach alleged criminal conduct on the continental shelf or in superjacent waters beyond a U.S. territorial sea.<sup>1</sup> The essay will also address whether other federal legislation concerning the outer continental shelf can provide federal criminal jurisdiction regarding conduct occurring on the outer continental shelf or in superjacent waters.

As documented in a prior essay on non-extraterritoriality of the “special territorial jurisdiction” of the United States addressed in 18 U.S.C. § 7(3), subsection 3 cannot rightly be applied to alleged criminal acts committed in foreign state territory.<sup>2</sup> There are several reasons why § 7(3) cannot be

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1. The statute reads:

The term ‘special maritime and territorial jurisdiction of the United States,’ as used in this title, includes:

. . . (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any placed purchased or otherwise acquired by the United States by the 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.

18 U.S.C. § 7(3).

2. Jordan J. Paust, *Non-Extraterritoriality of “Special Territorial Jurisdiction” of the United States: Forgotten History and the Errors of Erdos*, 24 YALE J. INT’L L. 305, 307, 313 (1999).

extraterritorial and reach conduct in foreign territory or anywhere else outside the borders of the United States and its territorial seas. First, the express focus and plain meaning of the subsection concerns “territorial jurisdiction of the United States.”<sup>3</sup> Second, the legislative history of the precursor to § 7(3) clearly addressed territorially and geographically limited jurisdiction with respect to federal lands within the borders of the United States.<sup>4</sup> Third, “territorial jurisdiction” has a special meaning under international law that precludes an extraterritorial reach of U.S. “territorial jurisdiction” to lands beyond the territorial borders of the United States and its territorial seas.<sup>5</sup> Fourth, § 7(3), as any federal statute, must be interpreted consistently with international law<sup>6</sup> and treaty-based and customary international law do not permit an extraterritorial reach of U.S. “territorial jurisdiction.” Fifth, as the Supreme Court has often demanded, unless a contrary intent is clearly expressed by Congress, “legislation is meant to apply only within the territorial jurisdiction of the United States.”<sup>7</sup>

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3. *Id.* at 307, 312, 315.

4. *See id.* at 307, 315-21 (discussing how the court in *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) wrongly stated that Congress was not focused on extraterritoriality when, in fact, there was a clear congressional intent not to expand U.S. jurisdiction extraterritorially or geographically); *see also* *United States v. Corey*, 232 F.3d 1166, 1189-91 (9th Cir. 2000) (McKeown, J., dissenting) (citing Paust, *supra* note 2); *United States v. Gatlin*, 216 F.3d 207, 214-16, 222 (2d Cir. 2000) (citing Paust, *supra* note 2) (“[T]he historical development of § 7(3) indicates unequivocally that Congress, in fact, intended for the statute to apply only to lands within the territorial boundaries of the United States.”); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 212-13, 214 n.45 (S.D.N.Y. 2000) (citing Paust, *supra* note 2) (“The legislative and interpretive history of Section 7(3) strongly supports [the] position that Section 7(3) does not concern lands outside the United States.”). The court in *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) did not pay attention to the legislative history, which was documented in the later essay.

5. *See* Paust, *supra* note 2, at 307, 312-13; *infra* notes 21-22 and accompanying text.

6. *See* Paust, *supra* note 2, at 307, 313-14; *infra* note 23.

7. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *see also* *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *N.Y. Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925) (holding that a statute will not have an extraterritorial effect if “[i]t contains no words which definitely disclose an intention to give it an extraterritorial effect” and “the

The essay also noted that in 1996 Congress, “consistent with international law, chose to expand the territorially limited jurisdiction in § 7(3) by expressly recognizing that the twelve nautical mile territorial sea of the United States ‘is part of the United States’ ‘for purposes of Federal criminal jurisdiction.’”<sup>8</sup> As others have rightly affirmed, subject to certain rights of innocent or transit passage, “the coastal state has the same sovereignty over its territorial sea and over the air space, seabed and subsoil thereof, as it has with respect to its land territory.”<sup>9</sup> However, the submerged lands within the territorial sea, over which the United States has sovereignty and limited territorial jurisdiction, are not the same lands as those that are part of a continental shelf beyond the twelve nautical mile territorial sea.

As is well known, under treaty-based and customary international law a continental shelf cannot provide the United States “territorial jurisdiction.” The Convention on the Continental Shelf recognizes limited rights of the United States over a relevant continental shelf, rights that are merely for particular economic and resource-related purposes: “The coastal

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circumstances do not require an inference of such purpose”); *United States v. Bowman*, 260 U.S. 94, 98 (1922) (“Crimes against private individuals . . . like assaults [or] murder . . . must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If the punishment of them is to be extended to include those committed outside 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.”); Paust, *supra* note 2, at 308-10 (discussing the Supreme Court jurisprudence resisting extraterritorial application of U.S. law without a clear intent). No such intent is clearly expressed in 18 U.S.C. § 7(3).

8. Paust, *supra* note 2, at 314 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 901(a), 110 Stat. 1214, 1317 (1996)). The legislation states:

The Congress declares that all the territorial sea of the United States . . . for the purposes of Federal criminal jurisdiction is part of the United States, subject to its sovereignty, and is within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code.

§ 901(a).

9. LOUIS B. SOHN & KRISTEN GUSTAFSON, *THE LAW OF THE SEA* 94 (1st ed. 1984) (citing Convention on the Territorial Sea and the Contiguous Zone, arts. 1-2, Apr. 29, 1958, 516 U.N.T.S. 205); United Nations Convention on the Law of the Sea, art. 2, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]).

State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.”<sup>10</sup> The same language is found in Article 77(1) of the United Nations Convention in the Law of the Sea.<sup>11</sup> Article 3 of the Convention on the Continental Shelf adds: “The rights of the coastal State over the continental shelf do not affect the legal status of the waters as high seas, or that of the superjacent airspace above those waters.”<sup>12</sup> For these reasons, writers have stressed that:

The coastal state has sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources . . . The coastal state does *not* have sovereign rights over the continental shelf for purposes other than the exploration and exploitation of its natural resources. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978) . . . The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters and airspace.<sup>13</sup>

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10. Convention on the Continental Shelf, art. 2(1), Apr. 29, 1958, 499 U.N.T.S. 311; *see also* North Sea Continental Shelf (Ger./Den; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 19 (Feb. 20) (“[T]he rights of the coastal State in respect of the area of the continental shelf . . . exist . . . in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.”).

11. UNCLOS, *supra* note 9, art. 77(1). The United States has not ratified this treaty but its provisions addressed in this essay reflect customary international law.

12. Convention on the Continental Shelf, *supra* note 10, art. 3; *see also* UNCLOS, *supra* note 9, art. 78(1) (“The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.”).

13. SOHN & GUSTAFSON, *supra* note 9, at 159-61 (emphasis added); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 515, cmt. b (AM. LAW INST. 1987) [hereinafter RESTATEMENT] (“Sovereign rights,’ which a coastal state enjoys . . . on its continental shelf, are functional in character, limited to specified activities. In the continental shelf, the coastal state exercises sovereign rights only ‘for the purpose of exploring it and exploiting its natural resources,’ both living and nonliving.” (citing Convention of the Continental Shelf, *supra* note 10, art. 2; UNCLOS, *supra* note 9, art. 77)); THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 327 (5th ed. 2013) (“The coastal state has sovereign rights *over the natural resources* of its continental shelf.” (emphasis added)); ANTONIO CASSESE,

Therefore, under treaty-based and customary international law the shelf is not the equivalent of sovereign U.S. territory within its borders or territorial seas and there are no sovereign rights with respect to the shelf “for purposes other than . . . exploration and exploitation of . . . natural resources.”<sup>14</sup> As recognized in a Fifth Circuit case, the United Nations International Law Commission was “unwilling to accept the sovereignty of the coastal state over the seabed and subsoil of the continental shelf” and, as a result, a relevant wreck was “not situated on lands owned or controlled by the United States.”<sup>15</sup> Further, the court noted that the International Law Commission “rejected any claim to sovereignty or jurisdiction over the superjacent waters”<sup>16</sup> and found that the continental shelf was decidedly “beyond the limits of territorial jurisdiction.”<sup>17</sup> In addition, federal district courts have affirmed that “rights that the United States enjoys in its EEZ [Exclusive Economic Zone] and continental shelf are ‘functional in character, limited to specific activities,’”<sup>18</sup> and that “[a]ll countries recognize that a coastal state possesses sovereignty or territorial jurisdiction within” its territorial sea.<sup>19</sup> “However, such sovereignty does not extend past this . . . limit.”<sup>20</sup>

More generally, under international law a state has “territorial jurisdiction” over the land within its borders and its

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INTERNATIONAL LAW 89 (2d ed. 2005) (“[S]overeign rights [are] *limited* to specific activities: exploitation and exploration of the natural resources of the shelf.”).

14. See SOHN & GUSTAFSON, *supra* note 9, at 160.

15. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 340 (5th Cir. 1978) (quoting U.N. GAOR, 11th Sess., Supp. 9 at 42, U.N. Doc. A/3159 (1956)).

16. *Id.* at 340 n.23 (quoting U.N. GAOR, 11th Sess., Supp. 9 at 40, U.N. Doc. A/3159 (1956)).

17. *Id.* at 343.

18. *Westerngeco L.L.C. v. Ion Geophysical Corp.*, 776 F. Supp. 2d 342, 368 (S.D. Tex. 2011) (quoting RESTATEMENT, *supra* note 13, § 511, cmt. b).

19. *Plaisance v. United States*, 433 F. Supp. 936, 938 (E.D. La. 1977).

20. *Id.* at 938-39.

territorial sea.<sup>21</sup> Waters “[o]utside the territorial sea are the high seas”<sup>22</sup> and are waters outside U.S. territorial jurisdiction.

Importantly, with respect to proper interpretation of 18 U.S.C. § 7(3), Supreme Court cases have long required that federal statutes be interpreted consistently with relevant international law if at all possible.<sup>23</sup> “[B]ecause courts must construe federal statutes consistently with international law if at all possible, and under international law it would not be lawful for the United States to assert ‘territorial jurisdiction of the United States’ over” lands outside its borders and territorial seas, such as the continental shelf, “§ 7(3) must be construed

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21. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 694-95 (2008) (reviewing the Court’s jurisprudence describing a nation’s territorial jurisdiction as being confined “within its own territory,” *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812), or “within its borders,” *Wilson v. Girard*, 354 U.S. 524, 529 (1957), *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956), or “within its territory,” *Reid v. Covert*, 354 U.S. 1, 15 n.29 (1957)). Subjective territorial jurisdiction is widely accepted as applying to conduct within a country’s territorial borders. *E.g.*, RESTATEMENT, *supra* note 13, § 402(1)(a) (conduct that “takes place within its territory”); BUERGENTHAL & MURPHY, *supra* note 13, at 249 (“conduct that occurs within its own territory”); JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 596 (3d ed. 2009) (conduct occurring “within the territorial confines of a State”). By fiction, U.S. territorial jurisdiction also pertains with respect to conduct on board a U.S. registered or U.S. flag vessel, aircraft, or spacecraft. *See, e.g., id.* at 596-97 n.2; *see also* Convention on the High Seas, art. 6(1), Apr. 29, 1958, 450 U.N.T.S. 82 (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.”); UNCLOS, *supra* note 9, art. 92(1) (using nearly the same language).

22. *United States v. Louisiana*, 394 U.S. 11, 23 (1969).

23. *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *United States v. Flores*, 289 U.S. 137, 159 (1933) (“[I]t is the duty of the courts of the United States to apply . . . its own statutes, interpreted in the light of recognized principles of international law.”); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (“[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”); Paust, *supra* note 2, at 307, 313 (discussing the “fundamental rule of construction” employed by the Supreme Court that requires a statute to be harmonized with international law, if possible).

accordingly.”<sup>24</sup> Necessarily, international law precludes the reach of “territorial jurisdiction” to a continental shelf beyond a territorial sea.

It is of additional importance that, “[u]nder international law, a state may not exercise authority to enforce [its] law [if it] has no jurisdiction to prescribe” domestic law.<sup>25</sup> Therefore, the United States cannot enforce its law unless it has jurisdiction to prescribe under international law. As recognized early in U.S. history, “if the Congress . . . were to call upon the courts of justice to extend the jurisdiction of the United States beyond the limits . . . [set by the “law of nations”], it would be the duty of courts of justice to decline.”<sup>26</sup> Because the United States does not have “territorial jurisdiction” under international law over conduct occurring on the continental shelf or in superjacent waters beyond its territorial seas, the United States has no jurisdiction to enforce a federal law regarding such conduct that rests merely on the principle of subjective territorial jurisdiction.<sup>27</sup>

A different issue is raised in view of language contained in the Outer Continental Shelf Lands Act (OCSLA).<sup>28</sup> Section 1333(a)(1) of the legislation declares:

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and to all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . . to the same extent as if the outer

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24. Paust *supra* note 2, at 313; *see also id.* at 315-20 (finding that the legislative intent and legislative history of § 7(3) clearly demonstrate that Congress focused on land within the borders of the United States and that § 7(3) was not meant to apply extraterritorially); *supra* note 4.

25. RESTATEMENT, *supra* note 13, § 431 cmt. a; PAUST, VAN DYKE & MALONE, *supra* note 21, at 591-92.

26. *United States v. Darnaud*, 25 F. Cas. 754, 759-60 (C.C.E.D. Pa. 1855) (No. 14,918).

27. *See supra* notes 21, 24 & 26.

28. Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, *et seq.*

Continental Shelf were an area of exclusive federal jurisdiction within a State.<sup>29</sup>

The meaning of some of these phrases is ambiguous. Does the word “laws” necessarily include criminal laws when language refers thereafter merely to “civil and political jurisdiction” and not to criminal jurisdiction?<sup>30</sup> Does the word “jurisdiction” necessarily contemplate a claim to use subjective “territorial jurisdiction” that is not possible under international law as opposed to jurisdiction for protection, control, and use of resources on and within the continental shelf in accordance with international law? Does the phrase “exclusive federal jurisdiction” when used in contradistinction to jurisdiction of states within the United States necessarily mean “territorial jurisdiction” or does it refer to forms of exclusive economic and resource-related federal jurisdiction that are permissible under international law? Such forms of ambiguity, coupled with the requirement of the *Charming Betsy* rule that federal statutes must be interpreted consistently with relevant international law, compel recognition that the ambiguous phrases in § 1333(a)(1) must be interpreted so as to merely reach and to

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29. *Id.* § 1333(a)(1).

30. *Cf.* 43 U.S.C. § 1333(a)(2)(A):

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial island, and fixed structures thereon.

*Id.* (emphasis added).

The *Charming Betsy* rule requires that this provision not be interpreted to extend the full panoply of state criminal laws as laws of the United States to the outer shelf, artificial islands, and fixed structures erected thereon as if the U.S. had territorial jurisdiction over the outer continental shelf. Moreover, language in this provision sets forth a relevant limitation when using the phrase “[t]o the extent that they are applicable,” because laws that must rest on territorial jurisdiction of the United States under international law would not be “applicable.” The phrase “other Federal laws” could also include international law because international law is part of the laws of the United States. *See, e.g.*, RESTATEMENT, *supra* note 13, § 111. States within the United States are also bound by international law. *See, e.g., id.* § 115 cmt. e; PAUST, VAN DYKE & MALONE, *supra* note 21, at 563-68, 578-79 (international agreements); *id.* at 579-81 (customary international law).

comply with special U.S. competencies under international law to preserve, protect, and otherwise regulate the resources on and beneath the continental shelf.<sup>31</sup>

As writers have pointed out, the OCSLA was enacted to establish “a regulatory system for the leasing, exploration and exploitation of the non-living resources of the continental shelf beyond” the territorial sea.<sup>32</sup> As part of the legislative history of OCSLA, it was declared that a relevant presidential proclamation concerning the outer continental shelf “is limited to jurisdiction and control of the resources of the land mass,”<sup>33</sup> that “we have neither absolute sovereignty nor absolute ownership,”<sup>34</sup> and that “[b]y [the OCSLA], the United States is not extending its national boundaries or its national sovereignty out into the high seas to the outer edge of the Continental

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31. See 43 U.S.C. § 1332(1) (proclaiming the “policy of the United States” to be that “the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition” (emphasis added)); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981) (noting that the federal government enjoys “sovereignty and ownership of the seabed and subsoil of the Outer Continental Shelf”); *EP Operating Ltd. P’ship v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994) (“OCSLA . . . vests the federal government with a proprietary interest in the [Outer Continental Shelf] . . .”). *But see* *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19 (1988). The Court in *Shell Oil* found that in the context of competing claims of a U.S. state, the United States had “territorial jurisdiction” under OCSLA. *Id.* at 26-28. However, the Court did not examine the lack of U.S. “territorial jurisdiction” under international law or the *Charming Betsy* rule; rather, the Court found that, in enacting the OCSLA, Congress was merely concerned “with defining territorial jurisdiction between the adjacent States and the Federal Government as to the submerged lands.” *Id.* at 27. Under the OCSLA, “the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected.” 43 U.S.C. § 1332(2).

32. See SOHN & GUSTAFSON, *supra* note 9, at 166.

33. 99 CONG. REC. 6962 (1953) (statement of Sen. Guy Cordon) (quoting S.J. Res. 13, 83d Cong. (1953)). In 1945, President Truman issued a proclamation stating that the United States “regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.” President Harry Truman, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 FED. REG. 12,303 (Oct. 1, 1945) (emphasis added).

34. 99 CONG. REC. 6962 (1953) (statement of Sen. Guy Cordon) (quoting S.J. Res. 13, 83d Cong. (1953)).

Shelf.”<sup>35</sup> For these reasons also, the jurisdiction of the United States under the OCSLA should be recognizably limited to jurisdictional competencies under international law that are directly and substantially related to exploration, protection, control, and use of natural resources of the seabed and subsoil of the continental shelf.

With respect to ambiguous phrases in the OCSLA, it is also critical to note that a long line of Supreme Court cases require that when following the *Charming Betsy* rule, even if legislation cannot be interpreted consistently with international law, a second step must be taken. Under the *Cook* rule, Congress must express a clear and unequivocal intent to override a particular treaty before a subsequent federal statute can prevail over the treaty.<sup>36</sup> With regard to 43 U.S.C. § 1333(a)(1), no congressional

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35. *Id.* at 6963.

36. *See, e.g.*, *Spector v. Norwegian Cruise Line*, 545 U.S. 119, 144 (2005) (Ginsburg, J., concurring) (noting that, by interpreting a U.S. statute as not applying in this relevant circumstance, the Court avoided the imposition obligations on a foreign cruise line that would conflict with international treaty obligations); *Transworld Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (finding that an “affirmative expression of congressional intent to abrogate the United States’ international obligations is required,” even when, as here, the “act” is an Executive Agreement and specifically applies to U.S. nationals abroad); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (noting the importance of a clear intent of the Congress before the Court is willing “to sanction the exercise of local sovereignty” outside the United States especially where the impact on international relations could result in retaliatory action taken by foreign nations); *Cook v. United States*, 288 U.S. 102, 120 (1933) (holding that a purpose of Congress to override or modify an international agreement concerning the proper reach of U.S. jurisdiction beyond what is allowed in an earlier treaty must be “clearly expressed” or the prior treaty prevails); *United States v. Payne*, 264 U.S. 446, 448 (1924) (reasoning that while the subsequent U.S. act would prevail over the treaty “in case of conflict, it should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and, pro tanto, abrogate, the treaty, is not to be lightly attributed to Congress”); *United States v. Le Yen Tai*, 185 U.S. 213, 221 (1902) (noting that the “purpose . . . must appear clearly and distinctly from the words used” by Congress); *Chew Heong v. United States*, 112 U.S. 536, 539-40, 549-50 (1884) (discussing how self-executing treaties are the equivalent of an act of Congress, and only by “declaring in unmistakable terms” can Congress repeal the same by necessary implication); *accord* PAUST, VAN DYKE & MALONE, *supra* note 21, at 153-54, 532-40, 456-

expression of a clear and unequivocal intent exists to override the Convention on the Continental Shelf or any other form of international law. For this reason, international law regarding the limited reach of subjective territorial jurisdiction of the United States must prevail over the OCSLA even if the legislation could not be interpreted consistently with international law.

Although this essay has focused on the lack of subjective territorial jurisdiction of the United States over an outer continental shelf and superjacent waters and why 18 U.S.C. § 7(3) and 43 U.S.C. § 1333(a)(1) cannot provide federal courts with extraterritorial criminal jurisdiction on the basis of subjective territorial competence, it is important to recall that § 1333(a)(1) and (2)(A)<sup>37</sup> of the OCSLA can be interpreted consistently with international law to allow a special prescriptive authority based in international law for the purpose of preserving, protecting, and otherwise regulating exploration and exploitation of natural resources on and beneath the continental shelf.

Under international law, there are other prescriptive competencies of the United States that can enhance congressional authority and support the extraterritorial reach of federal legislation. For example, under the protective principle, the United States can prescribe laws to reach direct and significant threats to national security here or abroad.<sup>38</sup> Under the nationality principle, the United States can prescribe laws to reach conduct of U.S. nationals,<sup>39</sup> including U.S. corporations,<sup>40</sup>

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47 (identifying a five-step process based in Supreme Court law with respect to a potential clash between a treaty and a subsequent federal statute); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 99, 120, 125 n.3 (2d ed. 2003); Paust, *supra* note 2, at 314.

37. See discussion *supra* note 31.

38. See, e.g., PAUST, VAN DYKE & MALONE, *supra* note 21, at 601, 609-11.

39. See, e.g., *id.* at 596, 610. 18 U.S.C. § 7(7) comports with this competence under international law in part when including within the special maritime jurisdiction of the United States “[a]ny place outside the jurisdiction of an nation with respect to an offense by or against a national of the United States.” *Id.* However, the purported reach to an offense “against a national of the United States” is not permissible under customary international law where either U.S. territorial, protective, nationality, or universal

here or abroad. And universal jurisdiction allows the United States to prescribe laws to reach conduct by any person, anywhere, that is unlawful under customary international law.<sup>41</sup> Additional competencies pertain under international law that can reach conduct on the shelf or superjacent waters. For example, the law of the sea provides special resource-related and environmental competencies in the Exclusive Economic Zone<sup>42</sup> and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf<sup>43</sup> allows creation of criminal law for prosecution of the offenses set forth in the treaty.<sup>44</sup> Nonetheless, the outer continental shelf and superjacent waters are not within the territorial jurisdiction of the United States.

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jurisdiction does not also exist because prescriptive jurisdiction would rest on a minority claim of passive nationality jurisdiction or the victim theory. *See* PAUST, VAN DYKE & MALONE, *supra* note 21, at 595-96. On the other hand, use of the victim theory can be permissible if consent to do so exists in a relevant treaty. An example would be the International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205 (1979). Article 5(1)(d) of the treaty provides consent among the parties for a state to establish prescriptive jurisdiction “with respect to a hostage who is a national of that State, if that State considers it appropriate.” *Id.* art. 5(1)(d). An example could involve hostage-taking of a U.S. national on a foreign-registered oil platform operating on the outer continental shelf of the United States. Yet, if demands are made of the U.S. government by a hostage-taker, protective jurisdiction would also exist, as would universal jurisdiction over the customary international crime of hostage-taking.

40. *See, e.g.*, PAUST, VAN DYKE & MALONE, *supra* note 21, at 610.

41. *See, e.g., id.* at 642-58.

42. *See, e.g., id.* at 982-83; SOHN & GUSTAFSON, *supra* note 9, at 115-49; UNCLOS, *supra* note 9, arts. 55-75.

43. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done in Rome on Mar. 10, 1988, Int'l Maritime Org. Doc. SUA/CONF/15/Rev.1, 1678 U.N.T.S. 304.

44. *See id.* art. 2.