G. Conclusion

Wang v. Ashcroft reviewed an alien's habeas corpus petitions, and the due process claims of aliens convicted of felonies.[272] Although the United States Court of Appeals for the Second Circuit affirmed the lower court's holdings, they analyzed the issues above and explained how the issues should be viewed by the lower courts.[273] For example, when analyzing Wang's due process claim, the lower court perceived the claim as a procedural claim where as the Second Circuit reviewed the claim as a substantive one.[274] Furthermore, in looking at the habeas review, the Second Circuit found that they need to outline a specific test as to how the lower courts should apply the law to the facts in these cases.[275] The Second Circuit did not actually outline a test, but they did show that the BIA correctly applied the facts of Wang's CAT claim to the relevant law.[276]

Pooja Sethi

VIII. UNIVERSAL JURISDICTION

United States v. Yousef

I. Introduction

Belgium adopted the law of universal jurisdiction in 1993 as a recognition of the increasing acceptance of the *aut dedere aut judicare* principle of international law, introduced in the four Geneva Conventions of 1949.[277] The law, which was inspired by a deep concern for justice and the firm determination to combat shocking impunity, confers to the Belgian judge universal jurisdiction to deal with war crimes, crimes against humanity and crimes of genocide, independently from the place where the crime was committed, the nationality of the victim and the location of the presumed perpetrator.[278]

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272. *Wang*, 320 F.3d at 130.

273. *Id.*

274. *Id.*

275. *Id.* at 143.

276. *Id.*

277. Roemer Lemaître, Belgium rules the world: Universal Jurisdiction over Human Rights Atrocities, Jura Falconis, 37 (00-01) 2, *available at* http://www.law.kuleuven.ac.be/jura/37n2/lemaitre.htm#N_1.

278. Press Release, The Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, The Law on Universal Jurisdiction Reviewed (June 24, 2003),

This law was repealed by the Belgian Parliament on August 1, 2003, because of pressure from the United States Defense Secretary Donald Rumsfeld, who threatened the country with the loss of NATO headquarters.[279] American corporate executives doing business in Belgium were concerned that Belgium's universal jurisdiction law would subject them to prosecution in that country.[280] Belgium said that it repealed its universal jurisdiction law because it wanted to reassess the impact of the Rome Statute of the International Criminal Court, reaffirm Belgium's adherence to the rule of law establishing the international immunity attached to the official capacity of certain individuals after the International Court of Justice's ruling in the Yerodia case, and because there was no objective reason for Belgium to prosecute an individual for certain acts, especially in cases where the individual's own country has a mechanism in place to prosecute that individual.[281]

The debate over international jurisdiction has even extended to the United States, where the Second Circuit ruled that the United States, and specifically the State of New York, had jurisdiction over the 1993 World Trade Center attackers, and that jurisdiction did not arise under the principles of universal jurisdiction, but rather under the extraterritorial jurisdiction principle, the protective principle, the passive personality principle, and the objective territoriality principle of customary international law.

II. Background and Summary of Arguments

This survey will cover only the international law implications of *United States v. Yousef*. Facts and issues are limited to that subject matter. This case is a combination of two cases, one dealing with the conspiracy to bomb U.S. airliners in Southeast Asia and the second with

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available at http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=5943.

279. Press Release, Human Rights Watch, Belgium: Universal Jurisdiction Law Repealed (Aug. 1, 2003) *available at* http://www.hrw.org/press/2003/08/belgium080103.htm; Press Release, American Jewish Congress, AJCongress Cautiously Approves Belgian Move To End Universal Jurisdiction Law (Aug. 6, 2003), *available at* http://www.ajcongress.org/pages/RELS2003/AUG_2003/aug03_01.htm.

280. Press Release, American Jewish Congress, AJ Congress Cautiously Approves Belgian Move To End Universal Jurisdiction Law (Aug. 6, 2003), *available at* http://www.ajcongress.org/pages/RELS2003/AUG_2003/aug03_01.htm.

281. Press Release, The Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, The Law on Universal Jurisdiction Reviewed (June 24, 2003), *available at* http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=5943.

the 1993 bombing of the World Trade Center. Only the first part of the case dealt with issues in international law, and as such, only that case is addressed in this survey.

The plaintiff in this case is the United States Government. The defendants are Ramzi Ahmed Yousef, Eyad Ismail, and Abdul Hakim Murad.[282]

The World Trade Center was bombed in February 1993.[283] Yousef was not found, and went to the Philippines to hide from the authorities.[284] While there, he planned to bomb U.S. airliners in Southeast Asia which were eventually destined to go to the United States.[285] This plot was discovered by Philippine authorities in January 1995, two weeks before the defendant intended to carry it out.[286] Philippine authorities were alerted by a suspicious fire in defendant's apartment which was being used as a chemical testing ground.[287] This led to the eventual discovery and capture of defendant.[288]

III. Discussion

Extraterritorial jurisdiction is defined as subject matter jurisdiction of a United States court to adjudicate conduct committed outside of the United States.[289] The Court in the instant case held that the United States has the right to exercise extraterritorial jurisdiction over Yousef under both federal law and under customary international law.

Jurisdiction Under Federal Law

Yousef is being tried under 18 U.S.C. § 32, which details consequences for putting a bomb on a United States aircraft.[290] The general rule is that Congress has the authority to enforce its laws outside its boundaries, but is presumed not to have done so, unless Congressional intent to do otherwise is clear.[291] The Court held that

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282. *Yousef*, 327 F.3d at 77.
283. *Id.* at 79.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Yousef*, 327 F.3d at 79.
288. *Id.*
289. *Id.* at 85.
290. *Id.* at 86.
291. *Yousef*, 327 F.3d at 86 (*citing* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248

here, the plain text of 18 U.S.C. § 32 makes it clear that Congress intended § 32 to apply extraterritorially because, under the United States Supreme Court's ruling in United States v. Bowman, Congress is presumed to intend extraterritorial application of a criminal statute where the nature of the crime does not depend on the locality of defendant's actions and where restricting the statute to the United States territory would severely diminish the statute's effectiveness.[292] In the instant case, the Court felt it was reasonable to conclude that Congress intended to vest in the United States courts the requisite jurisdiction, and that any other interpretation would contravene the purpose and strain the plain language of the statute.[293] Therefore the Court held that under federal law the United States has jurisdiction over Yousef.

Jurisdiction Under International Law

The Court also held that the United States has jurisdiction over Yousef under customary international law.[294] This jurisdiction, however, is not based on universal jurisdiction, as the District Court held, but rather under the protective principle, the passive personality principle, and the objective territoriality principle of customary international law.[295]

There are five possible basis for jurisdiction in customary international law: (1) the objective territorial principle, which provides for jurisdiction over conduct committed outside a state's borders that has, or is intended to have, a substantial effect within its own territory; (2) the nationality principle, which provides for jurisdiction over extraterritorial acts committed by a State's own citizen; (3) the protective principle, which provides for jurisdiction over acts committed outside the State that harm the State's interests; (4) the passive personality principle, which provides for jurisdiction over acts that harm a State's citizens abroad; and (5) the universality principle, which provides for jurisdiction over extraterritorial acts by a citizen or non-citizen that are so heinous as to be universally condemned by all civilized nations.[296]

(1991)); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); United States v. Gatlin, 216 F.3d 207, 211 (2d Cir.2000).

292. *Yousef*, 327 F.3d at 86–87 (*quoting* United States v. Bowman, 260 U.S. 94, 98 (1922)).

293. *Id.* at 88-9.

294. *Id.* at 91.

295. *Id.* at 91-2.

296. *Id.* at 91 (*citing* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5–7

The Court found jurisdiction under the passive personality principle because the plot involved bombing a United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States.[297] The Court found jurisdiction under the objective territorial principle because the purpose of the attack was to influence United States foreign policy and the defendants intended their actions to have an effect – in this case, a devastating effect – on and within the United States.[298] The Court found jurisdiction under the protective principle because the planned attacks were intended to affect the United States and to alter its foreign policy.[299]

The Second Circuit stated that the District Court erred in applying the universality principle to the instant case. The District Court relied on the Restatement (Third) of the Foreign Relations Law of the United States as the authority for its decision on jurisdiction on the basis of the universality principle. The Court held that universal jurisdiction did not apply because customary international law currently does not provide for the prosecution of "terrorist" acts.[300] The Second Circuit pointed out that universal jurisdiction is traditionally applied to piracy, war crimes, crimes against humanity, and genocide.[301] Terrorism is not included for a number of reasons, first and foremost being the cliché that "one man's terrorist is another man's freedom fighter."[302] The term itself is ill-defined, powerfully charged, and non-justiciable as inextricably linked to political question.[303] The Second Circuit reinforced the idea that international law is not made by scholars, like the American Law Institute, who authored the Restatement, but rather by States.[304] The Court also stated that the Restatement is wrong in asserting that customary international law trumps United States statutory law, and is wrong as an authority on universal jurisdiction as the Restatement

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(5th ed. 1999).

297. *Yousef*, 327 F.3d at 96.

298. *Id.* at 96–97.

299. *Id.* at 97.

300. *Id.* at 93-98

301. *Id.* at 104-5.

302. *Yousef*, 327 F.3d at 107.

303. *Id.* at 106 (*citing* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir.1984)).

304. *Id.*at 102–03 (*quoting* the Statute of the International Court of Justice, art. 38, Dec. 2, 1946, 2124 U.N.T.S. 74).

advocates the expansion of universal jurisdiction beyond the scope presently recognized by the community of States.[305]

Therefore, there is jurisdiction over Yousef under the customary international law principles of passive personality, objective territorial, and protective jurisdiction.

Jurisdiction Under the Montreal Convention

The Court also held that the United States has jurisdiction over Yousef under the Montreal Convention.[306] Title 18 U.S.C. § 32 was enacted as part of the Aircraft Sabotage Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2187-88, which implements the Montreal Convention.[307] The Court stated that treaties may diverge broadly from customary international law, yet nevertheless may be enforced, provided that they do no violate one of the strictly limited "peremptory norms" of international law.[308]

The Montreal Convention requires, and § 32 authorizes, the United States to prosecute Yousef.[309] Moreover, the Montreal Convention does not condition the requirement that a State party extradite or prosecute such an individual found within the State on the existence of any additional contacts between that State and either the offender or the offense.[310] In other words, no nexus requirement delimits the obligation of parties to the Montreal Convention to prosecute offenders.[311] Yousef could have been prosecuted by the Philippines, Japan, or Pakistan, but as they did not, the United States "was obliged" by the Montreal Convention, "without exception whatsoever," to indict Yousef once he was within the United States and irrespective of whether his acts were aimed at the United States.[312]

The Second Circuit said that Title 18 U.S.C. § 32 carefully tracks the text of the Montreal Convention; even if it did not, however, the Court held that the statute would still be valid.[313]

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305. *Id.* at 99–100.

306. *Yousef*, 327 F.3d at 108.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 109.

311. *Yousef*, 327 F.3d at 109.

312. *Id.*.

313. *Id.* at 110 (*citing* Breard v. Greene, 523 U.S. 371, 376 (1998) (*quoting* Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion)); *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other")).

IV. Conclusion

In conclusion, 18 U.S.C. § 32 provides jurisdiction over Yousef under federal law. The plain reading of the statute and the purpose of the statute would be thwarted otherwise.

The United States has jurisdiction over Yousef under the passive personality, objective territorial, and protective principles of customary international law because the defendants were trying to affect United States foreign policy by targeting a United States aircraft, United States crew, and United States citizens.

The United States also has jurisdiction over Yousef under the Montreal Convention, the codification of which is 18 U.S.C. § 32 in United States law, which allows jurisdiction over a defendant without the existence of a nexus, and creates an obligation to prosecute such defendant once he is in the territory of a party state.

Swati Desai