STATE CRIMINAL JURISDICTION

Questions of state competence to dispense punitive justice are neither antique nor merely academic. Not too long ago some newspapers queried which country might take cognisance of an affair concerning an American governmental official who shot and killed his American superior and a Vietnamese woman in Saigon. Previous to that incident, some Cubans fired a mortar-shell at the United Nations building in New York; an American schooner drifting on the high seas carrying the dead body of an American male movie-star and three suspected Mexican females was towed into the Guatemalan port of Champerico where investigation was made. Most alarming with respect to the Malaysian and Singapore context, however, are the recent local reports which indicate in no uncertain terms a considerable increase of piratical acts committed by usually unidentified culprits in our territorial waters and adjacent seas. All such events are capable of generating jurisdictional conflicts with respect to which the final word in theory as well as in practice has not yet been delivered.

The term "jurisdiction" as applied to the right or legal faculty to exercise authority with regard to occurrences of criminal character is employed in several different, though related meanings. Within the limits of the national legal system, it is generally understood as the competence usually conferred by constitution or by statute to governmental organs to administer criminal justice by prescribing and applying certain rules. In a narrower sense, it refers particularly to the authority of a court, a judge, or a magistrate at local, county, provincial or state, and national levels — in the first instance, on appeal, or in the highest resort — to try a criminal case and to pronounce the judgment including the sentence as provided by law.

It is proposed in this article however, to focus the attention upon jurisdictional problems of international concern. Examination will be made of issues relative to the competence of an independent body politic as a whole, under international law, to prescribe and apply policy with reference to crime committed within or without national boundaries. Indeed, these problems are not novel; already in the early days, the international community of nations had to cope in a more or less pragmatic way with this rather intricate matter. In determining the operational scope of their respective penal laws, each in its own manner and in correspondence with the jurisdictional principles as national experience has developed, states became more and more aware of the overlapping areas and lacunae which give rise to conflicts and which require peaceful solution. The primary goal in solving problems of penal jurisdiction became a matter of avoiding and resolving interstate disputes, and the trend toward international cooperation in this respect found expression particularly in extradition treaties and judicial assistance.

The traditional source of difficulty is evidently the fact that criminal jurisdiction was originally considered concomitant with and a manifestation of so-called "state sovereignty" that comprised the unlimited governmental authority to regulate. Hence, although apparently recognising the necessary restriction on state competence to prosecute and punish crime, there are still a considerable number of jurists who derive the right of a state to predicate jurisdiction from the orthodox notion of sovereignty. Thus, Binding wrote: "The scope of its (the state's) penal law is determined by every sovereign state as sovereign. Under no conditions would the existence of its pretensions with respect to punishment be conditioned upon the consent of a foreign sovereign." [1] Similarly, Traub stated: "The proper field of the penal competence of the state, and also the proper domain of its rules and penal statutes, results from the scope of the legal interests, which it alone is entitled to determine." [2]

Yet, to observe criminal jurisdiction of the state in the light of such an inflexible notion of sovereignty seems to be valueless, not only because it scarcely reflects the actual practices with reference to international relations, but also because it hardly advances adequate solutions to interstate jurisdictional conflicts. Even to circumscribe the authority of the state on the basis of territorial sovereignty does not seem appropriate, although national frontiers are certainly important for the determination of state competence. Too great emphasis upon territorial supremacy might easily lead to oversimplification in identifying the actual situation by localising crime in its entirety on one side or the other of a political boundary, whereas in the contemporary world with the ever-improving transportation and communication facilities, life is not encompassed by these imaginary lines. Human events often ignore metaphysical limits; criminals do not always confine their activities to the lines of territorial divisions. Homicides have been committed on board aircrafts flying above the high seas; high treason is conducted in foreign lands; and poisoned food has been delivered from one part of the world to the other.

For the purpose of protecting the integrity of a public order whose fundamental values and institutions need to be maintained and fulfilled, it therefore becomes increasingly inadequate for a state simply to equate criminal jurisdiction with territorial competence and to restrict the exercise of authority to its geographical frontiers. On the contrary, more experienced international racketeers nowadays are aided and encouraged in conducting their ventures by the speculation that they will go scot-free so long as they stay away from the spot of the crime. Hence, irrespective of the theories of sovereignty, states are compelled for practical reasons to extend their regulatory competence beyond their own territory.

Two prefatory problems may be advanced in connection with the matter of state competence to administer penal justice. First, would it

1. Binding, Handbuch des Strafrechts, I Bd. 374 (1885).

2. Traub, Strafrechtliche Abhandlungen, Heft 167, 23, (1913). *Cf.* articles 1, 2, 3, of the tentative Draft Declaration on Rights and Duties of States prepared by the U.N. International Law Commission (annex to U.N. Gen. Ass. Res. 375 (IV) (Dec. 6, 1949).

be lawful for a state in assuming jurisdiction to apply foreign criminal rules? Taking into consideration the most fundamental goal of criminal law, *viz.* the protection of the particular community against certain undesired behaviour as well as the limitations stipulated by the generally recognized principle of legality, there is no doubt that this question should basically be answered in the negative. This is to say that in principle, states are not expected to apply criminal regulation which is prescribed and meant to be applied within another political body. "Each state" Professor Katzenbach pointed out, "punishes acts criminal by its own law; there is never any choice of law problem as such — though it is entirely possible for the same acts to constitute a crime by the law of more than a single state."[3] Also, Article 304 of the Bustamente Code[4] provided that "(N)o contracting State shall apply in its territory the penal laws of the others."[5]

Another preliminary question to note is whether criminal jurisdiction should be regarded as a competence that international law expressly confers upon states, or whether states in the absence of express international limitations are to be considered at complete liberty to determine their own competence. These two points of view were advanced in the wellknown *Lotus*[6] case in which a Frenchman was held criminally responsible by Turkish authorities for a collision on the high seas causing the death of several Turkish subjects. The French government contended that Turkey, in order to have the right to take cognisance of the matter, must be able to indicate some title to jurisdiction recognised by international law. The Turkish government on the other hand took the view that in accordance with Article 15 of the Convention of Lausanne of July 24, 1923, Turkey was entitled to assert jurisdiction wherever such jurisdiction did not come into conflict with a principle of international law. In passing it should be noted that these different bases of reasoning are not merely two avenues of approach to a single principle as some authors suggest.[7] For, aside from the question of burden of proof concerning the existence of the relevant international prescription allowing or inhibiting a certain exercise of competence, there is in essence also a substantial difference, particularly in the outcome of the different modes of reasoning.

In its decision concerning this matter, the Permanent Court of International Justice unfortunately appeared to resolve the dichotomy in favour of the Turkish argument:[8]

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to

3. Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerance in Interstate and International Law," 65 *Yale L.J.* 1087 at p. 1140 (1956).

4. Havana Convention on Private International Law of 1928.

5. *Contra,* see the Air Law Committtee of the International Law Association, Art. 3.01 of its Draft of the Convention on Aviation Crimes.

6. P.C.I.J., Ser. A, No. 10, Judgm. No. 9, 18 (1927) ; see *post* at p. 75.

7. See Harvard Draft Convention on Jurisdiction with respect to Crime, 29 *Am. J.L.* 435, at p. 468 (1935 Supp.).

8. P.C.I.J. *op. cit., supra,* note 6, at p. 19.

> persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. . . .
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> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

As a general statement, it is conceded that no state, no individual or any other legal personality is allowed to act in violation of the limitations stipulated by international law. However, the law *qualita qua* is not always prohibitive in nature but is in many instances also directive, and from this point of view it does not seem appropriate to say that a state is completely at liberty to determine its own competence. From a practical perspective, it is also evident that at the present stage of development, the international law of criminal jurisdiction appears to consist of more affirmative than negative prescriptions, while the few limitations which states are not supposed to overstep are generally vague and uncertain. Where under certain widely accepted jurisdictional tenets a state is even permitted to take cognisance of offences committed in a foreign land, the demarcation that states are expected to honour becomes blurred, if not completely eradicated. A minimum public order is therefore difficult to maintain, if the lawfulness of assuming criminal jurisdiction is made dependent upon express restrictions only.

Hence, if there is freedom for states to declare their respective competence, this freedom — as discussed below — is to be exercised only in conformity with the generally recognised positive principles of law specifying the instances in which the state is *allowed,* to exercise authority. Accordingly, if in the *Lotus* case a judgment is to be rendered in favour of the Turkish government, it is not because "there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent;" [9] but it is because there is a widely accepted principle of law that acknowledges state competence over crimes commenced outside the boundaries but consummated within its territory.[10] The exercise of jurisdiction by Turkey is in compliance with this permissive rule. Consequently, the task of the international court should not have been to ascertain the absence of a prohibiting provision governing the jurisdictional assertion at issue, but to identify the rule concerning the matter in question. It would be chaotic indeed if states in the absence of negative prescriptions are entirely free to establish their jurisdictional areas as they wish, without being obliged to comply with the basic community expectations about law and authority.[11]

A. STATEMENT OF THE BASIC POLICIES

It is indisputable that there have always been commonly accepted

9. See not 6, at p. 25.

10. This is in the following pages described as "the objective application of the territorial principle."

11. See also Article 11 of the 1958 Geneva Convention on the High Seas.

tenets according to which states are supposed to administer penal justice. As early as 1625, Grotius in his celebrated "De Jure Belli ac Pacis" commented on the fundamental policies pertaining to the right to punish under international law. In the chapter "De Poenis." (II: 20), he stated *inter alia: "Qui punit, ut recte puniat, jus habere debet ad puniendum, quod jus ex delicto nocentis nascitur"* — in order that he who punishes may duly punish, he must possess the right to punish, a right derived from the criminal's offence.

Thus, the doctrine that there must be a nexus between the prosecuting state and the criminal event is not a novelty; it is a well-established principle that in order to exercise competence lawfully, there must be a relationship — a linking point, a connecting factor, a point of contact — between the state and the crime or its elements, and that in the absence of this relationship it is abuse of power for a state to dispense punitive justice. As Professor Dahm wrote:[12]

> Penal jurisdiction is not a matter for everyone to exercise. There must be a "linking point," a legal connection that links the punisher with the punished. The state may, insofar as international law does not contain rules contradicting this, punish only persons and acts which concern it more than they concern other states.

But what degree of relationship is necessary for the state to assume competence? How are the "persons and acts which concern one state more than they concern other states" to be identified particularly in complex crime situations which involve several linking points and several legal systems?

For some jurists, the doctrine is to be construed in the broadest sense. Mendelssohn-Bartholdy, for example, observed that state sovereignty with regard to crime is basically unlimited; the linking point idea is to be employed merely as a sort of scientific technique to classify the relevant categories of criminal offences as designated by law, and "T (he) number of linking points is as large as the number of offences." [13] Professor Hyde, on the other hand, pointed out that apart from offences committed and consummated within the state's territory, "(T)here are few situations where the requisite connection is deemed to exist . . . the connection is, however, apparent when the act of the individual is one which the law of nations itself renders internationally illegal or regards as one which any member of the international society is free to oppose and thwart. It is again apparent when the act complained of is to be fairly regarded as directed against the safety of the prosecuting State." [14]

Taking into consideration the objectives in criminal justice in general, the presence of a connecting factor can perhaps best be observed in the light of the public interest that is affected by a given incident. It

12. Dahm, Zur Problematik des Volkerstrafrechts 28 (1956).

13. Mendelssohn-Bartholdy, Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts, Allg. Teil VI, 112 (1908).

14. I Hyde, *International Law, chiefly as Interpreted and applied by the United States,* (1945), p. 804-805.

has been said that any territorially organised community has the fundamental right to defend the integrity of its public order by seeking those events the occurence of which is the important aim of public policy. From this perspective, criminal law is one of the principal segments of a legal system dealing with the control of human behaviour to safeguard the organised society, the individuals who compose it, and the traditional institutions that have been established. In order to identify the possible links between state and crime and to trace the relationships between the relevant components of community interest and the basic ingredients of a criminal event, a multifacial analysis of a crime situation in general is necessary. In this context Professors McDougal, Lasswell and Vlasic wrote:[15]

> It has been the function of certain traditional principles of jurisdiction ... to guide and assist state officials in their observation and evaluation of relevant "points of contact" and "connecting factors." The features of any particular event relevant to the appropriate balancing and accommodation of exclusive and inclusive interests may of course vary enormously, as may their contexts in transnational interaction. The significance of any particular feature — "point of contact" or "connecting factors" — in any particular controversy has been found to depend upon the total configuration of features and its place in that configuration.

1. *Relevance of Geographical Location of the Crime.*

Especially in Anglo-American jurisprudence, the most significant point of contact is related to the *locus delicti commissi.* Indeed, it has been long and widely recognized that states are competent, in general, to take cognisance of all crimes committed within their territory. This is the territorial principle of jurisdiction which international law accepts, as it were, without reservation except in those cases involving questions of "extraterritoriality" and "personal immunity" of the criminal offender.

Nonetheless, merely to state that the competence of a state over crimes under the principle is determined by national frontiers is of course insufficient for solving contemporary jurisdictional problems. Particularly under modern penal legislation, what is called a criminal offence does not need to be an isolated pattern of occurence; the constituent parts of the undesired event do not have to be restricted in terms of place or established simultaneously in terms of time. A crime may consist of a series of acts and omissions, a series of results, a series of effects, and it is very possible that this multitude of elements are located in different places and different countries. Hence, to meet these complex crime situations, the jurisdictional relationship between state and and the geographical location of crime has been construed in several ways.

a. *Locus of the conduct.* It is commonly accepted that regardless of where the criminal result (s) or effect (s) takes place, states are basically allowed to predicate jurisdiction over crime, if one or more of the unwarranted modes of conduct is performed within their territory. The *raison d'être* of this so-called "subjective application of the territorial principle" is that aside from the general responsibility that a state assumes in respect of the undesired behaviour *per se,* its *ordre public* pertinent to the protection of its community also calls for suppression of

15. McDougal,, Lasswell & Vlasic, *Law and Public Order in Space,* (1963), p. 664.

the criminal mind manifested in the wrongful conduct. For the purpose of assuming criminal jurisdiction, therefore, it is sufficient if the unlawful act or omission takes place within the state's territory, and it is in principle immaterial whether the crime happens to be completed or consummated outside the national frontiers. Accordingly, a state may rightfully apply its penal law in a case of a murderer who from within the territorial limit shoots and kills a person on foreign soil.

Yet, this application of the principle of territoriality is not always so simple, especially if it concerns offences that are *mala prohibitum.* Should a state be permitted to assume competence on the basis of conduct alone, while the result and effect that occur in a foreign territory are not criminal under the law of the land? In such a case, it is indeed difficult to justify prosecution of the offence, not only because there is no foreign interest affected, but also because it is questionable whether it is delinquent for a person to commit an act knowing that the result and effect is lawful in the country where they are supposed to occur.

In this context it seems necessary to distinguish the question of jurisdiction from that pertaining to the culpability and punishability of the offender. Since under the principle of territoriality a state may rightfully predicate competence over any occurences within its boundaries, it should of course basically be allowed to take cognisance of a crime conducted within its territory, even though it is not deemed criminal in the country where the criminal result and/or effect take place.

Yet, under ordinary circumstances, there are rare cases in which prosecution of the individual under the generally accepted standards of penal liability can amount to his conviction. For, pursuant to one of the standards, a person is punishable if his act in its entirety —conduct, result, and effect included — constitutes an unlawful event. The *mens rea* or criminal intent is to be directed towards the unlawfulness of the behaviour as a whole in the sense that he must not only know what he is doing, but he must also know, or at least have the way of knowing, that what he is doing is wrongful or contrary to law.

According to this minimum standard interpreted *a contrario,* the fact that the consequence (s) of the conduct is not considered criminal at the place of its occurence necessarily eradicates the unlawfulness and criminality of the entire event including the causing individual act or omission. The criminality of an act is a *fortiori* disputable if the person commits the act because of the knowledge that the result is lawful at the locus of its appearance. Thus, even if hunting of certain animals is unlawful in a certain state, it would still be difficult for that state to punish a person for firing a shot upon the forbidden object in a neighboring land whose game-laws do not include such prohibition. Similarly, under the criminal law of state A that prohibits transaction of a certain commodity, a person can still not be held criminally liable for purchasing that commodity from someone in state B where such transaction is allowed.

The difficulty for a state to dispense punitive justice with respect to an act or an omission which is directed toward a lawful result and/or effect in a foreign country applies *mutatis mutandis* with regard to criminal attempt conducted under similar conditions. An attempt is

generally considered punishable if there is an effort to accomplish a crime, and that effort amounts to some overt act which, if not prevented by one or more circumstantial factors independent of the perpetrator's will, would result in the full consummation of the offence.[16] Consequently, if the endeavour is not directed towards a wrongful consequence and, accordingly, not directed towards the commission of a crime, the conduct alone necessarily falls short of any criminality, even when that consequence would be criminal under the law of the state where the attempt is performed.

Similarly, with reference to conspiracy or any other form of participation conducted within the national boundaries to commit a crime outside the territory, although cognisance of the matter may in principle be taken on the basis of the conduct alone, nevertheless, in general the offender is only punishable if the event is also criminal at the actual *locus delicti commissi*. If this is the case, it is then basically unimportant under whose jurisdiction the actor or the other participants are to be located, although it should be noted that the national practices in most civil law countries, notably in Europe, usually do not permit prosecution, if the principal crime is committed or the principal offender is to be found outside the territorial limits.[17]

On the other hand, the assertion of penal jurisdiction will be useless if the conspiracy or participation does not involve a criminal offence, again because the conduct *per se* is then an insufficient basis for the culpability and punishability of the offender. Although gambling is illegal in a certain state, an agreement to gamble in Monte Carlo or in Nevada can under ordinary circumstances not be considered an infringement of the law of the *locus contractus*.

Thus, it is evident that the problem whether a person should be held criminally liable for conduct alone, while the result and effect are not deemed criminal in the foreign country where they occur, is not only a matter of jurisdiction, but in essence also a matter of substantive criminal law. Hence, apart from the question of its admissibility, the legislature can in prescribing the law always manipulate by making almost any pattern of conduct a consummated crime by itself, even if it merely comprises of the most innocuous type of an attempt, conspiracy, or other forms of participation.[18]

In actual practice, courts in fact are often exceedingly cautious in taking cognisance of an offence solely on the basis of criminal conduct. In *People* v. *Werblow,* for instance, an effort to establish jurisdiction

16. This is the definition of criminal attempt as commonly accepted in common law countries as well as civil law countries. In relation to the United States, see *People v. Lombard,* 131 Cal. App. 525 (1933); 21 P2d 955; see also *Dooley* v. State, 27 Ala. App. 261 (1936); 170 So. 96 at p. 98.

17. It is interesting to note that although abortion in Mexico is criminal, in *People* v. *Buffum* [40 Cal. 2d 709 (1953)] where a conspiracy was formed in California to commit such a crime south of the border, the Supreme Court of the State of California still held that there was no offence committed in this state.

18. An abortive attempt to commit suicide or to assassinate the Head of State, for example, is in some countries regarded a complete crime by itself.

under the New York statute on account of a part of the conduct alone did not succeed. The case involved a conspiracy committed by three persons, one in China, one in New York, and one in London, to defraud a branch of a New York corporation in London by forging a number of letters and cablegrams. When the one in China returned to New York, he was prosecuted and convicted on an indictment charging grand larceny by obtaining money under false pretences. The judgment was nonetheless reversed by the New York Court of Appeals on the ground that the particular part of the series of events which took place within the State of New York has not amounted to the crime as charged. Speaking for the Court, Judge Cardozo stated:[19]

> We are now asked ... to hold that a conspiracy formed in New York gives jurisdiction under the statute to punish for a larceny abroad if only some overt act can be found to have been here committed in furtherance of the conspiracy, even though the act is not a constituent of the executed larceny.
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> Such a reading of the statute strains it to the breaking point. We think a crime is not committed either wholly or partly in this state unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt. We do not mean that this construction of the statute is the consequence of some inherent limitation upon the power of the Legislature.

Judge Cardozo, however, went on to say that if the indictment had been for conspiracy, the state's jurisdiction might have been sustained under the respective statute.

Should a state prosecute a person on the basis of his conduct, while the criminal result or effect occurs in a place not subject to the authority of any state, for instance, on the open sea? It seems that with regard to offences that are *mala prohibitum* the answer should be in the negative for the same reasons as stated above. Here, too, despite that the state basically may assume competence over the matter, the fact that the consequences of the conduct are not unlawful under any law, necessarily dissolves the criminality of the event in its entirety. No person should be punished for his behaviour which is not intended to create consequences that are unlawful and detrimental to the community interest.

The situation is different with respect to crimes that are *mala in se, i.e.* crimes that by reason of their intrinsic wrongfulness are to be condemned anywhere. In these cases, the fact that the result and/or effect of the criminal conduct is not criminal under any specific legal system, does not efface the wrongfulness of the occurrence and, consequently, does not nullify the culpability of the offender. A murder consummated on the open sea is still criminally blameworthy, and the state in whose territory the criminal conduct, or part of it, is performed should still have the right, not only to take cognisance of the event, but also to punish the wrongdoer.

It should be admitted, indeed, that the difference between crimes *mala prohibitum* and crimes *mala in se* is not always evident, for there is a continuum, a gray zone, in which subjectivities play a distinct and vital role as to the ethical tolerableness of a certain type of occurrence.

19. 241 N.Y. 55, at p. 61 (1925).

Ultimately, it is the important task of the court to interpret the law in cases of ambiguity.

A similar policy should *mutatis mutandis* apply with respect to criminal attempt, conspiracy, and other modes of criminal participation. It is the neutralizing of the criminal mind which is in fact most significant in maintaining and fulfilling the public order interest.

b. *Locus of the result.* As with criminal conduct, a state should in principle be allowed to predicate jurisdiction on the basis of the criminal result that takes place within its territory. It is very possible that an offence is commenced outside the territory but the immediate result of the wrongful act or omission occurs within the state frontiers. A gun may be fired from state A but the victim is struck in state B; irrespective of the locus of the criminal effect, *in casu* the place where the victim dies, state B should be permitted to take cognisance of the homicide. As Professor Hyde wrote: "The setting in motion outside of a State which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain."[20]

Thus, in *State* v. *Morrow,*[21] the competence of the State of South Carolina was sustained in a case of an abortion, where the accused had sent drugs from Washington D.C. to a woman in South Carolina with the result that the latter took the pills and died subsequent to the abortion. This idea of so-called "objective application of the territorial principle" has been so significantly developed in the legal systems of both civil and common law countries that Moore commented: "The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognised in the criminal jurisprudence of all countries."[22]

In utilizing this aspect of the principle of territoriality, however, some courts in the United States have found it necessary to adopt the auxiliary theory of "constructive presence of the accused person." For example, in *Simpson* v. *State*[23] in which the accused who stood on the South Carolina bank of the Savannah River had shot at a person in a boat on the part of the river within the Georgia side, it was held that the Georgia courts were competent to try the case on the basis of assault with intent to murder. The following dramatic statement concerning the concept of constructive presence was presented in the judgment: [24]

> Of course the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual.

20. Hyde, *op. cit., ante,* note 14, at p. 798.

21. 40 S.C. 221 (1893).

22. Moore, Report On Extraterritorial Crime And The Cutting Case 23 (1887); U.S. For. Rel. 757, at p. 771 (1887).

23. 92 Ga. 41 (1893).

24. Ibid., at pp. 43-46. See also *People* v. *Adams* (1846), 3 Den. (N.Y.) 190 (1848), 1 Comst. (N.Y.) 173; and *County Council of Fermanaugh* v. *Farredon,* 2 Ir. Rep. 180 (1923), Annual Digest case No. 5 (1923-24).

> It may be constructive. The well established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. . . . So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. . . . The act of the accused did take effect in this State. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was therefore, in legal sense, after the ball crossed the State line up to the moment it stopped, in Georgia.

It is noteworthy that the objective application of the territorial principle has occasionally been confused with notions regarding the guilt of the criminal offender. In the *Lotus* case, for instance, it was contended before the Permanent Court of International Justice that this application of the principle should not be allowed if the crime that is committed beyond territorial frontiers produces unintended consequences within the territory. Thus, in defence of this view, Judge Loder in his dissenting opinion stated: [25]

> The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction. It is, however, justified where the act and its effect indistinguishable, when there is a direct relation between them; for instance, a shot fired at a person on the other side of a frontier; a parcel containing an infernal machine intended to explode on being opened by the person to whom it is sent. The author of the crime intends in such cases to inflict injury at a place other than that where he himself is.
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> But the case which the Court has to consider bears no resemblance to these instances. The officer of the Lotus, who had never set foot on board the Bozkourt, had no intention of injuring anyone, and no such intention is imputed to him. The movements executed in the navigation of a vessel are only designed to avoid an accident....
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> In these circumstances, it seems to me that the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded.

Taking into account the nature and scope of the subject of criminal jurisdiction, however, it is evident that the question concerning the different degrees of criminal guilt is basically irrelevant for determining the right of a state to take cognisance of an offence. The underlying policy of the objective territorial principle is no more than that, without prejudice to the penalising competence of the state where the crime is initiated, deference should be given to the authority to dispense punitive justice on account of the locus of the injurious result, independent of the question of *dolus* or *culpa* which is only pertinent to the determination of the degree of criminal liability according to the law to be applied.

In connection with the objective application of the principle of territoriality, some special attention should be given to the problem of criminal attempt committed abroad but intended to cause injury within the territory. Any solution in this respect should perhaps again be

25. P.C.I.J., ser. A, No. 10, Judgm. No. 9, p. 37 (1927).

sought in the light of the relevant definition according to which a person is criminally liable only if he commits a wrongful act which, if not interposted by certain conditioning factors independent of his will, would result in the completion of the respective offence. Thus, in a case where the conduct and the intended result are seperated in terms of geographical location, identification of the place where the consummation of the crime is prevented is obviously most essential.

Accordingly, on the basis of the fundamental goal of criminal justice to protect the interest of the respective community, it is then *a priori* safe to say that the objective territorial principle should apply only if such prevention — like in the *Simpson* case — takes place within the national frontiers of the state where the intended result is expected to occur. The commission of the crime in such a case then has proceeded to such an extent, that there is a concrete danger which actually enters the state and directly affects the community interest. A classical example is the case of the parcel of explosives intended to injure a person in another country, but intercepted at the port of arrival.

If the interception, on the other hand, took place within the territorial limits of the country of dispatch, there is then no reason why the state where the delivery of the parcel is supposed to be effected should assert jurisdiction over the matter, for its public interest is not materially violated. To argue on the ground of the so-called "subjective theory of jeopardy" that the atrocious intent manifested in the abortive attempt in the foreign land is sufficient to constitute a peril to the nation seems to be no more than hairsplitting sophistry; the alleged danger is so remote, that under the maxim *"de minimis non curat lex"* no jurisdiction can rightfully be exercised because of the lack of factual infringement of the national interest.[26]

It should be admitted that the problem of criminal attempt in relation to the objective territorial principle may not always be simple. Suppose that the parcel of explosives, being unpacked by the addressee, appears to contain merely a harmless imitation of a grenade, but the sender is not aware of the "innocence" of his enterprise; would the state where the detrimental result was expected to occur have the authority to prosecute the culprit, where the instrument utilized is *in casu* absolutely ineffective? *Query,* what would be the answer if the attempt is conducted with a relatively ineffective means, for instance, if the grenade is operative but not sufficiently powerful to kill an average person? Or, suppose that although the apparatus will not harm a person in general, the explosion itself may be mortal to a man with a heart disease? Should the actual danger generated by the wrongful conduct then be appraised *ante-factum* or *post-factum, in abstracto* or *in concreto?* It is true that the criminality of all these situations is in principle to be decided in accordance with the terms of the penal law to be applied. As regards the question concerning the objective application of the territorial principle, it suffices to say that a connecting factor or a point of contact with a criminal

26. It should be noted that without making distinction as to where the consummation of the crime is prevented, some countries purport to have jurisdiction over criminal attempts committed outside their territory. See Art. 10 of the Brazilian Project of Penal Code of 1927 and Art. 8 of the Swiss Project of Penal Code of 1918.

attempt committed abroad should be considered to exist only if there is a manifest encroachment of the interest of the territorially organised community concerned, which should be assessed in each case individually on the basis of a multifacial analysis of the respective situation.

Mutatis mutandis, the discussed policies concerning criminal attempt should also apply to conspiracy and the various forms of criminal participation. Typical in relation to the positions of the abettor, the accomplice and the accessory who perform their roles in the crime outside the state's territory is the provision in the California statute which reads:[27]

> Every person, who, being out of this state, causes, aids, advises, or encourages any person to commit a crime within this state, and is afterwards found within this state, is punishable in the same manner as if he had been within this state when he caused, aided, advised, or encouraged the commission of such crime.

One may question whether the objective territorial principle can be invoked in a situation where the respective act or omission is not unlawful in the foreign country where it is committed. Suppose that in the cited case of *State* v. *Morrow,*[28] abortion was legal in Washington D.C.; could the State of Carolina then lawfully exercise jurisdiction on the ground of criminal result alone without explicit support of the law to that effect?

Here again, although under the principle of territoriality a state may rightfully predicate competence on the basis of the undesired result, yet, it is questionable whether under the generally accepted minimum standard of criminal liability, prosecution of the offender can lead to conviction, especially if it concerns an offence that is *mala prohibitum.* Since the unlawfulness of the entire event is a necessary postulate to hold a person criminally liable, the fact that the act is not unlawful at the locus of the conduct, necessarily eradicates the unlawfulness, not only of the conduct itself, but also of the entire event. Particularly in those cases where under the applicable substantive rule the perpetrator's knowledge of the unlawfulness of his behaviour is required, it is certainly difficult for the prosecution — with respect to crimes *mala prohibitum* — to prove that the person knew, or must have known, that he was behaving contrary to the law of the locus of the result. The same policy is applicable to criminal attempt, conspiracy and other modes of punishable participation conducted under similar conditions.

In those cases where the criminal result is caused by a conduct performed in a place not subject to the authority of any state, the unlawfulness of the conduct as such is apparent if it concerns an offence which is *mala in se.*

c. *Locus of the effect.* Suppose that a person physically present in country A by means of a shot-gun wounds another person who is standing across the border in country B; but the victim, instead of being killed immediately, survives for sometime, and for one reason or another dies

27. See Sections 27, 778 (b) of the Penal Code of 1872 as amended to 1923.

28. See *op. cit., ante,* note 21.

because of the wound in country C. May state C in which the final effect of the crime takes place lawfully declare jurisdiction over the offence?

It should be observed that on this point, even the theory of constructive presence as upheld in the *Simpson* case[29] has not yet been sufficiently developed to cover such a complex situation. The theory merely says that the perpetrator of an offence shall be considered to accompany the agency sent into operation until the point where it becomes effective. But where did the agency in the hypothetical case pictured above become effective: in state B or state C?

There is indeed no unanimous opinion in this regard. A number of authorities maintain that the state in which the effect occurs would have the right to prosecute the criminal offender. A well-known case expounding this view is *Commonwealth* v. Mocloon[30] in which Mr. Justice Gray speaking for the Supreme Court of Massachusetts stated in pursuance of the ruling of *Tyler* v. *People*[31] that if a person's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential." It should be noted, however, that in this particular instance, the wounding took place on the high seas; moreover, the Massachusetts statute expressly provided for the punishment of persons causing death within the state's territory.

The opposite view was vigorously defended by Mr. Justice Campbell who, in his dissenting opinion in the *Tyler* case, explicitly rejected the applicability of the theory of constructive presence. "A wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant whether he strikes with a sword or shoots a gun; and he may very reasonably be held present where his forcible act becomes operative." He went on to say: "But when the bullet rests or the sword is withdrawn, he ceases to act. And the suffering which the person subsequent undergoes is not an act, but a mere consequence, a distinction that is real and essential and which cannot be disregarded. . . . It is the act which breaks the peace, that sets an evil example, and that causes all the mischief. And it would be introducing a principle which has no sanction in the common law, and for which I have not been able to see the reason, to hold that a man may be punished for results where he cannot be punished for the acts that caused them."

The truth is that from the perspective of substantive criminal law, it is obviously impossible to say that it is only the wrongful conduct, the injurious result, or the undesired effect which constitutes a crime; for a crime *qualita qua* is always conditioned, shaped, and established by all these relevant ingredients. No crime of murder has been committed so long as the victim is still alive. No crime of larceny has been completed so long as the stolen assets have not come into the malefactor's control. Especially in this era of huge business enterprises which transcend

29. See *op. cit., ante,* note 23.

30. 101 Mass. 1 (1869).

31. 8 Mich. 820 (1860).

national frontiers, a person may defraud a business agency in Paris in order that the main-office in Tokyo makes undue payment or suffers the eventual criminal effect. The crime of fraud then is commenced at the point where perversion of the truth is for the first time committed and is brought into perfection when the final outcome of the venture occurred.

Hence, from a basic policy point of view, no one element of a crime can be considered immaterial or of little importance. If a state under the subjective and objective principles of territoriality may rightfully assume competence on the basis of geographical location of conduct and result respectively, there is for the purpose of identifying connecting factors and linking points in principle no reason to deny a state the right to take cognisance of an offence on account of the locus of criminal effect. This tenet, which may be referred to as "effective application of the territorial principle," has also found widespread recognition, specifically in relation to crimes involving the death of the victim. In the Model Penal Code of the American Law Institute, for instance, it is suggested that criminal jurisdiction can be assumed "W(hen) the offence is homicide . . . and if the body of a homicide victim is found within the State."[32]

The problem as to which of the states concerned should ultimately exercise jurisdiction in such complex situations will be reserved for a later discussion. For the present it is sufficient to say that particularly the policies relating to penal competence on the basis of location of criminal result should in general also apply to jurisdiction on account of criminal effect.

2. *Relevance of Personality of the Subjects.*

Another reason by which a point of contact between state and crime may be established is through the personal characteristics of the subjects in the crime. More specifically, this non-territorial principle of jurisdiction refers to the nationality of both the perpetrator and the victim who may be either a natural person or a legal body.

a. *Nationality of the perpetrator.* There is indeed a variety of justifications for a state to assert criminal jurisdiction over its nationals, independent of the question of where the offence is conducted or where the injurious result and effect occur. An extreme statement in this regard is that of Beckett who pointed out that "(T)he jurisdiction, which a state chooses to exercise over its own nationals in relation to acts performed at home or abroad, can never be the concern of any other state and is therefore quite outside the sphere of international law."[33]

This so-called "active personality or nationality principle of jurisdiction" is commonly acknowledged primarily because of the allegiance which a person charged with a crime owes to the state of which he is a national. There is no doubt that each territorially organised community has the right to prosecute and penalise its own members for such acts

32. Section 1.03(4) of the Final Draft (1962).

33. Beckett, "The Exercise of Criminal Jurisdiction over Foreigners", 6 *B.Y.I.L.*, 44-45 (1925).

and in such manners as it may deem necessary. It is basically for municipal law to establish the rights and duties of citizens wherever they may be, and to determine which patterns of their undesired conduct are to be adjudicated by the *forum patrae rei*.[34]

As Hall aptly observed: [35]

> The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed; its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state; but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction.

Legislative practices of the various nations show several ways in which penal jurisdiction is assumed over nationals who commit crime outside the state of origin. As the Harvard drafters reported, there are in terms of the offence made punishable essentially five methods by which the principle of nationality is applied, *viz.* (1) to all offences, (2) to all offences that are also punishable by the *lex loci delicti,* (3) to all offences of a certain degree, (4) to offences against co-nationals, and (5) to certain enumerated offences only.[36]

It should be noted, however, that whereas according to the Harvard Draft Convention the nationality concept should apply to the criminal offender who is a national when the crime is committed *or* a national when prosecuted or punished,[37] it would seem more adequate if state authority in this respect is to be invoked only if the culprit is a national at the time of the commission of the offences *and* a national at the time he is tried by a national tribunal. For, if the *raison d'être* of the principle is to allow states to exercise control over the behaviour of their subjects abroad, there is then no justifiable cause for a state to extend this control to cover an individual after he relinquishes that state's nationality; because all ties of allegiance cease to exist, and there can be no valid interest any more for the state in the prosecution of the person. What it can do is merely to declare the undesired individual to be a "persona non grata."

Similarly, the principle should not apply to a person who becomes a national after committing a crime,[38] again by reason of the fact that he owed no allegiance at the time the wrong was done. It would indeed be peculiar if a state may confer citizenship upon a person and afterwards, under the principle of nationality, hold him responsible before the municipal law for behaviour previous to his becoming a national. If he is an

34. See *Blackmer* v. U.S., 284 421, at p. 437 (1932).

35. Hall, *International Law,* 56 (1924).

36. Harvard Research, *op. cit., ante,* note 7, at p. 523.

37. See Art. 5 of the Harvard Draft Convention on Jurisdiction with respect to Crime, *op. cit., ante,* note 7.

38. See Art. 5(2) of the Indonesian Penal Code of 1917 which provides differently.

actual threat to the community, the state can always by means of administrative measures bar him from obtaining citizenship and keep him outside the country. It is conceded that in some few occasions impunity may result from the adoption of this strict policy, but it is generally known that criminal law is not designed *coûte que coûte* to make an individual suffer even without reasonable cause. As a federal court observed in *United States* v. *Aluminum Co. of America:*[39] "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."

In the case of a criminal offender who possesses a double or multiple nationality, each state of which he is a national is of course competent to invoke the active personality principle with regard to the respective crime. Aside from the problem of *ne bis in idem* or double jeopardy which will be discussed later, the right of a state to predicate jurisdiction should obviously not be impaired or limited by the fact that the individual is also a national of another state. After all, if a person enjoys protection from different governments, he should also accept the obligations that arise from the different relationships with the respective states.

Finally, the principle of nationality should also be considered applicable to juristic persons having the nationality of the prosecuting state. While obviously such legal bodies cannot be incarcerated, it may, if convicted usually be fined or its charter suspended or repealed. The New York statute governing punishment of corporations convicted of felony, for example, provides that "(I)n all cases where a corporation is convicted of an offence for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars."[40]

b. *Nationality of the victim.* If a state may expect from its subject allegiance and compliance with the rules of the national public order system wherever he may be, it would be reasonable if on the other hand the state is prepared to provide him adequate protection, even though he may be abroad. Moreover, if the notion of self-protection, as will appear, justifies an extra-territorial jurisdiction when a crime is directed against the security and integrity of the state, it is logically difficult to see why the same idea may not support an extra-territorial competence when a crime is directed against a citizen of the state. It is true that this "passive personality principle of jurisdiction" which gives the *forum patrae victimae* the right to take cognisance of a crime is not always warranted by the various national legal systems, especially those of the common law countries; but if states like Argentina, Austria, Brazil Hungary, Italy, Mexico, Norway, Sweden, Turkey, and others[41] acknowledge this type of penal competence, its import from basic policy perspective cannot be overlooked.

Even in Great Britain where perhaps the strongest opposition to the

39. 148 F. 2d 416 (1945).

40. Cahill's *Cons. Laws,* Sec. 1932 (1930).

41. See Beckett, *op. cit., ante,* note 33, at p. 48.

principle is to be found, the government has, at least in one instance, maintained its competence to prosecute and punish extraterritorial crime in the protection of its nationals. The following incident is reported in Halleck's *International Law:*[42]

> A British subject having been murdered in 1877 by natives in the island of Tanna, H.M.S. "Beagle" proceeded thither; the murderer was tried by two naval officers, was found guilty, and executed by hanging at the forearm of the "Beagle", the commander being aware that Sir George Innes, Attorney-General for New South Wales, had already given an opinion, based on previous decisions, that there was no jurisdiction in the colonial courts to try such islanders, they not being British subjects, and the crime not being committed within British territory. The Admiralty deemed that the commander had adopted the most humane course, and approved thereof, . . . that the only real justification for so unusual a mode of punishment lay in the circumstance that the crime committed was not justiciable by any civilized tribunal, and was of such a nature as not to admit of any more merciful course being adopted. . . . The Attorney-General in the House of Commons supported the action of the naval officers.

Also, Wharton took the view that:[43]

> (I)f an American citizen is murdered or plundered abroad, it is the duty of his country to exact redress and retribution. ... If the crime is committed in a barbarous or semi-barbarous land, where a demand for extradition is not recognized, and where justice is not inflicted in accordance with civilized jurisprudence, then we have the right to execute justice ourselves, by seizing the offenders and trying them according to our laws, in all cases in which these laws embody crimes against men, irrespective of local limitations. Ignorance of law would, indeed, avail as a defence as to offences not *mala in se.* But as to offences *mala in se,* wherever the rights of a citizen are assailed, then it is the prerogative of his state to require redress.

For the purpose of identifying connecting factors, there is basically no reason to deny the right of a state to predicate jurisdiction on the ground of nationality of the party injured. This party may be a natural person, a private corporation, or even the respective territorially organised community as a whole, *viz.* in those cases where the crime is committed to the actual detriment of the public. In this context it should be noted that in addition to typical crimes against the community such as damaging of public works, polluting of public water-reservoirs, public nuisance, etc., there may also be common offences such as larceny, fraud, etc. that may be directed against the state if they involve public possessions. In fact, it is the very basis of criminal justice to prosecute a person for conduct that has injured a certain interest, and it is in this relation that the *forum patrae victimae* may assert the right to assume penal jurisdiction.

3. *Relevance of the Specific Community Interest Affected.*

Finally, in addition to geographical location of the crime and personality of the subjects involved, a point of contact between state and criminal offence should be considered to exist in those cases where a certain public interest of great importance is infringed. It is universally accepted that due to the eminence of some specific interests at stake, states have the authority to prescribe and apply policy with regard to crimes

42. I Halleck, *International Law,* (Baker's 4th ed.), p. 220.

43. Wharton, "Extraterritorial Crime", *4 So. L. Rev.,* N.S., 676 at p. 701 (1879).

manifestly detrimental to their community, even though these crimes are initiated and consummated by aliens in a foreign country. Most of the offences falling under this type of criminal jurisdiction are those which are deemed phenomenal in terms of impact as well as wrongfulness.

a. *In defence of some prominent exclusive interests.* Especially where modern means of travel and communication have increased the opportunities for committing crimes against the state from outside its territory, governments have become more and more aware of this growing danger, and the tendency in national legislation is towards extension of state competence to administer criminal justice according to the so-called "protective principle of jurisdiction." This principle, which purports to magnify the competence of the state surpassing its territorial limits to cover grave crimes conducted particularly by foreigners, is largely recognised by civil law nations, though it is also not completely unknown to Anglo-American jurisprudence. It is settled law, Judge Hand said, "that any state may impose liabilities, even upon persons not within allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[44]

Generally, the protective principle is employed in regard to crimes against national security, territorial integrity, and political independence of a state, but often also in respect of crimes injurious to the national economic and monetary system. A concise enumeration of offences governed by the principle is presented in Article 4 of the Guatemalan Penal Code of 1890 which denounces:

> Crime against the independence of the Republic, the integrity of its territory, its form of government, its tranquility, its internal or external security, or against the Chief of State, as well as falsification of the signature of the President of the Republic or of Ministers of State, or public seals, of current Guatemalan money, of bonds, titles, and other documents of public credit of the nation, or of notes of a bank existing by law in the Republic and which has been authorized to issue them, and also the introduction into the Republic or the spending of them when falsified.

It is true that most of these crimes are usually also punishable according to the *lex loci delicti.* In fact, with regard to subversive activities conducted from abroad, there is a general expectation that "(E)very State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organisation within its territory of activities calculated to foment such civil strife."[45] However, as governments within whose territory such activities are performed may decline to take appropriate measures, if not encourage the conduct of such movements, authority should be conceded to the state whose fundamental interest is severely jeopardized.

Moreover, political crimes perpetrated in a foreign country are not infrequently committed on the pretext of the exercise of the liberties guaranteed by the law of the land. Hence, to require that the respective

44. *U.S.* v. *Aluminum Co. of America, op. cit., ante,* note 39.

45. Art. 4 of the I.L.C. Draft Declaration on Rights and Duties of States, *op. cit., ante,* note 2.

activity for the purpose of invoking the protective principle be denounced as a crime by the law of the place of its commission would obviously be absurd, for it would naturally defeat the legitimate policy underlying the tenet. With reference to the authority of the state to dispense punitive justice on the basis of the principle, it should therefore be no defence that the conduct is not criminal under the *lex loci delicti.* Such a policy is necessary unless and until states understand more clearly their obligation to abide by certain minimum standards of protection of the most fundamental base values of other nations, and are prepared to take adequate action against individuals whose behaviour is in flagrant violation of this foreign interest.

b. *In defence of some prominent inclusive interests.* Lastly, there are certain crimes that are considered so injurious to the interest of the community of nations as a whole that every state is deemed to have both the right and the duty to suppress them, irrespective of the place where they are perpetrated, the personality of the offender or the victim, or the nationality of the particular exclusive state interest offended. This so-called "universality principle of jurisdiction" was in fact already developed in the early days, when no well-coordinated international means was available to meet the challenge of the international malefactor. But even though with the more effective system of international policing in modern days, the common interest which gave rise to the principle is still considered vital today.

The question as to which crimes should fall within the category of such *delicta juris gentium* should of course be answered in accordance with the contemporary conventional and non-conventional international law, including the national legal practices. Although it should be conceded that no consensus has yet been reached as regards the types of atrocities that are to be regarded to violate the interest of mankind, the international criminality of the following offences seems indisputable.

Piracy. Already in the old days when piratical depredations became a serious menace to the water-borne traffic and commerce, universal jurisdiction over this crime was commonly explained by the motto that the pirate who preyed upon all alike is the enemy of all alike. As Professors McDougal and Burke stated:[46]

> The general consensus that each state may in exercise of a universal competence enforce the international law of piracy by seizure even of the ships of other states is widely regarded as the most distinctive characteristic of this historic area of international law. . . . The universal jurisdiction over pirates is indeed important as the only instance of such extensive competence in peacetime and reflects the traditionally high regard for the maintenance of safety and order on the high seas. While piracy is no longer a major menace to sea travel, the use of private violence is not merely an historical curiosity, and the shared authority of states to repress such violence may continue to prove to be highly useful in particular circumstances.

Especially as piracy, which is *"hostis humani generis,"*[47] is usually con-

46. McDougal & Burke, *The Public Order of the Oceans,* (1962), p. 876.

47. An expression from *King* v. *Marsh,* (1615) 3 Bulstr. 27; 81 E.R. 23.

ducted on the open sea where no state may invoke territorial jurisdiction, adoption of the universality principle is *a fortiori* necessary and justifiable.[48]

Slave trade. It was at the Congress of Vienna in 1815 when slave trade for the first time received the solemn condemnation of several European powers. Among the great many conventions by which this inhumane conduct was stigmatized as a crime *jure gentium,* most important was perhaps the Slavery Convention of 1926 negotiated at Geneva under the auspices of the League of Nations, in which the signatories undertook to prevent and suppress slavery in all its forms, including forced labor.[49]

Engaging in traffiic in women and children for immoral purposes. That trade in "white slaves" and children is contrary to the fundamental rights and freedoms of the individual and derogatory to the dignity of the human person has long been recognised in a number of international agreements as well as in various national legislation.[50]

Counterfeiting of foreign moneys or securities. As provided in the Convention on Suppression of Counterfeiting Currency of 1929, states which recognise the principle of prosecuting offences committed abroad shall punish foreigners who are guilty of that offence in the same way as if the offence had been committed in their country.[51]

Damaging of submarine cables. The great importance of this international means of communication for interstate relations and mankind in general was already acknowledged in the International Convention for the Protection of Submarine Cables of 1884 which urged the cooperation of a number of states to safeguard the inclusive interest.[52]

Participation in the traffic of narcotics. Appropriate control over the use of narcotics is regarded so essential for the well-being of the

48. See Art. 34 of the Treaty of Lima (1878); Art. 13 of the Treaty of Montevideo on International Penal Law (1889); Art. 5 of the Resolutions of the Institute of International Law (1931); and Art. 4 of the Resolutions of the International Congress of Comparative Law (1932).

49. See also Convention of Compulsory Labour of 1930; Art. 308 of the Bustamante Code (1928); Art. 5 of the Res. of Inst. of Int'l Law; Art. 4 of the Res. of Int'l Congr. of Compar. Law; Art. 23(1) of the Univ. Decl. of Human Rights (1948); Suppl. Conv. on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); Conv. on the Abolition of Forced Labor (1957); and Art. 6 of the Draft Cov. on Econ., Soc. & Cult. Rights (1963).

50. See Geneva Conv. for the Suppression of the Traffic in Women and Children (1921); Art. 308 of the Bustamante Code (1928); Art. 5 of the Res. of Inst. of Int'l Law; Art. 4 of the Res. of Int'l Congr. of Compar. Law; Geneva Conv. for the Suppression of the Traffic in Women of Full Age (1933); Decl. of the Rights of the Child (1959); and Conv. on Consent to Marriage, Minimum Age for Marriage, and Registration for Marriage (1962).

51. See also Art. 5 of the Res. of Inst. of Int'l Law; and Art. 4 of the Res. of Int'l Congr. of Compar. Law.

52. See Art. 308 of the Bustamante Code; Art. 5 of the Res. of Inst. of Int'l Law; Art. 4 of the Res. of Int'l Congr. of Compar. Law; and *Eastern Extention Claim,* U.S. — Gr. Brit. Claims Arbitration 1923 (Nielsen's Report 73).

human race that each state is supposed to cooperate in the prevention and repression of this unauthorised private activity.[53]

Crimes against peace, war crimes, and crimes against humanity. Article 6 of the Nürnberg Charter annexed to the London Agreement 1945 stipulates:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing;
>
> (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before, or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Genocide. Taking into account the vast area of offences covered by the definition of "crimes against humanity," to treat the crime of genocide individually may appear superfluous. Yet, because of its specificness in terms of scope and nature, to focus upon this delict *sui generis* separately seems highly useful. Reference may be made to the relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations in 1948.[54]

> Article II. In the present Convention, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.
>
> Article III. The following acts shall be punishable:

53. See International Opium Convention (1912); Conv. for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (1931); and Art. 4 of the Res. of Int'l Congr. of Compar. Law; Narcotic Drugs Convention (1960).

54. Res. 260 (III).

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

> Article VI. Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Although pursuant to Article VI of the Convention, jurisdiction over the crime of genocide is to be determined on the basis of territoriality or to be exercised by an international penal court designated by the signatory states, yet, invocation of the other generally accepted principles of jurisdiction especially by non-signatory states should of course not be deemed barred by the provision. In the *Eichmann* judgment, for instance, the court referred among others to the applicability of the passive personality principle. However, taking into consideration the universal condemnation of the crime, any state should under the principle of universality basically be allowed to assert jurisdiction over this most serious offence.

Finally, it is interesting to note that according to the Harvard Draft Convention on Jurisdiction with respect to Crime, a state should under the universality principle be entitled to predicate jurisdiction with regard to offences *inter alia* (See Article 10) :

> (a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. . . .
>
> (b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national....
>
> (d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.[55]

In fact, this means more or less that irrespective of location of the crime as well as personality of the subjects involved, and independent of the question whether there is some pre-eminent exclusive or inclusive interest at stake, a state may always apply its criminal law to any crime perpetrated anywhere outside its territorial boundaries, so long as no jurisdictional claim is made by the government in whose territory the offence is conducted or by the country of which the offender is a national.

It is evident, of course, that under the basic policy requiring an actual nexus between state interest and the offence committed, the right

55. *Op. cit., ante,* note 7.

of a state to extend its authority to cover crime conducted under conditions described in the Havard provision is peculiar as well as questionable. On the general accepted hypothesis that criminal law is basically designed to defend the public order of a particular community whose values and institutions are to be maintained and fulfilled, no state should administer penal justice beyond the limits of this fundamental goal; hence, no state can arbitrarily magnify the operational scope of its penal legislation to cover these extraordinary situations. Moreover, since values may vary from time to time, the exercise of such authority could not only be in contradiction with justice, but it would also be a serious threat to the freedom of the private individual. Where under the circumstances depicted under (a) and (b), respectively, the state in whose territory the "crime" is committed and the state of which the "criminal" is a national are not interested in prosecuting the person, it is certainly hyperbolic for another state to take cognisance of the case merely because it happens to acquire control over his body, since there is obviously no valid nexus between this state and the alleged crime whatsoever. As to crimes committed "in a place not subject to the authority of any State" as delineated under (d), exercise of criminal jurisdiction appears to be no more than an unnecessary abuse of power.

B. TRENDS IN DECISIONS AND CONDITIONING FACTORS

Thus far, the policies concerning the right of a state to assume penal competence under the generally recognised principles have been discussed. Obviously, identification of this right and the different aspects alone would not be sufficient to solve jurisdictional problems in actual practice. In a given crime situation, a number of linking points may arise connecting the one offence with several states, thereby establishing concurrent competence. Which state then should take cognisance of the case? Or would the offender be subjected to the authority of all the states involved? Examination of both national and international jurisprudence reveals that it is primarily these conflicting conditions which require special attention.

1. *Claims Relating to Locus Delicti Commissi.*

"The jurisdiction of the nation within its own territory," Chief Justice Marshall said in his much quoted statement in *Schooner Exchange* v. *McFaddon,* "is necessarily exclusive and absolute. It is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereigny to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied."[56]

It is universally recognised, indeed, that states are basically competent to predicate criminal jurisdiction within their respective territorial boundaries. The principle of territoriality which determines the

56. 11 U.S. (7 Cranch) 116 at p. 136 (1812).

authority of a state by reference to the place where the criminal offence is perpetrated is incorporated in most modern penal codes.[57]

From a jurisdictional perspective, one of the basic problems obviously relates to what is to be understood under the term "territory." [58] There is a general acceptance to the effect that the territory of a state should include not only the land area and national waters, such as ports, harbours, bays, rivers and lakes, but also the territorial sea and the air space above all of them. Unfortunately, due to the varying geographical, economic, and strategical conditions, states hitherto still seem to disagree as to the desirable breadth of the territorial sea.[59] Especially in the last decades, the traditional three nautical mile limit concept appears more and more to lose popularity.[60]

In addition to the territorial sea, states usually extend their jurisdiction to cover certain offences committed in the so-called contiguous zone. This is particularly the case with respect to enforcement of tariff and smuggling laws.[61] Article 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone provides:

> 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
>
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.

57. See the Indian Penal Code of 1860, s. 2; Indonesian Penal Code of 1917, art. 2; Japan Penal Code of 1907, art. 1(1); Malaysian and Singapore Penal Code of 1872, s. 2; U.S.S.R. Fundamentals of Criminal Legislation, art. 4, and the various State Codes of the United States; see also art. 2 of the Draft Declaration on Rights and Duties of States, *op. cit., ante,* note 2. The territorial principle of criminal jurisdiction has also found recognition in art. 1 of the Montevideo Treaty on International Penal Law (1927); arts. 296 & 302 of the Bustamante Code (Havana, 1928); arts. 1 & 2 of the Cambridge Resolution on the Conflict of Penal Laws with respect to Competence (1931); arts. 1 & 2 of The Hague Resolution on International Penal Law (1932); art. 1 of the Cambridge Resolution on the Conflict of Penal Law.

58. For a comprehensive discussion of this subject-matter see Bishop, *International Law,* (1962) pp. 343-349, 439-625; Briggs, *The Law of Nations* (1952) pp. 239-391; I Lauterpacht, *Oppenheim's International Law,* (1952) pp. 401-532. MacDougal & Burke, (1962), *The Public Order of the Oceans,* pp. 89-729; MacDougal, Lasswell & Vlasic, *Law and Public Order in Space,* (1963) pp. 646-748; Whittemore Boggs, *International Boundaries: A Study of Boundary Functions and Problems,* (1940).

59. For disputes concerning territorial limitation, see *New Jersey* v. *Delaware,* 291 U.S. 361 (1934); *The Chamizal Arbitration, reported* in 5 *Am.J.I.L.* 185 (1911); *The Elida,* I Entscheidungen des Oberprisengerichts 9 (1915); *North Atlantic Coast Fisheries,* Sen. Doc. No. 870, Vol. I, 64 (61st Cong., 3rd Sess.) (1910); *Varanger Fiord* case, Norsk Retstidende 727 (1934); *The Corfu Channel* case, I.C.J. Rep. 4, 26 (1949).

60. See League of Nations, Acts of the Conference for the Codification of International Law (The Hague, 1930); See further Geneva Convention on the Territorial Sea and the Contiguous Zone, adopted by the U.N. Conf. on the Law of the Sea (U.N. Doc. A/CONF. 13/L. 52) (1958) and other related documents.

61. See for example the U.S. Anti-Smuggling Act of August 5, 1935, 49 U.S. Stat. 517, c. 438.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breath of the territorial sea is measured.

That states also purport to exercise exclusive competence over the territorial air space is illustrated in Article 1 of the Paris Convention of 1919 relating to the Regulation of Aerial Navigation which reads: "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory." A similar provision is to be found in the Chicago Convention of 1944 on International Civil Aviation.[62]

However, governments generally do not limit the exercise of competence to their respective territories as delineated above. Usually, exclusive jurisdiction is also claimed with regard to events occurring on board both public and private seacrafts and aircrafts, in embassies and consular buildings, as well as in army establishments in a foreign land, *i.e.* where the exclusive interest of the individual state of nationality calls for the application of domestically prescribed policies. Viewed from the territorial state in which such jurisdictional exception is expected, it is known as "extraterritoriality," an international legal concept which still has not found unanimous recognition.[63]

It is conceded, of course, that extraterritoriality in the sense of a complete detachment of a certain place or space located within the national frontiers from the territorial sovereignty of the state concerned is obviously merely fictitious. Yet, even though it is true that visiting foreign vessels and airplanes and the aforesaid foreign settlement ought to be deemed to be within the general sphere of competence of the visited country, the practice nonetheless demonstrates that in relation to offences committed within these entities, host-governments often refrain from exercising jurisdiction because of the expectation that deference is to be given to the authority of the respective foreign state. Hence, to deny completely the notion of extraterritoriality relative to the matter of penal competence seems unrealistic as well as incorrect.

Unfortunately, this extraterritoriality concept has to a considerable extent been confused with the idea of immunity of the person of the criminal offender,[64] notwithstanding the fact that there is a visible distinction between the two issues. A crime committed on board a warship by a member of the crew, for example, is considered to fall within the competence of the state of the flag, not because of the personal immunity of the perpetrator, but only because of the "self-jurisdiction" of the

62. See further Preamble of Great Britain Air Navigation Act, 1920, 10 & 11 Geo. 5, c. 80; and Art. 6 of U.S. Air Commerce Act, 1926 as amended in 1938, 52 Stat. L. 1028, 49 U.S.C.A. par. 176.

63. Professor Brierly, a traditional protagonist in international law, seemed to prefer an emphasis upon the immunity of the person of the alien (discussed *post*, under B, 2, d), rather than upon extraterritoriality of the locus of event. See Brierly, *The Law Of Nations,* (1963), p. 222.

64. In connection with the question of criminal jurisdiction, therefore, it seems preferable to use the terms "extraterritoriality" with reference to the sanctity of certain entities, properties and things, and "immunity" with reference to the sanctity of the alien person (the latter is discussed under "Claims Relating to Personality," *post,* at p. 76).

vessel; for, had the offence been conducted by the same individual on shore, it would then be the littoral state which is commonly assumed to have the right to exercise authority.[65]

The degree to which extraterritoriality is accepted in actual practice varies according to the character of the foreign entity as well as the circumstantial factors surrounding a specific case. It is commonly agreed that crimes committed on foreign men-of-war, military aircrafts, and army settlements should basically fall within the exclusive jurisdiction of the state of nationality. As to warships, some authors even take the position not only that offences perpetrated on board by non-crew members should remain within the competence of the ship authority, but also that individuals of the coastal community who after having committed a crime on the territory of the littoral state have taken refuge on board, cannot be forcibly taken off the vessel.[66] Similar policies are usually adopted in regard of foreign military airplanes [67] and establishments or bivouacs of foreign army forces.[68]

On the other hand, criminal law practice regarding the extraterritoriality of non-military governmental seacrafts and aircrafts appears to be somewhat obscure.[69] In *Chung Chi Cheung* v. *The King,*[70] the Privy Council upheld the territorial jurisdiction of the Colony of Hongkong with respect to a crime committed on board a Chinese customs cruiser. "The true view," admitted the Privy Council, "is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships and the naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exist or not."[71] In fact, in this

65. Lauterpacht, *op. cit., ante,* note 58, at p. 766.

66. *Ibid.,* at p. 765; see futher McDougal & Burke, *op. cit., ante,* note 58 at pp. 30-36 and the celebrated case of *The Schooner Exchange* v. *McFaddon,* 11 U.S. (7' Cranch) 116 at p. 136 (1812).

67. See McDougal, Lasswell & Vlasic, *op. cit., ante,* note 58, at pp. 716-717. See also Peng, *Le Statut Jurdique de L'Aéronef Militaire,* (1957), p. 75.

68. Lauterpacht, *op. cit., ante,* note 58, at pp. 759-60.

69. As regards private claims, the status of foreign non-military public ships is also a controversial issue. The inviolability of these crafts was acknowledged among others in the English case *The Parlement Belge* (1880), 5 P.D. 197, which involved a Belgian government-owned vessel engaged in the carrying of mail, passenger, and freight, and in the American case *The Pesaro* 271 U.S. 562 (1926) in which an Italian government-owned and-operated merchant vessel was libeled *in rem.* The latter case was subjected to serious criticisms, though the judgment has in fact never been explicitly overruled. Only in *Republic of Mexico* v. *Hoffman* 324 U.S. 30 (1945), a claim to immunity of a merchant ship owned by the Mexican government but chartered to a private corporation was denied. See further McDougal & Burke, *op. cit., ante,* note 58, at pp. 137-55. It should be noted, however, that there seems to be little relationship between the immunity of a ship in private law and its extraterritoriality in criminal law.

70. (1939) A.C. 160 (P.C.); discussed post, at p. 73.

71. *Ibid.,* at p. 175.

particular incident, the Privy Council explicitly assimilated the public vessel to a warship and recognised basically the possibility of jurisdictional exception. It was only on the ground of the allegation that the Chinese government lacked sufficient interest in the extradition of the accused individual and was considered to have waived its jurisdiction, that the British court in Hongkong was deemed competent to take cognisance of the matter.

Similarly, in *Japan* v. *Kulikov,*[72] the Japanese criminal law was considered applicable in a situation where a Russian vessel belonging to the Sakhalin Fishing Board had entered the Japanese internal waters unlawfully. It should be noted, however, that in this particular instance, it was the entire seacraft, including the responsible skipper, which was involved in the commission of the offence, and in such a situation, recognition of self-jurisdiction is naturally difficult to be expected.[73]

Nevertheless, probably due to the great variety of non-military governmental vessels and the different degrees of importance, a general consensus concerning their extraterritoriality cannot be said to exist and appears to be difficult to reach. That the trend in decisions seems to be in the direction of a more or less flexible policy is seen in the fact that in most cases jurisdictional exception in respect of this category of vessels is accepted only with certain reservations. As Professor Lauterpacht after surveying judicial practices concerning the question of sovereign immunity concluded: "(I)n the great majority of states in which there is an articulate practice on the subject courts have declined to follow the principle of absolute immunity."[74]

It has been most seriously doubted, whether extraterritoriality also applies to foreign privately owned ships and airplanes. From the perspective of the state of the flag, there is of course no discrimination as to its purported exclusive competence over the various types of sea and aircrafts; hence, domestic criminal law is also made applicable to relevant events taking place on board private vessels. For the purpose of prescribing and applying policy, these vessels too are commonly considered to be parts of the territory of the state of their nationality wherever they may be.[75]

On the other hand, in the case of the coastal or visited state, self-jurisdiction of privately owned foreign vessels and aircrafts within the territorial boundaries has been frequently denied. "The mere presence of a vessel within the effective control of a state," Professor McDougal

72. (1954) Int'l L. Rep. 105.

73. This particular situational setting is further discussed under "Claims involving complexities in the invocation of geographically quasi-overlapping spheres", which will appear in the December issue of this review.

74. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 28 *B.Y.I.L.* 220 at p. 251 (1951).

75. See *R.* v. *Anderson* (1868) 11 Cox C.C. 198 (discussed further, at p. 72, *post);* *R.* v. *Leslie* (1860) 8 Cox C.C. 269; see further, Indian Penal Code, s. 4(2); Indonesian Penal Code, art. 3; Japanese Penal Code, art. 1(2). See also, the *Lotus* case, P.C.I.J. Ser. A, No. 10, Judgm. No. 9, 25 (1927).

and Burke pointed out, "is commonly considered sufficient basis to authorize that state to apply policy for resolution of most maritime disputes . . . ;"[76] It is subsequently admitted, however, that the history of international law is fraught with controversies between states regarding the exercise of state authority over foreign vessels in internal waters, particularly in connection with exemptions from coastal jurisdiction and problems relating to the exercise of port authority over events aboard the vessel.[77] Article 301 of the Bustamante Code,[78] for instance, explicitly declared that the penal law of littoral states do not apply "in respect of offences committed in territorial waters or in the air, on foreign merchant vessels or aircraft, if they have no relation with the country and its inhabitants and do not disturb its tranquility." The inconsistency in outcome of competential disputes in this regard is perhaps primarily to be attributed to the fact that conflicts between coastal and flag states are usually dealt with on the basis of the merits of the particular issue which may vary from case to case. In general, this is *mutatis mutandis* also true with respect to private foreign airplanes.

Finally, in the absence of explicit treaty regulation, there is similarly a considerable amount of ambiguity as regards the extraterritoriality of foreign legations and consular buildings. Professor Oppenheim, for instance, observed that ". . . no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain limit;" but he added, ". . . an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like."[79]

That the authority of the respective foreign government related to events taking place in the premises of its representatives is expected to be honoured was among others shown in the celebrated *Kasenkina* affair which concerned *inter alia* an abortive suicide attempt committed by a Russian female who jumped from a third-story window of the Soviet consulate in New York. Immediately after the incident, local police officers entered the consular building, inspected certain rooms in connection with the event, and seized a letter which was subsequently returned unopened. Two days later the Soviet government submitted a protest, stating that the New York police had violated "the extraterritoriality of the buildings of the Consulate General of the U.S.S.R. in New York, the need for the observance of which is derived from international custom and from the norms of international law" and requested for the punishment of the guilty persons as well as for adequate protection of the "extraterritoriality of the building" against future "illegal acts" by police authority. In reply, however, the United States Department of State, even though seemingly recognising the inviolability of the consular building, exonerated the New York police and characterised their action as

76. McDougal & Burke, *op. cit., ante,* note 58, at p. 128.

77. *Ibid.,* at p. 1096.

78. See Annex to the Convention on Private International Law, adopted at Havana in 1928.

79. Lauterpacht, *Oppenheim's International Law* (1952), p. 719.

"entirely proper" since it had been taken not only by agreement with, but also in the presence of the Consul General himself.[80]

In those cases where there are treaties concerning the status of consulates, the rules governing the matter of extraterritoriality are generally explicit. Article 18 of the Pan American Convention on Consular Agents of 1928, for instance, prescribed:[81]

> The official residence of the consuls and places used for the consulate office and archives are inviolable and in no case may the local authorities enter them without the permission of the consular agents; neither shall they examine nor seize, under any pretext whatsoever, documents or other objects found in a consular office. . . .

a. *Offence falls outside state's jurisdiction.* Judicial records of practically every nation are abundant with claims relating solely to an alleged absence of the right of the state to exercise jurisdiction, without the assertion that another state should take cognisance of the matter in question. Hitherto, such claims have been presented only by private individuals, although it is quite probable that in the future under one or another covenant on human rights, governments also become effective claimants without themselves having interest in assuming competence over the offence at issue.

Especially in those cases where a crime is committed exactly on the peripheries of the state's territorial frontiers, the authority of the state to dispense penal justice is frequently disputed. Thus, in *The Grace and Ruby,*[82] the question of jurisdiction was raised in connection with the forfeiture by United States revenue officers of a British vessel engaged in a smuggling enterprise in violation of certain statutes.[83] At the time of the seizure, the vessel was lying off the coast of the State of Massachusetts beyond the three mile, but within the four league limits, for the purpose of having her cargo of liquors taken ashore by a coastal motorboat. However, the United States District Court in Massachusetts in its decision upon the matter of competence rejected the allegation of a lack of jurisdiction on the ground that the offence was considered to be committed "within the territorial limits of the United States." Speaking for the court, Judge Morton stated:[84]

80. Dep't of State Bull., XIX, no. 478 (Aug. 29, 1948), 251-62, and *ibid.,* No. 482 (Sept. 26, 1948), 408-09; see also Preuss, "Consular Immunities: The Kasenkina Case", 43 *Am.J.I.L.* at pp. 37-56 (1949).

81. For provisions of this nature in bilateral agreements pertaining to consular matters, see among others Art. 8(4-6) of the United States-United Kingdom Consular Convention of 1951, U.S. Treaties and Other International Acts Series; see also Art. 17 of the Harvard Draft Convention on Consuls, 26 *Am.J.I.L.* 322 (1932 Supp.).

82. 283 F. 475 (1922).

83. Rev. St. ss. 2872, 2874, and the National Prohibition Act (41 Stat. 305). A newer "Anti-Smuggling Act" was enacted in 1935; see 49 U.S. Stat. 517, c. 438. For similar cases, see *Church* v. *Hubbart,* 2 Cranch 187 (1804); *Cunard SS Co.* v. *Mellon,* 262 U.S. 100 (1923); *Ford* v. *U.S.* 273 U.S. 593 (1927); *Cook* v. *U.S.,* 288 U.S. 102 (1933).

84. 283 F. 475, at p. 477 *et seq.* (1922).

> The high seas are the territory of no nation; no nation can extend its laws over them; they are free to the vessels of all countries. But this has been thought not to mean that a nation is powerless against vessels offending against its laws which remain just outside the three-mile limit. . . .
>
> The mere fact, therefore, that the Grace *and Ruby* was beyond the three-mile limit, does not of itself make the seizure unlawful and establish a lack of jurisdiction.
>
> As to the seizure: The line between territorial waters and the high seas is not like the boundary between us and a foreign power. There must be, it seems to me, a certain width of debatable waters adjacent to our coast. How far our authority shall be extended into: them for the seizure of foreign vessels which have broken our laws is a matter for the political departments of the government rather than for the courts to determine.

In connection with the matter of overlapping territorial jurisdictions of the federal and state governments, reference can be made to the case of *Skiriotes* v. *Florida,*[85] in which a person was convicted of using forbidden diving equipment for taking sponges from the Gulf of Mexico off the coast of the State of Florida, at a point about two marine leagues from the shore line, within the territorial limits of the County of Pinellas, On appeal to the United States Supreme Court it was contended that the constitution of Florida in fixing the boundary of the State and the statute under which the appellant was prosecuted violated the Constitution and treaties of the United States; that the criminal jurisdiction of the courts of Florida could not extend beyond the international boundaries of the United States, and hence could not extend "to a greater distance than one marine league from mean low tide" on the mainland of the State and adjacent islands included within its territory. Although the decisions of the state courts were Upheld, the United States Supreme Court observed:[86]

> Even if it were assumed that the *locus* of the offence was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described diverse' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved,. . . . The question is solely between appellant and his own State.... If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.

It should be noted that with that statement, the Supreme Court seemed to have based the jurisdiction of the State of Florida over this particular case on the personality of the offender rather than on the locus of the delict.

Claims that a state should not assume competence are also made in those cases where the unlawful conduct was committed because the perpetrator was for one reason or another compelled to enter the state's territory. A well-kn6Wn example pertaining to such a situation is the

85. 313 U.S. 69 (1941).

86. *Ibid.,* at pp. 76-77.

Rebecca case,[87] in which an American schooner carrying merchandise was forced by weather conditions to enter the Mexican port of Tampico as the nearest place of safety. Upon entry, the master of the vessel notified both the American consul and the Mexican customs authority, but nevertheless, he was arrested on charge of attempt to smuggle, tried, acquitted, and re-arrested, while the schooner including its cargo was sold by order of a Mexican court. The case was eventually brought to the United States — Mexican General Claims Commission which decided in favour of the skipper. Speaking for the unanimous commission, Mr. Nielsen, the United States Commissioner, related the subjective factor of *mens rea* to the question of jurisdiction as follows: [88]

> Domestic courts have frequently considered pleas of distress in connection with charges of infringement of customs laws. . . . The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws have been generally stated to apply to vessels forced into ports by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers.... It may be concluded from the evidence that the captain had no intent to perpetrate a fraud on Mexican customs law.... It may also be concluded that the captain had no intent merely as a matter of convenience to flout Mexican laws. . . . The ship entered the port of Tampico in distress, and the seizure of both the vessel and cargo was wrongful.

A comparable situation occurred in the case of *Leiser* v. *United States.*[89] In this instance, it was the customs laws of the United States that were considered to have been violated by a person who by force majeure had to enter the country. Here, the accused was travelling by air from Frankfort, Germany, to Gander, Newfoundland, carrying 532.33 carats of cut and polished diamonds. Contrary to his expectation and intent, his plane had to overfly Gander because of the adverse weather conditions, and had to land at Boston, Massachusetts, where he was arrested on the ground that he had failed to declare the diamonds to the customs officers in charge. It should be noted that before any customs officer approached him, he had already made arrangements to return to Canada by the next available plane which was scheduled to leave within a few hours. Yet, the diamonds were forfeited.

In upholding the applicability of the relevant customs regulation, Circuit Judge Hartigan pointed out:[90]

> We are not convinced that any and all exemptions which may be accorded to ships in distress must of necessity be likewise granted to individuals arriving involuntarily by air. Moreover if it had been the intent of Congress to extend similar exemptions to such individuals, we believe it would not have been done inferentially by relying upon some highly technical interpretation of an ordinary word such as "arriving", but, on the contrary, would have been spelled out in some detail as was done in Section 1441(4) relating in part to vessels arriving in distress. An examination of this section reveals that it is not every vessel arriving involuntarily which is exempt from an obligation to make entry at the customhouse, but only those ". . . which shall depart within twenty-four hours

87. *U.S. on behalf of Kate A. Hoff* v. *United States,* Gen. Claims Comm'n, Opinions 174 (1929); 23 *Am.J.I.L.* 860.

88. *Ibid.,* at p. 178; p. 862 respectively.

89. 234 F. 2d. 648 (1958).

90. *Ibid.,* at p. 650.

> after arrival without having landed or taken on board any passenger, or any merchandise other than bunker coal, bunker oil, sea stores, or ship's stores . . ." We can think of no reason why Congress would wish to grant a much more generous blanket exemption in the case of persons arriving involuntarily by air. . . . We believe that Section 1497 subjected to forfeiture the diamonds which appellant failed to declare regardless of the fact that he came into this country involuntarily and with no "intent to unlade."

b. *Offence falls within another state's jurisdiction.* Although claims denying the competence of a state on the basis that another state should have jurisdiction over the matter in question may occur in situations involving geographically separated territories of two or more different states, yet most of them arise from conditions of what is called "concurrent territorial jurisdictions" *i.e.* where "parts" of one state enter or overlap the territory of another state. Indeed, where on the one hand, nation-states generally declare their criminal law applicable to ships and aircraft having their nationality, even when they are within the territorial boundaries of a foreign country, and where on the other hand littoral states, as described earlier, are often unwilling to recognise their extraterritoriality, conflicts of competence originating from this dual or multiple exercise of authority are inevitable.

In order to secure a minimum public order, states have in cases of these contradicting jurisdictional demands attempted to establish certain standards of international justice which require mutual protection of each other's interests as well as minimization of arbitrary coercion. With regard to jurisdiction over crimes committed on board merchant vessels in foreign territorial sea, for instance, Article 19 of the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone provides:

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during the passage, save only in the following cases:
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
>
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
>
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.
>
> 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
>
> 3. . . . .
>
> 4. . . . .
>
> 5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

More ambiguous and rather perplexing, however, are the policies to be applied to crimes perpetrated on board private airplanes in the open

air space or in the territorial air space of a foreign state. As Professors McDougal, Lasswell & Vlasic observed:[91]

> The somewhat unique features of air navigation have, further, stimulated the projection of a number of additional principles for allocating prescriptive competence with respect to crimes committed aboard aircrafts. Thus, in addition to states which may be accorded competence to prescribe under any of the above more traditional principles of jurisdiction, the state where the aircraft first lands after the commission of the crime, the state of embarkation, the state where the aircraft last took off prior to commission of the crime, and possibly even other states, may all in appropriate circumstances be accorded competence to control the legal consequences of a crime committed on board an aircraft over the high seas. . . .
>
> States do, however, assume competence to apply policy to private aircraft found within their bounds, as to other physical assets, in many different types of controversies, and this assumption of competence is commonly regarded as lawful.

Similarly, the outcome of competential disputes concerning crimes committed on board foreign vessels within national waters (or in foreign airplanes in airports) is not always consistent. In the *Wildenhus* case,[92] a jurisdictional question was raised in connection with the arrest of a Belgian seaman accused of manslaughter committed on board a Belgian privately owned steamship moored at the dock of a port in New Jersey. A petition was made by the Belgian consul for the release, upon writ of *habeas corpus,* of the suspect as well as the two witnesses from custody and for their delivery to the consul, "to be dealt with according to the law of Belgium." The petitioner's claim was *inter alia,* based on the allegation that the event took place outside the jurisdiction of the State of New Jersey, and pursuant to Article 11 of the convention between the United States and Belgium "Concerning the Rights, Privileges, and Immunities of Consular Officers" concluded on March 9, 1880, local authorities were not allowed to interfere in matters relating to the internal order of a merchant vessel, "except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore or in the port, or when a person of the country, or not belonging to the crew, shall be concerned therein."

The United States Supreme Court, however, rejected the claim, stating:[93]

> . . . the only important question left for our determination is whether the thing which has been done — the disorder that has arisen — on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose," of the people who look to the state of New Jersey for their

91. McDougal, Lasswell & Vlasic, *op. cit., ante,* note 59, at pp. 701-702, 713. See also Levy, *Delimitation of State Competence in International Law:* A special reference to jurisdiction over events aboard aircraft, at pp. 290-584 (Unpublished Thesis Yale Law School, 1960); Fauchille, "Regime Juridique des Aerostats", Annuaire (1902); and Fenston & De Saussure, "Conflict in the Competence and Jurisdiction of the Courts of Different States to Deal with Crimes Committed on Board Aircraft and The Persons Involved Therein", 1 *McGill L.J.* (1952-55).

92. 120 U.S. 1 (1887).

93. *Ibid.,* at p. 12.

> protection. . . . Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they, as a rule, care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction.... The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquility and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction.

Apart from the treaty regulation, the Supreme Court apparently purported to set up a criterion to be employed as a standard in the sharing of competence between flag and coastal states. Unfortunately, the criterion as stipulated seems normatively so ambiguous, that most penal offences — depending upon the circumstantial features as interpreted — may be construed as to disturb the public peace and will fall within the littoral jurisdiction.

On the other hand, where no competential claim is made by the coastal state concerned, the exercise of criminal jurisdiction by the United States over crimes perpetrated on American vessels in foreign national waters has found the approval of the Supreme Court. Thus, in *United States* v. *Flores,*[94] a citizen of the United States murdered another citizen of the United States upon an American vessel while at anchor in the port of Matadi, in the Belgian Congo, a place subject to the sovereignty of Belgium. The suspect was brought to Philadelphia, and subsequently tried by the District Court for Eastern Pennsylvania. However, this court, following its earlier decision in *United States* v. *Mathues,*[95] sustained a demurrer to the indictment, and discharged the accused on the ground that it was without jurisdiction to try the offence charged. Nonetheless, the United States Supreme Court reversed the decision, stating:[96]

> In the absence, of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offences committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law. So applied the indictment here sufficiently charges an offence within the admiralty and maritime jurisdiction of the United States and the judgment below must be reversed.

A comparable position is taken by the United Kingdom in respect of this assumption of territorial jurisdiction. In the celebrated case *R.* v. *Anderson,*[97] a manslaughter was committed by an American national aboard a British vessel when it was in the river Garonne within French

94. 289 U.S. 137 (1933).

95. 21 F. 2d. 533 (1927), *jo* 27 F. 2d. 518 (1928).

96. 289 U.S. 137, at p. 159 (1932).

97. (1868) 11 Cox C.C. 198; see also *R.* v. *Leslie* (1860) 8 Cox C.C. 269.

territory. Deciding on the question of competence submitted by the accused, Bovill C.J. speaking for the Court of Criminal Appeal, pointed out:[98]

> There is no doubt that the place where (the) offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of Prance, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country.

On the other hand, in *Chung Chi Cheung* v. *The King,*[99] the Judicial Committee of the Privy Council upheld the competence of the Full Court of Hongkong to try the case of an alleged murder committed on board a Chinese Maritime Customs cruiser. The accused, a Chinese cabin attendant of British nationality, had shot and killed on January 11, 1937, the English captain of the vessel, wounded the acting chief officer, and subsequently wounded himself, apparently in an attempt to commit suicide. Immediately after the incident, the acting chief officer directed the boatswain to proceed to Hongkong at full speed to ask the assistance of the local police, who later on conducted the preliminary investigation and took both the wounded officer and the suspect to a local hospital in Hongkong, where the alleged killer was prosecuted, convicted and sentenced to death.

In the meanwhile, on February 25, extradition proceedings concerning the surrender of the accused were commenced at the request of the Chairman of the Provincial Government of Kwangtung based on the assertion that the murder and attempted murder took place within the jurisdiction of China, since at the time of their commission, the Chinese cruiser was "approximately one mile off Futaumun (British waters)." With regard to this matter of location of the foreign public ship, however, the Committee merely stated on the appeal of the defendant that "(T)he fact that the crime was in reality committed within British waters is not now in dispute . . . (T)he accused was a British national . . . charged with murder "in the waters of this Colony," and duly committed."

On the question of jurisdiction in general and extraterritoriality in particular, the Committee made the following remarkable observations: [100]

> Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction.... If nothing more arose the Chinese Government could clearly have had jurisdiction over the offence, and though the offender had for reasons of humanity been taken to a local hospital, a diplomatic request for his surrender would appear to have

98. (1868) 11 Cox C.C. 198 at p. 204.

99. (1939) A.C. 160.

100. *Ibid.,* at p. 175.

> been in order. . . . But this request was never made. The only request was for extradition, which is based on treaty and statutory rights, and in the circumstances inevitably failed. But if the principles which their Lordships have been discussing are accepted, the immunities which the local courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived.... (T)he Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is only that, with full knowledge of the proceedings, they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if on consideration they decided to claim jurisdiction themselves. But the circumstances stated, together with the fact that the material instruments of conviction, the revolver bullets, &c., were left without demur in the hands of the Hongkong police, make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails.

c. *Error made in localisation of offence.* It should be noticed that in the disputes discussed above, it was generally the competence of the state itself which was contended on the basis that the respective offence, which location is determined, should be deemed to fall outside the territorial jurisdiction of that state or/and within the jurisdiction of another state. In a complex crime situation, however, where the criminal conduct, direct result, and further effect occur in different places, claims may arise pertaining to the incorrect localisation of the offence, thereby denying the authority of the prosecuting state.

The difficulty, obviously, is that under circumstances where the elements of the crime are dispersed over several jurisdictional spheres, each of the states concerned may localise the offence as if it were entirely committed within its territorial frontiers. As stated earlier,[1] where the criminal result and/or effect take place in one state while the wrongful conduct is performed elsewhere, the theory of "constructive presence of the perpetrator" is often utilised in order to bring the crime within the territorial competence of that state.[2]

Among national precedents involving goreign interest, the oft-quoted smuggling case of *The Grace and Ruby*[3] is an example in which the notion of "constructive presence" was brought into practice. "The act of unloading," the District Court of Massachusetts pointed out, "although beginning beyond the three-mile limit, continued until the liquor was landed, and the schooner was actively assisting in it by means of her small boat and three of her crew, who were on the motorboat for that purpose." Only in *People* v. *Werblow,*[4] the case involving persons in China and London conducting conspiracy to defraud a business-branch in New York, did the attempt to establish jurisdiction under the New York statute fail.

1. See *ante,* under A, 1, b & c.
2. See *Simpson* v. *State,* 92 Ga. 41 (1893); *State* v. *Morrow,* 40 S.C. 221 (1893). For an extensive application of the territoriality principle of jurisdiction, see Section 1.03 of the Final Draft Penal Code (1962) of the American Law Institute.
3. 283 F. 475 (1922).
4. 241 N.Y. 55 (1925).

However, in the case of *Queen* v. *Nillins,*[5] the Queen's Bench Division of the English High Court, in passing upon an application for *habeas* corpus by a person held for extradition to Germany to answer a charge of obtaining goods in Germany by false pretences, in fact recognised the objective application of the territorial principle. In this case, the letters containing the false pretences were written in England, where the forged bills of exchange given in payment of the goods were also posted, whereas the goods themselves were obtained in Germany. Accordingly, the petitioner contended that the crime was committed, if committed at all, in England. Nevertheless, the argument was rejected and extradition to Germany was allowed on the ground that the offence was also committed in Germany where the merchandise was received.[6]

The most prominent international decision dealing with the intricate problem of localisation of a crime is of course the *Lotus* case.[7] To briefly sketch the situation, in August 1926, a collision occurred on the high seas in which the *Lotus,* a French mail-steamer, rammed and sank the Bozkourt, a Turkish collier, causing the death of eight Turkish subjects. Upon the subsequent arrival of the Lotus at Constantinople, Lieutenant Demons, the French officer of the watch on board the Lotus at the time of the collision, was arrested by the Turkish authorities and charged with manslaughter. The French objection to Turkey's assertion of competence was followed by diplomatic negotiations which culminated in the submission to the Permanent Court of International Justice of the question whether Turkey had violated international law by instituting criminal proceedings against the Frenchman in pursuance of the Turkish Penal Code, Article 6 of which provided for the punishment of foreigners who committed an offence abroad against Turkish subjects.

The reasoning of the parties' respective opinions will not be discussed here. It suffices to say that the international court which decided in favour of Turkey held *inter alia* that the burden of proof was on France to show that Turkey's assumption of jurisdiction was violative of international law, for restriction upon the right of a state to exercise competence in the administration of criminal justice is not to be presumed in the absence of an explicit international rule. With regard to the question of localisation of the criminal offence, the court observed that there is no rule of international law which forbids Turkey to predicate jurisdiction upon the fact that the respective criminal conduct took effect on a Turkish vessel, and, consequently, on a place assimilated for jurisdictional purposes to Turkish territory. It stated:[8]

5. 53 L.J.M.C. 157 (1884).

6. See further *R.* v. *Jacobi and Hitter,* 46 L.T. 595 (1881); *King* v. *Godfrey,* 1 K.B. 24 (1923); *Lamar* v. *U.S.,* 240 U.S. 60 (1916); *Rocha* v. *U.S.,* 388 F. 2d. 545 (1961); etc. See also the *Cutting* case discussed *post.* For problems related to claims concerning injunctive relief with respect to activities conducted in a foreign country, see *Steel* v. *Bulova Watch Co.,* 344 U.S. 280 (1952).

7. P.C.I.J., *op. cit., ante,* note 76.

8. *Ibid.,* at pp. 23, 30-31; for contemporary law concerning collisions at sea, see Article 11 of the 1958 Geneva Convention on the High Seas.

> ... it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effect, have taken place there....
>
> The offence for which Lieutenant Demons appears to have been prosecuted was an act — of negligence or imprudence — having its origin on board the *Lotus,* whilst its effects made themselves felt on board the Boz-Kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

2. *Claims Relating to Personality.*

That nation-states consider individual members of their respective communities as highly important base of power seems not to need clarification. Because of the paramount significance of people with respect to a nation's power position, governments make claims with reference to their nationals which extend to almost every phase of community value processes, including those connected with the administration of punitive justice. In this regard, they purport on the one hand, to exercise comprehensive and continuing control over the social behaviour of their citizens, independent of the place where they may be; but on the other hand, they also assume, at least to a certain extent, the right to protect these individuals against detrimental conduct of members of other communities as well as against unwarranted use of power by foreign state officials.

a. *National law applicable to offences committed abroad by nationals.* There appears to have been an old basic idea originating especially from the era of Western exploration that subjects who travelled to "barbarous" lands were to be deemed to take their domestic laws with them. This means that whatever they did in these unknown shores must be scrutinized and judged by national law, which would be applicable so far as its application was not unjust, taking into consideration the circumstances and conditions surrounding each particular case.

This idea that was based upon a presumption of the absence of any "civilized" law outside one's own country has of course to be reappraised, but the right of the state to predicate jurisdiction over nationals abroad remains generally recognized, though the *raison d'être* nowadays is rather the allegiance that a person owes to his country wherever he may be.

According to Wheaton,[9] there is still difference in opinion on whether the right to prosecute and punish citizens for acts done in foreign countries exists. A preponderant number of scholars favour such a right, and actual practice recognizes the validity of this type of state competence.

9. Wheaton, *International Law,* Sec. 113 (1929).

Although most criminal legislation at the present adopt the active personality principle of jurisdiction, yet the extent to which nationals abroad are subject to national law varies from state to state. In India, the entire Penal Code of 1860 applies to any offence committed by "any citizen of India in any place without and beyond India."[10] In Indonesia, the Penal Code of 1917 is made applicable to the following offences committed by nationals outside the country:[11]

(a) felonies against security of the state, felonies against Presidential dignity, some felonies against the public order, circumventing military draft, bigamy, some felonies against the public order of the sea.

(b) all other criminal offences which are considered felonies under the Indonesian Penal Code and made punishable in the country of their commission, on the understanding that capital punishment cannot be imposed in those cases where this penalty is not prescribed by the *lex loci delicti commissi.*

The Japanese Penal Code of 1907 also provides in Article 3 an enumeration of specific offences which fall within the state's jurisdiction if commited by Japanese nationals outside the territory; whereas in Article 5 of the Fundamentals of Criminal Legislation for the U.S.S.R. and the Union Republics it is prescribed that:

Citizens of the U.S.S.R. who have committed a crime abroad are held criminally responsible in accordance with the criminal laws operating in the Union Republic on whose territory they have been declared criminally responsible or have been arraigned before the court.

Persons without citizenship, resident on the territory of the U.S.S.R.. who have committed a crime outside the territory of the U.S.S.R. are held responsible on the same basis.

If the afore-mentioned persons have been punished abroad for the crime committed, the court may accordingly reduce its sentence or may release the guilty person from serving the sentence.

Aliens committing crimes outside the bounds of the U.S.S.R. are held criminally responsible in accordance with Soviet criminal legislation in cases where such provision is made by international agreements.

That the nationality principle of jurisdiction is equally recognized in Anglo-American jurisprudence is sufficiently evident in judicial pronouncements in many cases. As the United States Supreme Court once stated with reference to Americans who had committed a criminal offence in Brazil: "The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offence to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance."[12]

According to Professor Hyde, the term "nationality" refers to "the relationship between a State and an individual which is such that the

10. Art. 4(1).

11. Art. 5(1) 1 & 2 *jo* Art. 6.

12. *U.S.* v. *Bowman,* 260 U.S. 94, 102 (1922); see also the *Blackmer* and *Joyce* cases, post, at pp. 79, 80 respectively.

former may with reason regard the latter as owing allegiance to itself." [13] Mr. Koessler, who objected to the word "allegiance" as being vague and archaic, defined nationality as "the status of belonging to a State for certain purposes of international law." [14] As a general rule, however, it is for each state individually to determine which persons are to be considered its subjects.[15]

Where international commerce and trade facilities are over-expanding, it is generally found necessary to invoke the active personality principle of jurisdiction not only to cover crimes perpetrated by nationals abroad, but also those committed by juristic persons outside the territory of the state of nationality. It is true that there is still no unanimous opinion as to whether a corporation should be regarded as having the nationality of the state under whose laws it is organized, or of the state where the greatest number of shares are located, or of the state where the seat or main office is situated. Here again, it is generally for each state to stipulate under what conditions a juristic, body is to be deemed to have its national character.[16]

Finally, the active personality principle is in some penal law systems interpreted as to enable the state to prosecute and punish public officials, military personnel, private seamen and airmen, nationals as well as foreigners, for crime committed abroad in connection with the discharge of their public duties.[17] Hence, in addition to the comprehensive applicability of the principle to private nationals, the Harvard drafters also suggested that: [18]

> A State has jurisdiction with respect to any crime committed outside its territory,
>
> (a) By an alien in connection with the discharge of a public function which he has engaged to perform for that State; or
>
> (b) By an alien while engaged as one of the personnel of a ship or aircraft having the national character of that State.

The competence of a state to dispense punitive justice with reference to offences perpetrated by these public servants and military personnel is of course justified because of the extraordinary relationship between the

13. II Hyde, *International Law, Chiefly As Interpreted And Applied By The United States* 1064, (1945).

14. Koessler, "Subject" "Citizen," "National" and "Permanent Allegiance," 56 *YALE L.J.* 58, 69, 76 (1946-47).

15. For some leading cases in this respect, see the case of *Tunis-Morocco Nationality Decrees,* P.C.I.J., Ser. B. No. 4 (1923) and the *Nottebohm* case, I.C.J. Rep. 4 (1955).

16. See report of the League of Nations Committee of Experts for the Progressive Codification of International Law, "Nationality of Corporations and Their Diplomatic Protection", 12 *Publ. of the League of Nations* (1927); also in 22 *Am.J.I.L.* 171-214 (1928) (Supp.).

17. See for example Indonesian Penal Code Art. 7; Japanese Penal Code Art. 4.

18. Art. 6 of the Harvard Draft Covenant on Jurisdiction with respect to Crime, 29 *Am.J.I.L.* 435 (1935 Supp.).

state and these individuals. Obviously, it is every state's primary concern to secure the faithful and correct discharge of public duties by these functionaries, irrespective of their nationality and no matter where these duties are to be performed. As to non-military seamen and airmen, whereas on the ground of extensive application of the territoriality principle a state may assume competence over offences committed on board their ships and airplanes in a foreign land, on the basis of extensive application of the personality principle, crimes committed outside the craft on foreign soil may also fall under the authority of the state of nationality.

a. (i) *Where the perpetrator is a national.* Despite the fact that a state does not possess the right to enforce its laws within the territory of another state, it is authorized by virtue of the allegiance which a person owes to his state of nationality "to prosecute its nationals while they are abroad and to execute judgments against them upon property within the State or upon them personally when they return, or the State may prosecute its nationals after they return for acts done abroad. . . . While the exercise of such jurisdiction is perhaps the exception rather than the rule in countries deriving their jurisprudence from the English common law ... an examination of the legislation adopted in various countries reveals that practically all States exercise some penal jurisdiction on the principle of nationality." [19]

One of the leading criminal cases in which the United States Supreme Court upheld the applicability of the active personality principle is *Blackmer* v. *United States.*[20] In this case, an American citizen residing in Paris was found guilty of contempt of the Supreme Court of the District of Columbia for failure to respond to subpoenas served upon him in France requiring his appearance as a witness on behalf of the United States at a criminal trial in that court. In pursuance of the provisions of an Act of July 3, 1926, a fine of $30,000 with costs was imposed with respect to each subpoena, to be satisfied out of the property of the person concerned which was seized by order of the court. Both the statute and the proceedings were assailed by the convicted defendant as being repugnant to the Constitution of the United States. It was *inter alia* alleged that the Act did not provide "a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property," and that the provisions "for hearing and judgment in the entire absence of the accused and without his consent" were invalid.

However, the United States Supreme Court decided against him: [21]

> While it appears that the petitioner moved his residence to Prance in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. . . . With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. . . . In the present instance, the question concerns only the method of enforcing

19. See *ante,* note pp. 519-521.

20. 284 U.S. 421 (1932).

21. *Ibid.,* at p. 436 *et seq.*

> the obligation. The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is jurisdiction in *personam,* as he is personally bound to take notice of the laws that are applicable to him to obey them.... As the Congress could define the obligation, it could prescribe a penalty to enforce it.

Somewhat more complicated seems to be the situation in the English case of *Joyce* v. *Director of Public Prosecution.*[22] In this case, a person was convicted of high treason by the Central Criminal Court and sentenced to death. The jurisdictional question presented to the House of Lords was whether an alien, who had been "resident of the realm," could be held guilty of acts committed "outside the realm". As the counsel for the appellant argued, an alien owes allegiance so long as he is "within the realm", the physical presence of the alien "within the realm" is necessary to make his conduct as charged treasonable.

Actually, the main problem in this case, as in the majority of cases pertinent to the application of the active personality principle, is whether a state may assert full discretion in determining which persons are to be regarded as nationals for the purpose of administering criminal law. Especially in those situations where the citizenship of a person is not easy to identify and where the normatively ambiguous concept of "genuine link" between state and its subject[23] is insufficient to provide a reasonable solution, it may be preposterous for a state to expect from a person the usual allegiance and to prescribe and apply policy with regard to his conduct on the basis of "nationality".

The decision in the *Joyce* case appears rather peculiar in the sense that while on the one hand the alienship of the accused was recognised, yet on the other hand his allegiance as a national in several respects was considered to be a necessary deduction. It was pointed out that although the person was an alien and had left the country for a period of time, nonetheless his family and effects remained in England and continued to be under the protection of the Crown. But more important, the person was provided a British passport which is, according to the judgment in *R.* v. *Brailsford,* "a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the goverments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." Consequently, the possession of such a document was deemed to extend the person's duty of allegiance beyond the moment he left the border. The fact that he had never surrendered the passport to the British authorities and had never taken any overt step that could have indicated his intention to withdraw from his allegiance, except the treason itself, was regarded as sufficient to show that his relation with the British Crown had never ceased. "I am clearly of opinion," Lord Jowitt concluded in dismissing the appeal, "that so long as he holds the passport he is within the meaning of the statute (of 1351 providing punishment for treason) a man who, if he is adherent to the King's enemies in the realm or elsewhere commits an act of treason.... (T)he special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject and his German

22. (1946) A.C. 347.

23. See the *Nottebohm* case, I.C.J. Rep. 4 (1955).

work book showed that it was in this character that he was employed, for which his passport was doubtless accepted as the voucher."

(ii) *Where the perpetrator is of multiple nationality.* As a matter of policy, it has been stated that in a case of dual or multiple nationality, each state of which the criminal offender is a national should basically have the right to assume jurisdiction over his misconduct. In this context, *Kawakita* v. *United States*[24] is a case in point.

The case involved the conviction of a person, a United States citizen by birth but a Japanese by reason of his parentage, who was during World War II employed by a nickel factory in Japan and had to interpret communication between the Japanese and U.S. prisoners of war assigned to work at that factory. When the war ended, he went back to the United States on an American passport issued to him on the basis of an oath taken by the U.S. consul at Yokohama to the effect that he was a citizen of the United States and had not done any act amounting to expatriation. However, shortly after his arrival in the United States, he was identified by a former American prisoner in Japan, whereupon he was arrested, indicted, and tried for his activities during the war which involved some treasonable acts against U.S. military personnel under his control. But at the trial he defended himself on the argument that he must have renounced or abandoned his American citizenship and was expatriated in pursuance of the Nationality Act of 1940, as amended, according to which a national of the United States, whether by birth or by naturalization, shall lose his nationality *inter alia* by:

> (a) . . . .
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> (c) . . . .
>
> (d) Accepting, or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; . . .

There were indeed some strong indications that at the time he was employed by the nickel factory he was regarded by the Japanese authorities as a citizen of Japan. Among the actions he had taken, which might have given rise to the inference that he had elected the Japanese nationality, was the entry of his name in the "Koseki" at the beginning of 1943 together with an official request to remove his name as an alien; he had changed his registration at the Meiji University from American to Japanese citizenship as well as his address from California to Japan; he used the Koseki entry to find a job at the Oeyama Nickel Industry Co.; he travelled to China on a Japanese passport; he accepted labour draft papers from the Japanese government; and finally, he faced the East each morning and paid respects to the Japanese Emperor.

Nevertheless, he was convicted at the trial court and the United States Supreme Court upheld the decision. Mr. Justice Douglas, speaking for the Court, presented the following apt reasoning:[25]

24. 343 U.S. 717 (1952).

25. 343 U.S. 717 at p. 725 *et seq.* (1952).

> . . . dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other. For example, when one has a dual citizenship, it is not necessarily inconsistent with his citizenship in one nation to use a passport proclaiming his citizenship in the other. . . . Hence the use by petitioner of a Japanese passport on his trip to China, his use of the Koseki entry to obtain work at the Oeyama camp, the bowing to the Emperor, and his acceptance of labor draft papers from the Japanese government might reasonably mean no more than acceptance of some of the incidents of Japanese citizenship made possible by his dual citizenship. . . .
>
> On December 31, 1945, he applied for registration as an American citizen, and in that connection he made an affidavit in which he stated that he had been "temporarily residing" in Japan since August 10, 1939; that he came to Japan to study Japanese; etc. . . . These representations led to the issuance of an American passport....
>
> ... Petitioner was held accountable by the jury only for performing acts of hostility toward this country which he was not required by Japan to perform. . . . One who wants that freedom can get it by renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor. An American citizen owes allegiance to the United States wherever he may reside.

Another interesting case to be mentioned in relation to the problem of multiple nationality is *Kennedy* v. *Mendoza-Martinez* and *Rust* v. *Cort* (consolidated),[26] which concerns *inter alia* the conviction of a person who was a U.S. citizen by birth but a Mexican on the basis of parentage for remaining in Mexico during the Second World War solely to avoid U.S. military service. Approximately five years after he served the one year sentence, he was re-arrested pending his deportation which was ordered by the U.S. Immigration Service on account of the fact that by staying outside the United States to evade military service after September 27, 1944 (i.e. when the applicable Section 401 (j) of the Nationality Act of 1940 took effect), he had lost his American nationality. Thereupon, he requested a declaratory judgment from the Federal District Court for the Southern District of California, seeking disposition of the unconstitutionality of Section 401 (j) of the Nationality Act, affirmation of his status as a U.S. citizen, and nullification of the order of deportation directed against him.

The case was finally submitted to the United States Supreme Court which decided in favour of the petitioner. Referring to the *Perez*[27] and *Trop*[28] precedents, the Court declared that the related sections of the Act "are punitive and as such cannot constitutionally stand, lacking as they do the procedural safeguards which (the Vth and Vlth Amendments of) the Constitution command (s). . . . Dating back to Magna Carta, ... it has been an abiding principle governing the lives of civilized men that 'no freedom shall be taken or imprisoned or disseised or outlawed or exiled . . . without the judgment of his peers or by the law of the land.' "[28a]

26. 372 U.S. 144 (1963).

27. 356 U.S. 44 (1958).

28. 356 U.S. 86 (1958).

28a. 372 U.S. 144 at p. 186 (1963).

Indeed, it would not only be unfair but also illogical if a man subsequent to his conviction that was based upon his U.S. citizenship is deemed to have lost that citizenship prior to the conviction. The Supreme Court's decision in this case furthermore demonstrates in an unambiguous way that the practice also duly honours the proposed policy that in applying the active personality principle of jurisdiction, the accused individual must be a national at the time of the commission of the offence *as well as* at the time of his trial and conviction.

b. *National law applicable to offences committed abroad against nationals.* It should at the outset be noted that the passive personality principle of jurisdiction as accepted by some states and contested by others is in actual practice seldom employed and should be considered merely auxiliary in character. Common law countries in particular are strongly opposed to the idea of prosecuting foreign crimes on the ground that the victim is a national. According to Halleck's "International law," there is only one instance in which British authorities invoked this type of competence, *viz.*, in the previously discussed *Beagle* case.[29]

In the United States also, there appears to be a traditional reluctance as regards the subscription to the principle. In the *LeVerger* affair,[30] for instance, American authorities expressly rejected the assumption of criminal jurisdiction over a case concerning an alleged disappearance of a U.S. citizen in China in the summer of 1905 under circumstances indicating that he might have been killed by a Frenchman who had fled to Algiers. In answer to a request by the brother of the victim whether the suspect might be apprehended and returned to China for investigation and possible trial, the U.S. Department of State said that:[31]

> . . . (T)he United States Government does not exercise jurisdiction over crimes committed beyond the territorial limits of this country, except in a few involving extraordinary elements, in which category the one mentioned by you is not included. It is true that this Government exercises extra-ordinary criminal jurisdiction in China, but such jurisdiction is confined to crimes committed by American citizens. Our consular representatives in China can have no authority to try a French citizen charged with crime in that country, even though the victim should happen to be an American citizen.
>
> According to the treaties which most of the European nations have negotiated with China, each nation maintains the right to try and punish its own citizens for offences committed in the Chinese Empire. It would seem from this that the crime in question is properly within the cognizance of the French consular representative in China; but, inasmuch as according to the laws of France a Frenchman may be punished by the courts in France for crimes committed outside of that country, it does not seem necessary to have LeVerger returned to China to be tried by the French consular representative; but, if he is located in France, to prosecute him there.

A celebrated case in which the passive personality principle was specifically recognized is the oft-quoted *Cutting* case,[32] which involved the prosecution and punishment of a U.S. citizen who was found guilty at the Bravos District Court of Chilhuahua, Mexico, of the penal offence of

29. See under A, 2, b; I Halleck, *International Law,* (Baker's 4th ed.) 220.

30. Cited in II Hackworth, *Digest of International Law,* 179 (1940-44).

31. Acting Secretary of State (Adee) to Mr. L. E. Morley, Sept. 17, 1906; MS. Dep't of State, file 226/16.

32. U.S. For. Rel., 761 (1887).

defamation. In brief, the case concerned some defamatory statements made by the defendant against a Mexican citizen, first in the local newspaper El Centinela, in reference to which a judgment of conciliation against the defendant was rendered by a mediating town judge; but then once again in a Texas newspaper, the El Paso Sunday Herald, some copies of which were circulated by the defendant in Chihuahua. It was subsequent to the latter conduct that, in addition to a private suit for indemnity, a criminal case was instituted on the basis of the formal complaint by the victim.

Presumably on account of the conciliatory judgment on his article in El Centinela, the accused — placing the emphasis upon his writing in the El Paso Sunday Herald — vigorously denied the penal jurisdiction of the Mexican court on the ground that the act was committed in Texas, invoking the protection of the consul of the United States. The court, however, rejected the contention saying:

> . . . (T)he criminal responsibility of Cutting arose from the article published in El Centinela, issued in this town, which article was ratified in the Texas newspaper, which ratification, however, did not constitute a new penal offence to be punished with a different penalty from that which was applicable to the first publication.
>
> . . . (But) (E)ven on the supposition, not admitted, that the defamation arose from the communication published on the 20th of June in the El Paso Sunday Herald, article 186 of the Mexican Penal Code provides that "Penal offences committed in a foreign country by a Mexicans against Mexicans or foreigners, or by a foreigner against Mexicans," may be punished in the Republic and according to its laws, subject to the following conditions: 1. That the accused be in the Republic, whether he came voluntarily or has been brought by extradition proceedings; 2. That if the offended party be a foreigner, he shall have made proper legal complaint; 3. That the accused shall not have been definitively tried in the country where the offence was committed, or, if tried, that he shall not have been acquitted, included in an amnesty, or pardoned; 4. That the branch of law of which he is accused shall have the character of a penal offence both in the country in which it was committed and in the Republic; 6. That by the laws of the Republic the offence shall be subject to a severer penalty than that of "arresto mayor" — requisites which have been fully met in the present case.

c. *National law applicable to offences committed by aliens within the state's territory.* Perhaps the most important general principle which makes visitor's exchange among nations possible is that aliens are in principle obliged to comply with all the laws and regulations of the country they visit; for, without such a minimum fidelity, no state would for its own sake allow a stranger the privilege to enter its domain or remain within it. Thus, aside from those cases involving personal immunity, it is universally recognized that under the territorially principle of competence states have the right to prosecute and punish and/or expel foreigners for activities detrimental to the public order.

These conditions are often clearly expressed in treaties concerning the position of nationals in foreign states. For example, the Inter-American Convention on the Status of Aliens[33] explicitly provides:

> Article 1: States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory.

33. Adopted in Havana, Feb. 20, 1928; 46 Stat. 2753.

> Article 2: Foreigners are subject as are nationals to local jurisdiction and laws due considerations being given to the limitations expressed in conventions and treaties.

> Article 6: For reason of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory.

(i) *Applicability of national law in general.* Indeed if a state may lawfully prevent entrance of aliens, it should logically also be entitled to Stipulate the requirements under which they shall be permitted to remain within its territory and to compel their departure whenever these requirements are violated. The exercise of this minimum right of a state to oust aliens for non-compliance with the law is illustrated in the case of *Fong Yue Ting* v. *United States*,[34] in which the expulsion of certain individuals of Chinese nationality for failure to apply to the collector of internal revenue for a certificate of residence, as required by the Act of May 5, 1892, was approved by the United States Supreme Court:[35]

> The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, . . . (is) an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare....

> Chinese labourers . . . are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

Yet, the general competence over foreigners does not mean that states may treat their visitors completely arbitrarily. In the *Boffolo* case,[36] for instance, an Italian subject who resided in Caracas, Venezuela, was arrested and ejected from the country for writing in a weekly newspaper which he published an article that was "somewhat critical of the local minor judiciary, . . . referring, but in an unimportant manner, to the President". The case was finally submitted before the Italian-Venezuelan Mixed Claims Commission for arbitration.

The less favourable aspect of the case for the Venezuelan government was not only that the undesired conduct did not constitute a criminal offence under the Venezuelan penal law, but also that freedom of speech and of the press, freedom of transit and change of domicile, freedom from arbitrary arrest for nationals as well as foreigners, were guaranteed by the Venezuelan Constitution. Hence, although the Commission recognised the authority of a state in general to expel foreigners, it honoured in this case the claim of the individual, for there is "a broad difference between the right to exercise a power and the rightful exercise of that power". The Commission pictured the law as follows:

34. 149 U.S. 698 (1893).

35. *Ibid.*, at pp. 722 *et seq.*

36. Ralston, Venezuelan Arbitration Of 1903, 696; S. DOC. 316, 58th Cong., 2d Sess., #4620 (1904).

1. A State possesses the general right of expulsion; but

2. Expulsion should only be resorted to in extreme instance, and must be accomplished in the manner least injurious to the person affected.

3. The country exercising the power must, when occasion demands, state the reasons of such expulsion before an international tribunal, and an inefficient (sc.: insufficient) reason or none being advanced, accepts the consequences.

4. In the present case the only reasons suggested to the Commission would be contrary to the Venezuelan constitution, and as this is a country not of despotic power, but of fixed laws, restraining, among other things, the acts of its officials, these reasons (whatever good ones may in point of fact have existed) cannot be accepted by the Umpire as sufficient.

(ii) *Applicability of national law where personal immunity is claimed.* Whereas in general states are competent to prosecute and punish aliens for crimes perpetrated within its territory, there are certain situations in which exercise of this competence is limited or completely barred by reason of factors attributed to the person of the law violator. This "personal immunity" which international law accords to certain individuals such as heads of foreign states, diplomatic representatives and other important public officials, exempts a functionary from local jurisdiction irrespective of the locus of the delict; hence, as stated earlier, it is an institution which is quite distinct from the notion of extraterritoriality, for the latter aims to exclude an offence from territorial competence on account of the character of the place of its commission.

As today's practice of international law shows, at least heads of foreign states and diplomatic envoys are — even in the absence of treaty regulation — fully exempted from criminal jurisdiction of the receiving state. Since on the basis of *jus repraesentationis omnimodae* these persons in their respective quality of chief organ and plenipotentiary represent their state in its totality and are considered to have the right to act on its behalf, their subjection to local jurisdiction and control would not only be incompatible with the dignity of the nation they represent but also make the adequate fulfillment of their duties impossible.

In this respect Professor Oppenheim, who apparently ignored the difference between "personal immunity" and "extraterritoriality", made the following observation:[37]

> . . . .(H)e (the monarch) must be exempt from every kind of criminal jurisdiction.... He must be granted so-called extraterritoriality conformably with the principle *par in par em non habet imperium*, according to which one sovereign cannot have any power over another sovereign.... As regards extraterritoriality, there seems to be no good reason for distinguishing between the position of a monarch and that of presidents or other heads of States.

Similarly, diplomatic envoys are "just as sacrosanct" as heads of states and also they are excluded from any type of penal jurisdiction. ". . . (T)he theory and practice of International Law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys"[38].

37. Lauterpacht, *Oppenheim's International Law,* 678 at p. 681 (1952).

38. *Ibid.*, at p. 708.

In addition to heads of foreign states and diplomatic representatives, states are also expected in the exercise of criminal jurisdiction to honour the personal immunity of certain public officials of nation-states and international organizations as specifically designated by special treaties as well as general agreements. Article 105 of the United Nations Charter, for instance, provides:

> 1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
>
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Also Article 19 of the Statute of the International Court of Justice stipulates that "(T)he members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."[89]

Most controversial with reference to state competence to exercise penal jurisdiction is the question concerning the nature and extent of the inviolability of spouses, members of the family, and other individuals accompanying heads of states and ambassadors in foreign countries, as well as that of members of legations, consuls, consular functionaries, and members of foreign armed forces. It is questionable, indeed, whether in the absence of explicit treaty stipulation, the privileges as afforded to these persons by the receiving state is a matter of right derived from international law or is merely a matter of courtesy prescribed by municipal law or incidentally extended by local officials. Although it is commonly conceded that they may have an important role in the field of foreign affairs of their home-states, there seems to be a general consensus to the effect that the privileges to be granted to them cannot be the same as those accorded to heads of foreign states and diplomatic envoys.[40]

Practice shows that beyond the obligations as stipulated by specific treaty provisions, states are not always prepared to acknowledge personal immunity of consuls and consular officials. Also, where the relevant conventional regulation is ambiguous, court may decline to accept the inviolability of this category of foreign functionaries particularly with respect to criminal proceedings. Such a denial, for example, took place in *Bigelow* v. *Princess Zizianoff*,[41] a case concerning an American consular officer in Paris who was tried and convicted before a Correctional Tribunal in France for issuing defamatory statements about the princess to the Boston Sunday Post. The newspaper, which appeared for sale in Paris, contained an article based on the information accusing the princess

89. For similar provisions in other important international agreements, see Articles VIII(4) and XV(2) of the Constitution of the Food and Agriculture Organization of the United Nations; Article IX of the Agreement of the International Monetary Fund.

40. See also, Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Relations of 1963.

41. Court of Appeal of Paris, Jan. 28, 1928; *AmJ.LL.* 172 (1929).

of being an international spy.

The defendant appealed to a higher court denying the jurisdiction of French courts for two reasons. The first was derived from the Consular Convention between France and the United States of 1853. It should be noted that the Convention merely provided that ". . . . consul-general, consuls, vice-consuls or consular agents . . . shall enjoy . . . the privileges usually accorded to their offices, such as personal immunity, except in the case of crime. . . ." The second was drawn from "the general principles of public law and international law, which prohibit, even in the absence of any convention, citing a foreign consul before the courts of the country where he performs his duties for acts done in the performance of those duties".

The Court of Appeal, however, rejected both contentions. As regards the treaty regulation, it pointed out:[42]

> The proof that the provision lacks clearness and precision results from the disagreement itself. And in case of disagreement, the French Government alone is qualified to interpret, without being otherwise bound by the contrary opinion of a co-contracting state, which can denounce a treaty whose application is not in conformity with its own views. Contrary to an ill-founded claim of the defence, the interpretation of a consular convention has no need of being bilateral. So the court will not take time, as the tribunal did, in attempting to establish that the two governments were in agreement on the principle, since the existence of this agreement is not necessary.

With respect to the second argument, it was stated that the offences was chargeable to Mr. Bigelow, the American consular officer, personally, since it was "the personality of the agent" and not "the impersonality of his office" which was disclosed in the commission of the crime. The Court *inter alia* referred to a previous decision of the Court of Cassation concerning the criminal prosecution of a U.S. consul and concluded that "(T)he personal immunity granted to consuls (and consular agents) by the convention does not exclude the competence of our courts in penal matters . . . (It) should be understood not as an immunity from personal jurisdiction in criminal matters, but only as an exemption from preliminary arrest and detention . . ."[43]

A similar trend in applying jurisdiction policy exists with regard to crimes conducted by members of foreign armed forces passing through or remaining temporarily within a state's domain. As stated before, it is as a general rule not the personal immunity of the foreign soldier but rather the "extraterritoriality" of the *locus delicti* which usually induces the host-state to refrain from exercising competence; for, without express treaty provisions, it seems very likely that states will assume the right to take cognisance of offences committed outside the military base, man-of-war, or military aircraft to which the law violator belongs. In this context, reference can be made to the Bustmante Code which provided:

> Article 299. Nor are the penal laws of the State applicable to offences committed within the field of military operations when it authorizes the passage of an army of another contracting State through its territory, "except offences not legally connected with said army."

42. 23 *Am. J.I.L.* 172, at p. 175 (1929).

43 For the question of inviolability of documents belonging to foreign legations, see *Rose* v. *The King,* (1947) 3 D.L.R. 618.

> Article 300. The same exemption is applied to offences committed on board of foreign war vessels or aircraft while in territorial waters or in the national air.

It can be said, however, that the entrance of friendly foreign forces is in the majority of cases accompanied by special agreements regulating as punctiliously as possible the matter of competence with respect to crimes committed by the men, their relatives, and other persons accompanying them.[44]

In actual practice, the outcome of jurisdictional disputes in cases of regulatory ambiguity seems to be inconsistent. This is presumably to be attributed to the fact that in this regard decision-making is too much affected by extra-legal factors rather than by the merits of the conflict itself. In the *Schwartzfiger* case,[45] for example, the Supreme Court of the State of Panama definitely refused to acknowledge the criminal jurisdiction of the republic over a case involving an American soldier of the Canal Zone who, in carrying out an order of his military superior to transport an injured person by ambulance to the city of Colón, had accidentally hit and killed a local citizen. The tribunal referred to the convention of 1903 concerning the canal and stated:[46]

> It is a principle of international law that the armed force of one state, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command.
>
> In such case the government to which the army belongs is responsible for any damages that may be caused by the passage of the force, and for any violations of local law which it may commit. But individually its members remain subject to the jurisdiction of their own officers, and to the laws of the country to which they belong.

On the other hand, when a comparable incident took place in the case of *Wilson* v. *Girard*,[47] the authorities of the visiting forces had ultimately to yield to the local government which apparently under massive social pressure persisted in its right to exercise competence over the conduct of a foreign soldier. In this case, a U.S. Army guard, while carrying out an order to watch several military items in a camp in Japan, used a grenade launcher to discharge an expended 30-caliber cartridge case which penetrated the back of a Japanese woman who died subsequently. As the amended Paragraph 3 of Article XVII of the Administrative Agreement signed in 1952 by the United States and Japan provided:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> (a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to
>
> (i) offences solely against the property or security of the United States, or offences solely against the person or property of another member of the United States armed forces or civilian component or of a dependent;

44. See Article VII of the N.A.T.O.'s Status of Forces Agreement, 1951.

45. 24 *Panama Registro Judicial* 772, 21 *Am.J.I.L.* 182 at p. 184 (1927).

46. *Am.J.I.L.* 182, at p. 182 *et seq.*

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Pursuant to Article XXVI of the Agreement, a Joint Committee was established; however, it failed to obtain a solution acceptable to both parties mainly because the United States claimed that the act was done in the performance of official duty, whereas Japan insisted that the conduct of the soldier was without the scope of his official duty. Due to the disagreement concerning the primary right to assume competence, the issue was referred to higher authority which eventually ordered the United States representatives on the Joint Committee to notify the Japanese colleagues that in accordance with Paragraph 3(c) of Article XVII of the agreement, the United States had elected to waive whatever jurisdiction it might have in the case.[48]

3. *Claims Relating to Protection of Certain Interest.*

In order to safeguard some specific national as well as international interests, it has long been recognized that states are competent to prescribe and apply policy with reference to certain crimes irrespective of the place of commission or the personal characteristics of the perpetrator. Since a state may always predicate penal jurisdiction on the bases of the territoriality and personality principles, the right to exercise authority by virtue of this doctrine of preservation of interest in essence concerns only offences committed by aliens outside the national frontiers, on the open sea, in unoccupied land, or even in foreign territory.

a. *That the state is competent to try crimes committed against the national interest.* Particularly in civil law countries, it is generally accepted that states have the right to exercise jurisdiction on the basis of the protective principle with regard to crimes committed abroad, which specifically affect the exclusive interest of the nation, its peace, integrity, security, and economic well-being.[49]

47. 354 U.S. 524 (1957).

48. It should be noted that the case was submitted to the United States Supreme Court basically because of a petition for *certiorari* to review the denial of the suspect's writ of *habeas corpus*. The fundamental question to be decided by the Court was whether the U.S. Constitution prohibited the execution of the treaty regulation providing for waiver of the right to exercise jurisdiction. The Court, however, decided against the applicant on the ground that there was no constitutional or statutory barrier to the application of the relevant provision.

See also the consolidated case of *Reid* v. *Covert,* 354 U.S. 1 (1957), for the question whether a U.S. court-martial or a U.S. civilian tribunal should take cognizance of crimes perpetrated by civilian followers of U.S. armed forces abroad.

49. See Article 4, Indonesian Penal Code, 1917; Art. 2 of the Penal Code of Japan; Sec. 4.3(2), (5) & (6) of the German Penal Code, and other related provisions in the penal codes in the European Continent.

Yet, to say that the protective principle of jurisdiction is not applied in common law countries is certainly incorrect. In the United States, there are explicit provisions in the codified law which are difficult to reconcile with an exclusive territorial or personal theory of criminal jurisdiction and which appear to be founded, at least in some measure, upon the notion that the government is competent to prosecute offences which interfere with the well-functioning of its public agencies and instrumentalities, inependent of the locus of the offence or the nationality of the offender. An interesting example of the assumption of this type of non-territorial and non-personal competence in the United States is a provision in an early Texas statute. Under the chapter entitled "Forgery of Land Titles, etc." the penal code of this state provided in Article 454:

> Persons out of the State may commit and be liable to indictment and conviction of committing any of the offences enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to arrest and punish all persons offending against its provision, whether within or without this State.

This was an unambiguous expression of the legislature's intention to apply to all offences, regardless where they might be committed and irrespective of the person of the offender, whenever title to land within the State of Texas was affected. It should be noted that the validity of the statute was upheld in *Hanks* v. *the State*,[50] a case involving a forgery which was entirely performed in the State of Louisiana. The accused was convicted and his conviction was upheld by the Texas Court of Appeals.

Similarly, in *United States* v. *Bowman*,[51] the decision of the United States Supreme Court indicated that certain statutory provisions designed for the protection of the nation's public interest may be applied to aliens for acts committed outside the territory. In this case, the Court overruled a demurrer, filed on behalf of a U.S. citizen, to an indictment for conspiracy to defraud the United States Shipping Board Emergency Fleet Corporation. In delivering the opinion of the court, Chief Justice Taft, although admitting that in principle statutes punishment offences which affect the good order and peace of the community are to be understood as applicable only within the territorial limits of the state, pointed out:[52]

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated. . . . Some such offences can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute.... In

50. 13 Tex. App. 289 (1882).

51. 260 U.S. 94 (1922). See also the quoted pronouncement of Judge Hand in *U.S.* v. *Aluminum Co. of America,* 148 F. 2d. 416 (1945), that "any state may impose liabilities, even upon persons not within allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . ."

52. 260 U.S. 94, at p. 98 (1922).

> such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offence.

Among domestic cases having international impact, the *Eichmann* judgment is undoubtedly one of the most celebrated precedents in which a national court effectively employed the protective principle of jurisdiction. In fact, the circumstances *in casu* were even more inherently unique, since penal competence was here asserted in regard to events that occurred prior to the establishment of the state, the community interest of which was to be defended under the respective doctrine. In this case, the defendant, Karl Adolf Eichmann, was brought to trial before the District Court of Jerusalem in charges of "unsurpassed severity — charges of crimes against the Jewish people, crimes against humanity, and war crimes" committed in Europe during the Second World War.[53] The law of the State of Israel which conferred upon the court the authority to adjudicate the case was the so-called Nazis and Nazi Collaborators (Punishment) Law 5710-1950, Section 1(a) of which provides:

> A person who has committed one of the following offences —
>
> (1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people;
>
> (2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity;
>
> (3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime;
>
> is liable to the death penalty.

It was not unforeseeable that counsel for the defendant contested the jurisdiction of the court, not so much on the basis that the Israeli law is binding only within the national sphere, but more on the basis of the principles of international law which were alleged to prohibit the assumption of such competence. It was asserted "that the Israeli Law, by inflicting punishment for acts done outside the boundaries of the State and before its establishment, against persons who were not Israel citizens, and by a person woh acted in the course of duty on behalf of a foreign country ('Act of State') conflicts with international law and exceeds the powers of the Israel legislator. . . ."[54]

The court, however, accepting that for the purpose of penal jurisdiction there must be a nexus between the state assuming competence and the crime to be adjudged, pointed out that in addition to the international character of the offence which would have been sufficient for Israel to exercise authority on the universality principle it being the *forum patrae victimae* could under the notion of the passive personality principle also lawfully take cognisance of the matter. But, more explicitly relating to the applicability of the protective principle of penal jurisdiction, the

53. District Court of Jerusalem, Criminal Case No. 49/61 (1961), English translation.

54. It was said, furthermore, "that the prosecution of the accused in Israel upon his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court."

tribunal decided:[55]

> The "linking point" between Israel and the accused ... is striking and glaring in a "crime manifest against the Jewish people", a crime that postulates an intention to exterminate the Jewish people in whole or in part. . . . If there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel.
>
> The connection between the State of Israel and the Jewish people needs no explanation. The State of Israel was established and recognized as the State of the Jews. The proclamation of Iyar 5, 5705 (14.5.48) (Official Gazette No. 1) opens with the words: "It was in the Land of Israel that the Jewish people was born", dwells on the history of the Jewish people from ancient times until the Second World War, refers to the Resolution of the United Nations Assembly of 29.11.47 which demands the establishment of a Jewish State in Fretz Israel, determines the "natural right of the Jewish people to be, like every other people, self-governing, in its sovereign State". It would appear that there is hardly need for any further proof of the very obvious connection between the Jewish people and the State of Israel: this is the sovereign State of the Jewish people.

b. *State competent to try crimes committed against interest of mankind.* Finally, jurisdictional claims are made on the basis of the universality principle, according to which states are supposed to have the right to prosecute certain crimes injurious to the inclusive interest of man, regardless of where and by whom they are committed. The specific offences which are commonly presumed to be governed by the principle have been enumerated in the preceding section.[56] In this respect, again, it is usually the civil law countries, the statutory law of which generally contains express provisions concerning the applicability of the non-territorial jurisdictional tenet.

In particular with regard to piracy, the competence of any state to dispense punitive justice irrespective of the *locus delicti commissi*, the nationality of the freebooter as well as that of his vessel or of his victim, has long been widely recognized. Even in the Anglo-American countries, where there has always been a certain degree of reluctance to predicate jurisdiction on extra-territorial basis, it is not only considered a right but also an obligation to safeguard the public order of the sea against unauthorized private violence. *Pirata est hostis humani generis;*[57] and as Sir William Scott stated in the *Le Louiss*:[58] "With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war". Also in *United States* v. *Smith,*[59] Mr. Justice Story described piracy more or less in a similar way. "The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race".

55. *Ante,* at p. 92, note 53, at pp. 31-32.

56. See *ante,* p. 59, *et seq.*

57. See *King* v. *Marsh,* (1615) 3 Bulstr. 27; 81 E.R. 23.

58. (1817) 2 Dods. 210; 165 E.R. 1464.

59. 18 U.S. (5 Wheat.) 153, 161 (1820); see also Johnston J. in *U.S.* v. *Bowers,* 18 U.S. (5 Wheat.) 190 at pp. 193-195 (1820).

The universal condemnation of the crime of piracy continues in these modern days. In the 1958 Convention on the High Seas,[60] it is expressly provided in Article 14 that "(A) 11 States shall co-operate in the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State".

Immediately after the Second World War, attention of the world was focussed upon the Nurnberg and Tokyo trials of war criminals. Here, too, the penal jurisdiction of the military tribunals formally established by the Nurnberg and Tokyo Charters could in principle be derived from the universal character of the relevant crimes. ". . . (T) he very essence of the Charter," the Nurnberg tribunal observed, "is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State authorizing action moves outside its competence under international law".[61]

Similarly, at the *Eichmann* trial,[62] the District Court of Jerusalem, referring to the applicability of the universality principle of penal competence, stated:[63]

> The abhorrent crimes defined in this (Israeli) law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are *universal.*

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*(to be continued**)*

60. U.N.Doc. A/CONF. 13/L. 53.

61. International Military Tribunal, Official Documents 223 (1947-49).

62. See also Schwelb, "Crimes Against Humanity," XXIII *B.Y.I.L.* 178-226 (1946).

63. District Court of Jerusalem, *op. tit.*, *ante,* at p. 92, note 53 at p. 8.

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** Part II of this article will appear in the December 1967 issue of the Malaya Law Review with the following contents:

4. Claims Relating to Effective Control over the Person of the Offender
   a. With the formal consent of the state of refuge
      (i) That extradition is governed by conventional (and non-conventional) international law
      (ii) That nationals can(not) be extradited
      (iii) That the requirement of "double criminality" must (does not have to) be fulfilled

(iv) That extraditable acts are (not) subject to the "principle of speciality"

(v) That political and military offences are (not) extraditable

(vi) That extradition is (not) to be supported by *prima facie* evidence

b. Without the formal consent of the state of refuge

(i) Forcible seizure of the offender in foreign territory

(ii) Other modes of acquisition of control

C. APPRAISAL AND RECOMMENDATION

1. The Problem Stated

2. The Human Rights Aspect in Jurisdictional Conflict

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b. Impact of the rule on criminal jurisdiction

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(iii) Claims involving complexities in the invocation of different types of nexus in geographically quasi-overlapping spheres

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