STATE CRIMINAL JURISDICTION

(Continued from p. 95)

4. *Claims Relating to Effective Control over the Person of the Offender.*

Criminal jurisdiction has been discussed as a *de jure* right of a state to predicate and exercise authority with respect to events of criminal nature. This, obviously, is to be distinguished from the *de facto* exercise of that right, which is generally possible only if there is actual control over the body of the malefactor. In given complex situations, a state which may legitimately assume competence over an offence and is desirous to exercise it may not have the body of the criminal, whereas another state in which the culprit takes refuge may not have or may decline to exercise jurisdiction over his misconduct. Hence, the fact that a state is unable to acquire effective control over the corpus of the delinquent is certainly not the test of its right to take cognizance of the offence, and *vice-versa.*

It is true, of course that states can always condemn a wrongdoer and execute economic and reputational penal measures *absente reo.* However, principles of fair trial[1] as well as the preferred sanctioning devices generally require the accused's physical presence in order that he can properly be brought before the designated court of justice for the denouncement of his conduct. Anglo-American law is especially strict in this regard.[2] To this end, there are, various modes whereby effective control over the person of the criminal offender can be obtained.

a. *With the formal consent of the state of refuge.* The most legal and conventional way to acquire the body of an alleged lawbreaker from a foreign country is obviously through extradition, *i.e.* the delivery of a suspect, an accused, or a convicted individual through certain formal proceedings by a state on whose territory he happens to be, to another state under whose jurisdiction he is alleged to have committed or to have been convicted of a crime, for prosecution or execution of punishment.[3]

Amongst the variety of arguments in favour of extradition of criminal fugitives, most important are the following:

(i) It is highly desirable for crime not to remain unpunished. The state under whose jurisdiction the offence was committed is chiefly interested in the prosecution of the offender, and for practical reasons it

1. For a contrary view, see Art. 12 of the Nürnberg Charter.

2. See *Matthews* v. *State,* 198 Pac. (Okl.) 112 (1921).

3. See Art. 1(a) of the Harvard Draft Convention on Extradition, 29 *Am.J.I.L.* 15, (1935 Supp.).

is preferable that the trial takes place where the evidence concerning the crime is most easily obtainable.

(ii) It is important for the state of refuge to protect its own public order against the menace to which peace and security are exposed by the immigration of the criminally dangerous person. Hence, in many cases it is advisable for that state to extradite the accused or convicted individual. Merely to expel the culprit can hardly be described as international co-operation in the suppression of crime and it only releases the expelling state — temporarily perhaps — of the undesired element without bringing his detrimental activities to an end by securing orderly trial and penalization.

(iii) In many cases extradition should be allowed to promote friendly relations with the requesting state, for the requested state may soon be in a position which requires similar assistance.[4]

Despite the fact that states generally accede to the concept of extradition, the conditions under which delivery of a criminal offender should be allowed is still an object of controversy.

a. (i) *Extradition governed by conventional (and non-conventional) international law.* There is a widespread view, particularly in common law countries, that delivery of suspected or convicted delinquents should be allowed only in those cases explicitly provided for by special treaties by which the states concerned are bound. Such a view seems to originate from the basic idea of territorial sovereignty according to which states are competent to grant asylum to every person whenever they see fit.

Thus, in *Factor* v. *Laubenheimer,*[5] the United States Supreme Court agreed that "the principles of international law recognize no right to extradition apart from treaty"; and in *Valentine* v. *United States ex rel Neidecker,*[6] the court took the position that in the absence of express authorization by statute or treaty, the President lacks the power to arrest and extradite persons not charged with committing crime in the United States. Also in a memorandum of the U.S. Department of State of September 1921, it was stated that " (E)xtradition will be asked only from a Government with which the United States has an extradition treaty, and only for an offence specified in the treaty".[7]

Yet, primarily because of the recurrence of substantially similar provisions in the scores of extradition treaties, there have also been many occasions in which courts have recognized the existence of customary international law in this respect. In a German-Czechoslovakian case,[8]

4. See further Biron & Chalmers, *The Law and Practice of Extradition* (1903); see also the Harvard Draft on Extradition, *ante,* p. 224, note 3, at pp. 32-51.

5. 290 U.S. 276 (1933); further discussed *post.*

6. 299 U.S. 5, at pp. 9, 18 (1936).

7. Harvard Draft on Extradition *ante,* p. 224, note 3, at p. 432.

8. Annual Digest and Reports of Public International Law Cases 1919-22, Case No. 182, further discussed *post.*

for example, the German Reichsgericht expressly rejected the idea that questions of extradition are to be solved exclusively in pursuance of treaty provisions. Indeed, throughout the history of interstate relations, there have been numerous instances in which surrender of individuals was effected merely as a matter of amity on the part of the requested state. Furthermore, in the absence of an agreement, some states may allow extradition solely on the basis of municipal law, while others, such as Venezuela, are prepared to deliver an individual in any case, provided that the crime of which he is accused is of a very serious nature.[9]

a. (ii) *Nationals can(not) be extradited.* In accordance with the basic Anglo-American tradition, the object of extradition, as Professor Oppenheim wrote,[10] can be any individual, whether he is a subject of the prosecuting state, of the state which is required to extradite him or of a third state. As to nationals being extradited, the affair of one *Tourville* was described as an example. In this case, a British subject was in 1879 surrendered by Great Britain to Austria where the man was subsequently convicted and hanged for the murder of his wife in the Tyrol. The case was all the more remarkable, the learned author commented, as the criminal law of England extends over murder and manslaughter committed by British citizens abroad.

In *Charlton* v. *Kelly,*[11] the United States Supreme Court in affirming a judgment dismissing a petition for habeas corpus intended to prevent delivery of an American citizen demanded by Italy stated that "there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons,' where no such exception is made in the treaty itself". If the refusal by Italy to extradite criminal fugitives of Italian nationality to the United States was, as contended, "a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect"; to the Court, the agreement "was only voidable, not void", until the Executive elected to terminate it. In the meantime, it was the plain duty of the court to recognize the obligation under the treaty to surrender nationals.[12]

Notwithstanding the fact that Great Britain and the United States are basically prepared to extradite their own nationals, in the presence of explicit treaty stipulations to the contrary, they have on some occasions declined to do so. Thus, in *Valentine* v. *United States ex rel. Neidecker,*[13] the United States Supreme Court rejected the request by the French government for the extradition of an American national on the ground that Article 5 of the Franco-American Extradition Convention of January

9. See Annual Digest *ante,* p. 225, note 8, (1925-26), Case No. 225.

10. I Lauterpacht, *Oppenheim's International Law* (1952), p. 638.

11. 229 U.S. 447 at pp. 467, 473 (1931).

12. It should be noted that in 1946 the Italian government, by exchange of notes on April 16 and 17, agreed on the basis of reciprocity to extradite Italian nationals to the United States pursuant to the U.S. — Italian Extradition Convention of March 23, 1868; see U.S. Treaties and Other International Acts Series.

13. *Ante,* p. 225, note 6.

6, 1909, (37 Stat. 1526) provided that "neither of the contracting Parties shall be bound to deliver up its own citizens".

On the other hand, many continental countries abstain from extraditing their own subjects to foreign states. This reluctance is attributable to the fact that these nations usually accept and apply the active personality principle of jurisdiction in such a way that most crimes perpetrated by nationals abroad falls within the national penal competence.

The Harvard drafters, however, suggested in their draft convention that "(A) requested State shall not decline to extradite a person claimed because such a person is a national of the requested State".[14] However, realizing that some states may have difficulty in accepting such a rule, the drafters prepared two reservations:

> Non-extradition of nationals with duty of prosecution.
>
> A requested State may decline to extradite a person claimed on the ground that he is a national of the requested State, and was such national at the time when the act in question is alleged to have been done, if the act for which extradition is sought is punishable in the courts of the requested State; however, in any case in which this right to decline extradition is exercised, the requested State shall have a duty to prosecute the person claimed for the act for which his extradition is sought.
>
> Non-extradition of nationals without duty of prosecution.
>
> A requested State may decline to extradite a person claimed on the ground that he is a national of the requested State, and was such national at the time when the act in question is alleged to have been done.[15]

a. (iii) *The requirement of "double criminality" must (does not have to) be fulfilled.* There is a widely recognized international rule that a criminal act to be extraditable must be punishable by the laws of both the requiring and requested states. With reference to this so-called "principle of double criminality", the United States Supreme Court stated in *Collins* v. *Loisel*: "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive ... It is enough if the particular act charged is criminal in both jurisdictions".[16]

A controversial case in this respect is *Factor* v. *Laubenheimer*[17] which involved a person held in custody in the Northern District of Illinois pending extradition to England in pursuance of the Webster-Ashburton Treaty of 1842 as supplemented by the Blaine-Pauncefote Convention of 1889. The British application for surrender was based on a charge that the person in question, at London, had "received from Broadstreet Press Limited" certain sums of money, "knowing the same

14. Harvard Draft on Extradition, *ante,* p. 224, note 3, Art. 7.

15. Reservations nrs. 3 & 4 of the Harvard Draft, further explained *ibid,* at pp. 123-37.

16. 259 U.S. 309 at p. 312 (1922).

17. 290 U.S. 276 (1933).

to have been fraudulently obtained". The District Court ordered his release from custody on the ground that "the act charged was not embraced within the applicable treaties because (it was) not an offence under the laws of Illinois, the state in which he was apprehended and held". The Court of Appeals, however, referring to *Kelly* v. *Griffin,*[18] reversed the judgment, stating that the act was a crime in Illinois.

The pith of the issue seems to be the fact that whereas one category of crimes enumerated in the relevant treaties was expressly declared extraditable if the conduct is "criminal" or "punishable" by the laws of both nations, with regard to the other category of offences that included the act of which the person was accused, no additional qualifications were stipulated. The problem, therefore, was one of construction of the treaty provisions: whether in a case of regulatory ambiguity the principle of double criminality should apply.

The United States Court apparently agreed that the act at issue was not criminal in the State of Illinois, yet it uphold the decision of the Court of Appeals. In delivering the opinion of the Court, Mr. Justice Stone admitted that international law "recognizes no right to extradition apart from treaty"; however, with reference to the obscurity in the treaty provision, the following observation is made:[19]

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

The tribunal, furthermore, referred to the fact that under the Dawes-Simon Treaty, the ratification of which was announced by presidential proclamation of August 9, 1932, the offence with which the person was charged was extraditable. It should be noted, however, that the applicability of this particular agreement to the case at issue was questionable on the ground that it was not bindng on Great Britain until proclaimed by an Order-in-Council.

Mr. Justice Butler, joined by two other justices, dissented:[20]

> The acts of receiving of which petitioner is accused in England are not made criminal in Illinois where he was found. That is now practically conceded by England. The court impliedly so holds and necessarily — even if *sub silentio* — overrules its decision on that point in *Kelly* v. *Griffin* . . .
>
> The contracting parties, upon adequate grounds and in accordance with uniform usage, have always adhered to the principle that extradition will not be granted for acts that are not deemed criminal in the place asylum.

18. 241 U.S. 6 (1916).

19. 290 U.S. 276, at p. 277.

20. *Ibid,* at p. 321.

> There is nothing in the treaties to support the majority opinion that while England is not similarly bound, the United States agreed to deliver up fugitives for acts not criminal in the place of asylum.

In relation to this requisite of double criminality, the Harvard drafters appeared to be even more demanding as they proposed in Article 2 of the Draft Convention on Extradition as follows:

> Except as otherwise provided in this Convention, a requested State shall extradite a person claimed, for an act
>
> (a) For which the law of the requesting State, in force when the act was committed, provides a possible penalty of death or deprivation of liberty for a period of two years or more; and
>
> (b) For which the law. in force in that part of the territory of the requested State in which the person claimed is apprehended, provides a possible penalty of death or deprivation of liberty for a period of two years or more, which would be applicable if the act were there committed.

a. (iv) *Extraditable acts are (not) subject to the "principle of speciality".* The international law of extradition also recognizes the principle that a surrendered individual must be tried and punished only for the specific offence(s) for which his extradition was requested and granted. Thus, when in a *German-Czechoslovakian* case[21] a person was delivered by Czechslovakia to Germany for the crime of larceny was convicted for "unlawful export of horses", the German Reichsgericht in Criminal Matters, in sustaining the appeal from conviction, stated that in the absence of an extradition treaty between the two countries, questions of extradition were to be governed by the relevant rules of customary international law, according to which the requesting state may prosecute the surrendered person only for those crimes in respect of which extradition was granted.

Similarly, in *United States* v. *Rauscher,*[22] the defendant was extradited under the Anglo-American Treaty of August 9, 1842, upon a charge of murder, but he was subsequently indicted and found guilty on a charge of "inflicting cruel and unusual punishment". Even though the applicable agreement contained no express stipulation to this effect, the Supreme Court of the United States denied the competence of the trial court to try the person because the offence for which he was brought before the trial judge was not the one for which he was surrendered. ". . . (T)he weight of authority and of sound principle are in favour of the proposition that a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

21. *Ante,* p. 225, note 8.

22. 119 U.S. 407 (1886).

Some courts, however, take a more liberal position with respect to this principle of speciality by allowing the punishment of an extradited individual so long as his conviction pertains to the *same facts* on account of which his body was obtained from the foreign country. In *in re Inglese,*[23] for example, an Italian railroad employee who had stolen some 300,000 lire and had fled to Switzerland was extradited on the basis of the crime of theft. He was subsequently tried and sentenced in an Italian lower court for the crime of "peculation"; he appealed on the ground that he could be tried and convicted only for the crime for which he was surrendered by the Swiss authorities. The Italian Criminal Court of Cassation rejected this contention maintaining that he was sentenced for the same act for which he was extradited. "... (I)t is the specific fact constituting the crime that is decisive, and not merely its legal definition".

In Article 23(1) (a) of the Harvard Draft Convention on Extradition, the principle of speciality is formulated in the following manner: "A State to which a person has been extradited shall not, without the consent of the State which extradited such person, prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited".

a. (v) *Political and military offences are* (*not*) *extraditable.* There is a wide-spread acceptance of the basic principle that a person should not be extradited on account of a political or military crime. The idea seems to originate from the French Constitution of 1793 which granted asylum to any foreigner exiled from his home-country "for the cause of liberty", although Belgium appears to be the first in adopting an extradition law in 1833 which explicitly interdicted the delivery of foreign political refugees.

Hence, in the case of *in re Castioni,*[24] Great Britain rejected an extradition request by Switzerland on the basis of a wilful murder, since the wanted individual appeared to have killed a local official during a revolt against the municipal government of Bellinzona. In 1934, the Italian Court of Appeal of Turin refused a request for the surrender of two Frenchmen charged with the assassinaton of King Alexander of Yugoslavia and Mr. Barthou, the French Minister of Foreign Affairs, at Marseilles. It was said that under the Italian Criminal Code the assassination, "having resulted from political motives and having injured the political interests of Yugoslavia, constituted a political offence".[25]

It is evident that too strict application of the doctrine does not always lead to satisfactory results, particularly if it concerns so-called *délits complexes, i.e.* offences involving common crimes like murder, fraud and arson, where the political motives are difficult to distinguish from the criminal ones. For instance, when in 1854 Belgium was asked

23. Annual Digest, *ante,* p. 225, note 8, (1919-22), Case No. 193 (1919).

24. (1891) 1 Q.B. 149.

25. 61 Journal du Droit International Privé 1157-69 (1934).

to surrender two Frenchmen who had attempted to cause an explosion on the railway line between Lille and Calais with the intention to assassinate Emperor Napoleon III, the Belgian Court of Appeals had to reject the application on the ground that the municipal extradition law of 1833 strictly inhibited the delivery of political offenders. It was in this connection that two years later, in 1856, Belgium adopted the *attentat* clause, according to which murder of the head of a foreign state or of a member of his family was not to be considered as a political crime.[26]

Since absolute non-extraditability of offences having political flavour may not only be unjustifiable but may also endanger the friendly relations between states, a variety of escape devices have been established in order to meet the reasonable demands of foreign governments regarding acquisition of control over the body of certain categories of so-called political malefactors. In 1892, Switzerland enacted an extradition law, Article 10 of which provided that political criminals shall nevertheless be surrendered if the chief feature of the offence has more the aspect of an ordinary than of a political crime; the decision concerning the extraditability of such criminals would rest with the Bundesgericht, the highest Swiss court of Justice.[27] In the Convention signed at Geneva on November 16, 1937, twenty-three states undertook to treat as criminal offences, acts of terrorism — including conspiracy, incitement, and participation in such acts — and to grant extradition for such offences in some specific circumstances.[28] Also, in a leading English case, *in re Meunier,*[29] an attempt was made to lay down a criterion on which the extraditability of political offences was to be determined. In this case Mr. Justice Cave stated:[30] ". . . (I)n order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not".

On the subject whether the non-extraditability of a political offender is a matter of "right of asylum" of the individual or a matter of "privilege of asylum" to be granted by the state of refuge, some interesting observations can be found in *Chandler* v. *United States.*[31]

> In the absence of treaty a State may, without violating any recognized international obligation, decline to surrender to a demanding State a fugitive political offender — including, presumably, persons charged with treason . . . — it has long been the general practice of States to give asylum. But the

26. See I Lauterpacht, *Oppenheim's International Law,* (1952) pp. 647-648.

27. With respect to the question as to whether the requested state or the requesting state is competent to determine the political nature of a crime, see *Columbia-Peru Asylum* case, I.C.J. Rep. 266 (1950) and *Haya de la Torre* case, I.C.J. Rep. 71 (1951).

28. For these provisions, see Lauterpacht, *op. cit.,* note 26, at pp. 648-49.

29. (1894) 2 Q.B. 415.

30. *Ibid,* at p. 419.

31. 171 F. 2d. 921 (1949).

> right is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it. An asylum State might, for reasons of policy, surrender a fugitive political offender — for example, a State might choose to turn over to a wartime ally a traitor who had given aid and comfort to their common enemy ...

With regard to political offences, the Harvard Draft Convention on Extradition provides in Article 5 the following:

> (a) A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offence, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offence.
>
> (b) As it is used in this Convention, the term "political offence" includes treason, sedition and espionage, whether committed by one or more persons; it includes any offence connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offences having a political objective.

An approximately similar rule is prescribed in Article 6 of the Draft Covenant with reference to military offences.

a. (vi) *That extradition is (not) to be supported by prima facie evidence.* Finally, it seems important to note that although it is not within the competence of the requested state to thoroughly investigate a disputed case on its merits, it is nevertheless widely conceded that to prevent possible abuse, it may assume the right to ascertain whether the evidence submitted by the requesting state *prima facie* justifies proceedings against the person to be extradited. Accordingly, in the case of *Insull,*[32] the Greek Court of Appeals rejected a request for extradition by the United States on the basis that "there is not sufficient evidence to justify the commitment for trial of the accused".

In other cases, courts may in invoking extradition treaties also be more lenient regarding this matter of proof. In *in re Hurlimann,*[33] for instance, in allowing the delivery of the requested individual, the Italian Criminal Court of Cassation pointed out: "Since the convention between Switzerland and Italy (which cannot be altered without openly breaking it, not even by a statute made by us afterwards, but only by a new treaty made between the contracting parties) prescribes in Article 9 thereof that extradition must be granted on the basis of the mere production of a warrant, it precludes any enquiries as to the sufficiency of the *prima facie* case as to the crime with which the accused is charged".

In relation to this matter of evidence, the Harvard drafters formulated in Reservation No. 5 of the Draft Convention the following proposal:

> A requested State may require that the requesting State make out a *prima facie* case of guilt on the part of the person claimed such as would be sufficient, in case the person claimed were accused of having committed the alleged

32. See translation of the case in 28 *Am.J.I.L.* 362-72 (1934); see also Hyde, *The Extradition Case of Samuel Insull,* 28 *Am.J.I.L.* 307-12 (1934).

33. Annual Digest, *ante,* p. 225, note 8, (1919-22), Case No. 183.

act or acts within the territory of the requested State, to justify a magistrate of that State in ordering that he be held for trial.

b. *Without the formal consent of the state of refuge.* It is not only through extradition proceedings that a state may acquire control over the person of the escaped law-breaker. There are cases in which law-enforcement officers of the prosecuting state, without the co-operation of the government of the state of refuge, forcibly capture a suspect and bring him within the territorial jurisdiction of their own state. This is sometimes called "abduction", though it is questionable whether such an act can be accommodated under this legal term. In other instances, the wanted individual may voluntarily enter the state's boundary, perhaps unaware of his exposure to the peril of being prosecuted; or officials of the state of refuge may surrender the person without any formal proceeding, perhaps erroneously.

b. (i) *Forcible seizure of the offender in foreign territory.* Despite being flagrant violations of the foreign state's territorial sovereignty, there have been many occasions in which governmental officials of a country by force capture the wanted criminal within the limits of another country and transfer him to their own land. The opinions of international jurists on whether such forcible seizure affects the competence of the capturing state to take cognizance of the crime in question are again controversial. Most authors, however, seem to prefer a clearcut distinction between that aspect of the matter pertinent to the relationship between the governments involved and that purely concerning the relationship between state and indivdual, and consider the infringement of the foreign nation's right completely irrelevant to the state's criminal jurisdiction over the offender.[34]

Thus, a United States District Court in dismissing an application for habeas corpus relating to the arrest of the applicant in British Columbia observed:[35]

> The defendant states he is a citizen of the United States. He is now before the courts of the United States. Canada is not making any application to this court in his behalf or its behalf, because of any unlawful acts charged, and if Canada or British Columbia desires to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels. The defendant cannot before the court invoke the right of asylum in British Columbia.

In general, there is sporadic support of the opposite view. In this relation, a well-known authority, Professor Dickinson, suggested:[36] "In principle, in international law cases, there should be no jurisdiction to prosecute one who has been arrested abroad in violation of treaty or international law". Hence, the Harvard Draft Convention on Jurisdiction

34. See II Hyde, *International Law, Chiefly As Interpreted And Applied By The United States* 1032 (1947); see also 35 *Corpus Juris Secundum* Section 47, p. 374.

35. *U.S.* v. *Unverzagt,* 299 F. 1015 at p. 1017 (1924).

36. Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 *Am.J.I.L.* 231 at p. 239 (1934).

with respect to Crime, of which the author was the chief reporter, provided in Article 16: [37]

> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

The practice, especially in Anglo-American countries, appears to be in favour of the idea of non-affected criminal jurisdiction. In *ex parte Susannah Scott,*[38] for example, a British police officer in Belgium arrested the suspect charged in England with the misdemeanour of perjury. The person appealed to the British ambassador in Belgium who refused to intervene, and the officer brought her to England where she was imprisoned pending trial. In dismissing her application for release by way of habeas corpus, Lord Tenterden stated:[39]

> I consider the present question to be the same as if the party were now brought into Court under the warrant granted for her apprehension . . . The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it … For these reasons, I am of opinion that the rule must be discharged.[40]

In the United States, one of the earliest judgments involving criminal arrest in violation of the sovereignty of another state is *State* v. *Brewster,*[41] in which a foreigner who was convicted of theft in the State of Vermont pleaded before the State Supreme Court that the trial tribunal had no jurisdiction to try the case by reason of the fact that he was forcibly captured in Canada, the country of his domicile, by the citizens of Vermont and brought into the state to be placed on trial. The contention, however, was rejected.

An abduction case involving a protest by the foreign state is *ex parte Lopez,*[42] in which the criminal offender was forcibly taken from Mexico to the United States and charged with an offence under American law.

37. See 29 *Am.J.I.L.* 442 (1935 Supp.).

38. (1829) 9 B. & C. 446.

39. (1829) 9 B.&C. 446 at p. 448.

40. See also Lord Goddard's judgment in *ex parte Elliott,* (1949) 1 All E.R. 373.

41. 7 Vt. 118 (1835). That the United States Supreme Court also takes the same position is evident in the celebrated case of *Ker* v. *Illinois,* 119 U.S. 436 (1886), which concerned a criminal accused abducted by a U.S. agent in Peru and forcibly brought to Illinois, where he was tried and convicted of embezzlement. See further *Lascelles* v. *Georgia,* 148 U.S. 537 (1892); *Pettibone* v. *Nichola,* 203 U.S. 192 (1906); *Friable* v. *Collins,* 342 U.S. 519; and *U.S.* v. *Sobell,* 244 F. 2d. 520 (1957).

42. 6 F. Supp. 342 (1934).

The government of Mexico intervened in the judicial proceedings with the allegation that Mexico's territorial sovereignty had been violated and demanded that the prisoner be surrendered to them to be kept in custody in Mexico pending the hearing of the request for delivery by the United States (if any) under the applicable extradition treaty between the two countries. In deciding on this Mexican intervention, the court said:[43] "The intervention of the government of Mexico raises serious questions, involving the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this court has no jurisdiction".

A comparable incident took place in the *Vincenti* affair; but here, the U.S. Department of State accepted the protest made by the British government against the arrest by American law-enforcement officers of an American citizen on board an American motorboat in British territorial waters off Bimini, Bahama Islands, British West Indies, and the transfer of the captive to the United States. In presenting the apology, the Secretary of State replied to the British ambassador as follows:[44]

> . . . (Y)ou will observe that the persons who arrested Vincenti and forcibly removed him from the Biminis Islands, acted on their own initiative and without the knowledge or approval of this Government in any way, and have been reprimanded and indefinitely suspended for their participation in the. affair. Furthermore, it appears that Vincenti's bail has been exonerated and all proceedings subsequent to his unlawful arrest have been revoked. The incident is greatly regretted by this Government and I trust that the steps taken to make amends for it are entirely satisfactory to your Government.

An internationally known case of recent date involving the forcible seizure of the accused person in a foreign country is the case of *Eichmann,*[45] the German Nazi who was abducted by Israeli agents in Argentina and taken to Israel, where he was tried and convicted under the Nazis and Nazi Collaborators (punishment) Law. It was not surprising that counsel for the defendant contested the competence of the Israel tribunal to take cognizance of the case, contending that the prosecution of the accused in Israel upon his abduction from a foreign country conflicted with international law and exceeded the jurisdiction of the court.

The court, however, after thorough elaboration on this particular issue overruled counsel's contention. Evidently admitting that the abduction of the defendant was a violation of Argentina's sovereignty (on the basis of which a resolution was passed by the United Nations Security Council[46] regretting the incident), the tribunal nonetheless observed:[47]

43. *Ibid,* at p. 344.

44. Quoted in I Hackworth, *Digest Of International Law* (1940-44) p. 624; correspondence of Secretary Colby to Ambassador Geddes, June 10, 1920, MS. Dep't of State; Mr. Peterson to Mr. Colby, Aug. 9, 1920, *ibid.*

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

46. Resolution of June 6, 1960 (Doc. S/4349).

47. District Court of Jerusalem, *op. cit., supra,* note 45, at pp. 36-37.

> . . . that in accordance with established judicial precedents in England, the United States and Israel, the Court is not to enter into the circumstances of the arrest of the accused and of his transference to the area of jurisdiction of this State, these questions having no bearing on the jurisdiction of the Court to try the accused for the offences for which he is being prosecuted, but only on the foreign relations of the State.... It is an established rule of law that a person standing trial for an offence against the laws of the land may not oppose his being tried by reason of the illegality of his arrest or of the means whereby he was brought to the area of jurisdiction of the country.

It is true that cases in which states or courts decline to assume jurisdiction because of the forcible arrest of the offender in a foreign land are few. A lack of competence was asserted in *United States* v. *Ferris,*[48] a case pertaining to the prosecution of a crew of a foreign vessel for conspiracy to violate the Prohibition and Tariff Acts subsequent to the seizure of the ship some 270 miles off the west coast of the United States. In denying the jurisdiction of the courts of the United States, Judge Bourquin stated:[49]

> ... (A)s the instant seizure was far outside the limit (established by treaty), it is sheer aggression and trespass (like those which contributed to the War of 1812), contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to the defendants. The prosecution contends, however, that courts will try those before it, regardless of the methods employed to bring them here. There are many cases generally so holding, but none of authority wherein a treaty or other federal law was violated, as in the case at bar. That presents a very different aspect and case. "A decent respect for the opinions of mankind," national honour, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed — require that treaties shall not be reduced to mere "scraps of paper"....
>
> It seems clear that, if one legally before the court cannot be tried because therein a treaty is violated, for greater reason one legally before the court, in violation of a treaty, likewise cannot be subjected to trial.[50]

b. (ii) *Other modes of acquisition of control.* Occasionally, a state may have the opportunity to obtain actual control over a suspect wanted from abroad without even making any extraordinary efforts, for instance, if the alleged criminal offender voluntarily or semi-voluntarily enters the state's territory. The Lotus incident[51] is a case in point; subsequent to the collision on the high seas and after having rendered the necessary assistance to the shipwrecked men of the Turkish Boz-Kourt, the French vessel proceeded apparently on its own free will to Constantinople where

48. Annual Digest, *ante,* p. 225, note 8, (1927-28), Case No. 127. See also *Ford* v. *U.S.,* 273 U.S. 593 (1927). See further *Domingues* v. *State,* 90 Tex. Cr. 92 (1921), involving the forcible apprehension of a Mexican citizen in Mexico by American expeditionary force which acted under instruction from the U.S. War Department. In this case, however, "it was to be assumed" that the instructions from the War Department were in accord with a permission (tacitly?) granted by the Mexican government."

49. Annual Digest, *ante,* p. 225, note 8, (1927-28).

50. See also the view of a French Tribunal Correctionnel in *in re Jolis,* Annual Digest, *ante,* p. 225, note 8, (1933-34).

51. P.C.I.J., Ser. A, No. 10, Judgm. No. 9 (1927).

several days following its arrival, the responsible French officer was requested by the Turkish authorities to go ashore for interrogation which eventually lead to his arrest, trial, and conviction. Under such circumstances, it was obviously difficult for France to successfully claim the man's return on the ground that the skipper or whoever was in charge of the course of the Lotus, or the prosecuted officer himself, was unaware of the possibility of criminal prosecution by the Turkish government.

Can a state whose governmental officials erroneously and without the formalities of extradition proceedings surrender a criminal escapee to the prosecuting state be successful in demanding the person's return? The practice as demonstrated in the *Savarkar* affair[52] seems to answer the question in the negative. In this case an Indian, a British subject, who was accused of high treason and abetment of murder, and was being conveyed in a boat to India for trial, escaped to the shore on October 25, 1910, while the vessel was in the harbour of Marseilles. He was, however, seized by a French policeman who erroneously and without any formality reconducted him to the ship with the assistance of some members of the crew who were pursuing the fugitive. Since Mr. Savarkar was *prima facie* a political prisoner, the French government demanded that Great Britain return him and formally applied for his extradition. But Great Britain refused to comply with the French demand and the parties eventually agreed to have the conflict decided by the Court of Arbitration at The Hague.

While admitting that irregularity had been committed by the act of reconducting the criminal suspect to the British vessel, the award of the court nonetheless was in favour of Great Britain. It was asserted that there was no rule of international law which imposed in such a situation any obligation on the state which had the prisoner in its custody to restore him on account of a mistake committed by the foreign agent. It should be mentioned that the French government was previously notified that Savarkar would be a prisoner on board the British ship, while it was calling at Marseilles, and had agreed to this.[53]

C. Appraisal and Recommendation

1. *The Problem Stated.*

In spite of the differences in the application of the commonly accepted jurisdictional principles, it can nevertheless be said that there is, in general, a significant consistency with regard to the bases on which states in practice predicate the competence to prescribe and apply policy with respect to crime. Not only is the principle of territoriality universally deemed to be of great importance, but also, the personality doctrine is almost everywhere recognized except for some less vital variances in its invocation. Similarly, the protective and universality principles have equally found widespread acceptance and are regarded as admissible

52. See 36 *Law Magazine and Review,* pp. 329-330 (1911).

53. For another case having certain features in common with the *Savarkar* affairs, see Charteris in 8 *Journal of Comparative Legislation and International Law* 3rd ser., 246-49 (1926).

grounds for a state to exercise penal jurisdiction. Although in certain respects some states may assume competence which is more comprehensive than other states, in other respects they may of their own volition be less demanding in the exercise of authority.

Hence, most multilateral conventions concerning the subject-matter serve no more than as a re-assurance of the right of the signatories which they are already exercising by virtue of their own municipal laws. As the Harvard drafters aptly admitted, their Draft Convention on Jurisdiction with respect to Crime was merely "the summation of contemporary practices, with such modifications as have seemed essential in order to make of those practices an acceptable and harmonious whole, reduced to a *lex scripta*".[54]

It is apparent, however, that the presence of a "connecting factor" or a "point of contact" has always been considered an indispensable postulate in order that a state may rightfully assert competence. It is only the relationship between the prosecuting political body and the respective crime, whether on account of the *locus delicti commissi,* the personality of the parties involved, or the specific community interest violated which can convey the reasonable presumption that the public order of the particular territorially organized community has been affected by the undesired occurrence. Without a nexus, *i.e.* without any interest, no state can lawfully take cognizance of an event however wrong and repulsive it may be in the light of domestic policy. This is the minimum standard of international law concerning the right of states to predicate criminal jurisdiction.

But the core of the whole issue of penal competence, nonetheless, is that with the formulation of the minimum requisite and the related competential tenets alone, a great bulk of jurisdictional problem arising from complex situations will still remain unsolved. Suppose that a national of state A shoots from state B a national of state C who is standing in state D and who subsequently flees to state E where he dies as a result of the wound inflicted. Or suppose that a national of state V and a national of state W jointly commit a political crime against state X while they are on board a ship flying the flag of state Y and the vessel happens to be in the waters of state Z. Pursuant to the "linking point" theory, each of the states involved has the right to prosecute and punish the criminal offender; but should each of them be allowed to exercise this right, so that the malefactor may for several times be brought before the tribunal of justice? If the answer is in the affirmative, how should a system of priority be arranged to avoid conflict as to which state may first lay hands upon the wrongdoer? Or if the answer is in the negative, which state then should exercise the sole competence over the offence?

From the perspective of these intricacies, it would have been much less complicated, indeed, if only one device of criminal jurisdiction is to be applied; for instance, if states could limit their authority with respect

54. Harvard Draft Convention on Jurisdiction with respect to Crime, 29 *Am.* J.I.L. 435 at p. 471 (1935 Supp.).

to crime perpetrated on their own territory, or more preferable, on their own land area only. However, in a situation where it becomes increasingly difficult for a government to confine its endeavours in maintaining the internal public order to its own state frontiers, the assertion of competence beyond these boundaries is imperative to protect the community interest. Similar objection can be advanced if only nationality of the offender, nationality of the victim, or any other single standard is to be adopted as a sole criterion in the assumption of penal jurisdiction.

Thus, whereas the incongruencies in the trends in decision regarding the application of the jurisdictional principles by states are not to be considered as of primary importance, more fundamental from the point of view of minimizing the possibilities of interstate conflict and preserving human rights of the private individual is the quest for a rational solution to complex problems arising from concurrent competence as caused by the immense area of criminal jurisdiction that each state usually covers. Unfortunately, the decisions in actual practice in this respect have not always been coherent and occasionally even seemingly arbitrary.

While the majority of general conventions, including the Harvard Draft, merely provide definitions of the various limits which states are not supposed to exceed, the solution of jurisdictional conflicts originating from inevitable overlapping areas (as well as enclaves) of state authority appears to be left to special agreements between the states interested in a given situation and in respect of a given issue. Yet, although such agreements may to some extent reduce or even resolve disputes between the respective parties, on the other hand the heterogeneous modes of solving the problems may certainly lead to arbitrary arrangements Violating not only the rights of third states but also the fundamental freedoms of the individual. Besides, in those cases lacking these agreements, the exercise of penal competence will remain a matter of power, rather than a subject governed by appropriate rules of authority. A certain system for adequate guidance in solving competential conflicts is therefore necessary both for the sake of certainty for the private individual and for a minimum public order.

2. *The Human Right Aspects in Jurisdictional Conflicts.*

Before the problem of conflicting competence can be analyzied, it seems proper to examine the procedural standards which states under the international law of human rights and fundamental freedoms are obliged to honour whenever they undertake to dispense punitive justice to the private individual. Most relevant in this context is of course the question whether it is permissible for a state in assuming its penal competence to prosecute and punish a person for the same offence for which he has once been tried by a foreign court.

a. *The rule "non bis in idem".* So far as domestic judgments are concerned, most states have already adopted the salutary principle that no one may be prosecuted for a criminal offence for which he has been acquitted *(autrefois acquit)* or has been convicted and sentenced or pardoned *(autrefois convict).* Immunity from double prosecution, one of the cherished basic liberties in the law of mankind, has already been

recognized in the early times and its adequacy in a public order of human dignity needs no special explanation.

Yet, particularly in respect to decisions by foreign courts, states unfortunately still take different positions as to the applicability of the principle, though the majority basically recognizes them in connection with the so-called doctrine of "act of state". Some penal systems acknowledge the principle of *non bis in idem* with reference to any type of crime committed abroad, and only certain exceptions are made on account of the political character of the offence or the nationality of the offender.[55]

A considerable number of penal codes merely give credit for the punishment the malefactor has undergone in the foreign country. For instance, Article 5 of the Japanese Penal Code of 1907 reads:

> Even when an irrevocable judgment has been rendered in a foreign country, the imposition of penalty in Japan for the same act shall not be barred thereby. If, however, the offender has undergone the execution, either in whole or in part, of the penalty pronounced abroad, the execution of penalty in Japan shall be reduced or remitted.

Even though according to Article 39 of the post-war Japanese Constitution :[56]

> No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he, in any way, be placed in double jeopardy.

In some states the recognition of the principle is restricted to decisions of foreign courts which consist of a conviction only.[57]

It is laudable, indeed, that there are yet certain countries which allow the broadest scope for the operation of the double jeopardy prohibition with respect to judgments by foreign tribunals. Pursuant to Article 76 of the Indonesian Penal Code of 1917:

> (1) Except in those cases in which review of judicial decisions is allowed, no one can be re-prosecuted on account of a fact *(i.e.* act or omission) for which a final decision by an Indonesian judge has been rendered. . . .
>
> (2) If the final decision was rendered by another judge, then no prosecucution of the same person on account of the same fact shall take place if:
>
> *1.* an acquittal or dismissed *(i.e.* dismissal on technical ground or other types of acquittals not based upon insufficiency of evidence);
>
> 2. a conviction followed by a complete execution of the sentence, pardon, or statute limitations in regard to the enforceability of the verdict.[58]

55. See Art. 14, Brazilian Law No. 2416 (1911).

56. See also Art. 5 par. 3 of the Fundamentals of Criminal Legislation for the U.S.S.R. and the Union Republics of 1958.

57. See Art. 3, Swedish Penal Code, 1864.

58. For a discussion on the applicability of the principle with regard to foreign judgments, see among others I van Bemmelen & van Hattum, *Hand- en Leerboek van het Nederlandse Strafrecht* (1953), pp. 562-563; for Malaysia and Singapore, see s. 282 of the Criminal Procedure Code.

The double jeopardy prohibition is also widely recognized in common law countries. In India, Article 20(2) of the Constitution of 1947 as amended in 1951 stipulated that "(N)o person shall be prosecuted and punished for the same offence more than once". Similarly, in the United States, the 5th Amendment of the Constitution declares *inter alia:* "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

The generally adopted policy in the United States as to the applicability of the doctrine with reference to foreign judgments, is unfortunately somewhat obscure. Particularly in the earlier cases, judges have been rather reluctant to accept a defendant's plea on the ground that the criminal offence charged had been adjudged in a foreign court.[59] In an elaborate proposal recently presented by the American Law Institute, however, no reference was made either to domestic or foreign decisions.

Yet, in a well-known case, *Coumas* v. *The Superior Court of San Joaquin County,*[60] the Supreme Court of the State of California accepted in unambiguous language a judgment of a foreign tribunal as a bar to a second prosecution in the state. The case concerned an American immigrant of Greek descent who in 1932 was accused of the crimes of murder and assault committed in California. Before his case could be tried, he escaped and ultimately managed to reach Greece, his country of origin. Thereupon, the United States demanded from the Greek government his extradition, but the latter declined to surrender the person on the basis that "he (had) never divested himself of Greek citizenship", and according to section 3 of the Greek Code of Penal Procedure:

> Hellenes are never extradited to Foreign Authorities not even for the acts committed by them abroad. They are subjected to trial, however, in this country, even for the felonies and misdemeanours committed by them abroad and they are punished in accordance with the laws of this country, as if they had committed these acts within the boundary lines of the state, subject, however, to the provisions of existing Government treaties.

Pursuant to this provision the man stood trial on October 16, 1935, in the Felony Court of Corinth, Greece, on the same alleged criminal offences. A judgment was entered against him based on a jury verdict (1) finding him "guilty of manslaughter" on the murder charge and (2) acquitting him on the assault charge, but finding him guilty of "the unlawful carrying of a firearm". In accordance with the sentence, he served four years and four months in prison.

After having served his punishment, the man returned to California where he was re-arrested on September 26, 1947, and imprisoned in the county jail awaiting trial for the crimes he had committed in 1932. Upon arraignment, he pleaded the defences of "prior conviction" and "former jeopardy" on account of his trial and conviction in Greece. It should be noted that section 793 of the Californian Penal Code provides: "When an act charged as a public offence is within the jurisdiction of another

59. See for instance *Cross* v. *North Carolina,* 132 U.S. 131 (1889); *U.S.* v. *Regan,* 273 Fed. 727 (1921); *State* v. *Reid,* 115 N.C. 741 (1894).

60. 31 Cal. 2d. 682 (1948).

state or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state".

In its decision in favour of the accused, the Supreme Court of California observed:[61]

> Petitioner's pleas come precisely within the contemplated scope of this penal statute . . . (I)t appears that petitioner's trial in the Felony Court of Corinth, Greece, was fair and impartial; . . . and served by him ... In other words, petitioner's trial in the Greek court was not a mere farce, resulting in a sentence of imprisonment of inconsequential degrees as related to the import of the criminal charges against him, but, on the contrary, its *bona fide* character in every respect is clearly shown by the record. The jurisdiction of the Greek court was established in pursuance of the Treaty of Extradition with Greece as then existing; such treaty, like others, is a part of "the supreme law" of our land and binding upon the courts.

It is questionable, indeed, how the state's highest court would have decided if the trial in Greece had been a farce, if there had been an express treaty provision regulating the matter at issue, and if the applicable Californian statute had not been that explicit in referring to foreign judgments.

The rule *non bis in idem* is in one way or another also recognized in international agreements pertaining to matters of penal jurisdiction. In the Treaty of Lima of 1878, the first multilateral convention on criminal competence, it was said in the section concerning the right of any state to take cognizance of certain crimes such as piracy and counterfeit that:

> The foregoing provisions shall not have effect,
>
> 1. If the criminal has been tried and punished at the place of the commission of the crime; or
>
> 2. If he has been tried and acquitted, or has received remission of the penalty; or
>
> 3. If action for the crime, or the punishment, has become impossible etc....[62]

In relation to the matter of extradition, the Bustamante Code of 1928 also set forth that "Extradition shall not be granted if the person demanded has already been tried and acquitted, or served his sentence, or is awaiting trial, in the territory of the requested state for the offence upon which the request is based".[63] Finally, in Article 14.7 of the recently prepared Draft Covenant on Civil and Political Rights,[64] it is declared that "(N)o one shall be liable to be tried or punished for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

61. 31 Cal. 2d. 682 at p. 452 *et seq.* (1948).

62. See Art. 37.

63. See Art. 358.

64. Adopted by the Third Committee of the General Assembly of the United Nations on September 24, 1963 (A/C. 3/L. 1962) — recently accepted by the General Assembly.

In a public order of human dignity, an unqualified recognition of the *non bis in idem* principle is not only a desideratum but also an indispensable postulate. If a criminal court under the double jeopardy prohibition is supposed to give deference to domestic judgments, there is then basically no reason why similar policy should not be applied to decisions by foreign tribunals. Under the maxim *nemo debet bis vexari,* no one who has been convicted and paid for his wrong, whether or not he obtained pardon or parole, should again be imperilled by a re-prosecution of his misdeed. No one who has been acquitted should be required to prove his innocence again. As the Harvard drafters aptly stated: "The principle is so obviously just, indeed, and so widely approved in the world's legal system, that it hardly seems necessary to adduce reasons in its support".[65]

Hence, it is all the more surprising that the Harvard Draft Convention on jurisdiction prescribed the extremely important doctrine only for aliens. As it suggested in Article 13:

> In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions and has been acquitted on the merits, or has been convicted and has undergone the penalty imposed, or having been convicted, has been paroled or pardoned.

It needs no emphasis that from the viewpoint of equality of basic rights and fundamental freedoms of any individual, there is certainly no justification for discrimination between aliens and nationals as to the protection of human dignity. Irrespective of nationality, no person should be subject to double or multiple prosecution for the same wrong. This basic rule is to be deemed an integral part of adequate administration of criminal justice.

b. *Impact of the rule on criminal jurisdiction.* Although for the purpose of assuming penal competence it does not seem necessary to apply the *non bis in idem* doctrine to the extent of the Indonesian penal statute,[66] yet under the noble principle, states should be expected to refrain at least from re-trying criminal offences that have previously been adjudicated by a foreign court. This means that with the exception of those instances in which a case was dismissed by a foreign tribunal on technical grounds such as lack of jurisdiction or other procedural deficiencies, no state should take cognizance of a crime, once the alleged criminal was acquitted on the basis of a foreign judgment that has been rendered after a trial on the merits, or convicted and punished, whether he was subsequently paroled or pardoned.

Various objections, indeed, can be advanced against some implications in the application of the proposition. From the perspective of the autotelic idea of criminal sanctioning, one may question whether a community whose interest has been violated should not have the right to retributive justice to make the offender suffer, independent of the question

65. Harvard Draft on Jurisdiction with respect to Crime, *ante,* p. 238, note 54, at p. 603.

66. See *op. cit., ante,* p. 240, note 58.

whether or not he has been punished abroad. Should the "natural equilibrium",[67] the social harmony of the particular society that has been disturbed, not be re-instated through the prosecution of the wrongdoer in the face of the angered members of the community? Here again is a typical dilemna related to the traditional dichotomy of punishment having more practical goals and punishment being an end in itself.

Yet, taking into consideration the ultimate objective of criminal justice, *viz.* to defend the public order of a community against undesired modes of conduct of the private individual, it appears excessive as well as unnecessary to penalize an offender more than once for the same offence for the reason that the deprivation once inflicted upon him for his misdeed should be regarded sufficient, not only to satisfy the demands of the different communities whose interest has been infringed, but also to preserve their peace and order against future violation by the same malefactor. Even when the foreign sentence is deemed to be too mild, it still seems improper for a state to dispence punitive justice with respect to a *res judicata* so-called by commuting the second penalty with the penalty provided by the foreign court. For, whereas on the one hand the foreign criminal judge may and should in fixing the sentence be considered to have taken into account the total damage created by the wrongdoer, on the other hand respect to that foreign judgment should prevail over possible mistrust in regard to its propriety. If there is any issue arising from an obvious *mala fides* on the part of the foreign administration of penal justice, the issue then should be settled on the governmental level without impairing the fundamental right of the individual to freedom from double jeopardy.

Since multiple prosecution of the same offence is impermissible, diplomatic protest by the interested state would equally be proper in those cases in which a foreign court convicts a person of a crime which does not fall within the country's jurisdiction, or a foreign tribunal arbitrarily exercises competence by instituting criminal proceedings against a person, thereby taking the risk of an acquittal by reason of a lack of evidence. In the latter case, if the bulk of evidence is to be found in the protesting state, this state then would of course be obliged in the sphere of international co-operation to provide the foreign court with the necessary assistance instead of persisting upon its own right to re-prosecute the offender.

Would it be allowed for a state in a case of concurrent jurisdiction to re-prosecute a delinquent who, subsequent to his conviction by a foreign tribunal, escaped wholly or partly the execution of the sentence? If the escapee is an alien, there is no doubt that under the double jeopardy prohibition, the only way to make him further suffer for the wrong done is to return him to the country where he is supposed to undergo the punishment, or at least to evict him in case his extradition is not demanded by that country. The case, however, is somewhat more complicated if it concerns a national and the applicable extradition regulation interdicts his delivery. Nevertheless, even with respect to nationals it seems appropriate to say that if a government is not prepared to extradite its own citizens, this non-extraditability, which is more a matter of domestic policy rather than a matter of exclusive interest of mankind, should

67. See Herbart and Leibniz, *Practische Philosophie* (1808).

certainly not be used as an apology to infringe the humanitarian principle of *non bis in idem.* It is therefore recommended that states take this problem into consideration before entering into extradition agreements or adopting municipal extradition laws.

Finally, it should be noted that whereas in cases of concurrent jurisdiction states are expected to honour the jeopardy prohibition, on the other hand, with regard to the matter of reiteration or recidivism as an aggravating factor which may influence the severity of a sentence, domestic courts may certainly take into account the judgments rendered by foreign tribunals.[68] This, however, is naturally a matter to be regulated by municipal law.

3. *The Idea of Mono-Jurisdiction.*

It has been said that from the perspective of a minimum public order as well as from the point of view of human rights and liberties, the most precarious aspect of the entire jurisdictional problem concerns the general demand for adequacy and certainty with regard to policies to be adopted in cases of conflicting competence. Because of the extensive areas that states cover in prescribing and applying penal rules, there is indeed no doubt that jurisdictional disputes which have so often occurred in the past will continue to take place in the future.

Since under the doctrine of *non bis in idem,* only one state is in cases of concurrent competence allowed to take cognizance of the offence, the main problem then is how to establish that single jurisdiction in a way that is most satisfactory in the light of the various interests at stake.

a. *Basic concept.* In the earlier discussion, the three different facets of crime which become the bases of seven distinguishable points of contact — *i.e.* the nexus between state and a particular event — have been analyzed at length:

(i) First, it is the *locus delicti commissi* which accords the right to a state to assert competence upon the fact (1) that the crime is commenced or conducted within its territory, this is the "subjective application of the territorial principle"; (2) that the immediate criminal result occurs within its territory, this is the "objective application of the territorial principle"; and (3) that the actual criminal effect takes place within its territory, this is called the "effective application of the territorial principle".

(ii) Secondly, it is the national character of the subjects involved which connects state with offence because (4) the perpetrator is a subject of that state, this is the "active personality principle"; or (5) the victim is a subject of that state, this is the "passive personality principle".

(iii) Thirdly, it is the specific community interests affected, *viz.* (6) the exclusive interest of a state, the preservation of which is the *raison d'être* of the "protective principle" and (7) the inclusive interest of the community of mankind in the suppression of *delicta juris gentium* which gave birth to the "universality principle of competence".

68. See Art. 310 of the Bustamante Code of 1928 which prescribed this policy.

A state may of course always attenuate this internationally accepted basis of penal jurisdiction by either relinquishing or limiting the applicability of certain doctrines, but whether it may adopt some additional types of nexus is doubtful.

Moreover, the mere fact that international law allows states to assume competence based on the presence of the enumerated connecting factors should certainly not be interpreted as a *carte blanche* upon which they may exercise authority in any case and on any of the recognized principles. For, in order that penal jurisdiction is exercised proportional to societal need in administering criminal justice and yet correspondent to the principles of human rights and individual liberties, there should be certain limitations which states are supposed to honour.

First, no state should exercise jurisdiction without the necessary support of the relevant municipal rules of law as stipulated by statutes or precedents simply because it would be a flagrant violation of the peremptory principle of legality. With regard to the exercise of penal competence on the basis of "subjective", "objective", or "effective" application of the territorial principle, for instance, there must be at least a reference to the general applicability of the territoriality doctrine in the penal law to be invoked.[69] Similarly, with respect to the other jurisdictional principles, the law must prescribe in general or in more specific terms the cases in which penal competence will be exercised. In fact, crimes governed by the protective and universality principles are usually specifically enumerated.

Secondly, whereas the place of criminal conduct and that of criminal result are relatively easy to identify, the problem of localization of "criminal effect" requires some special attention. The problem is that while the term "criminal result" is accepted to connote the immediate consequence of a certain act or omission, the term "criminal effect" may be interpreted to include infringement of almost any kind of interest — public or private — even an interest which is most trivial and remote.

Yet, in order to prevent excessive exercise of penal competence, it would be adequate if the so-called "effective application of the territorial principle" is restricted to cover only those events which actually constitute an ingredient of the respective crime. So, with reference to the crime of murder, the locus of effect should not go beyond the place where the victim dies or is found dead,[70] and that for the crime of fraud, not beyond

69. In the *Lotus* case, for example, Turkey's jurisdictional claim with respect to the criminal offence commenced on board the French mail steamer but consummated on the Turkish vessel was in conformity with Art. 6 of the Turkish Penal Code. Law No. 765 of March 1st, 1926, which specifically provides:

> Any foreigner who, apart from the cases contemplated by Article 4, commits an offence to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

See P.C.I.J, Ser. A, No. 10, Judgm. No. 9 at pp. 14-15 (1927).

70. See Sect. 1.03 of the American Law Institute's Model Penal Code, Final Draft (1962), quoted *ante,* p. 233, note 35.

the place where or from which the money or other valuables is obtained by the false representation.

It is therefore surprising that the United States Supreme Court in the *Wildenhus* case[71] upheld the applicability of local law merely because the manslaughter committed on board the Belgian ship at the port of Jersey City "awaken a public interest" and "disturb the quiet of a peaceful community". Even if this were true, but since the crime was perpetrated and consummated entirely on board the foreign vessel and involved only foreigners, members of the crew, it is evident not only that for the purpose of assuming jurisdiction the interest of the littoral community whose tranquility has been interrupted was too insignificant compared to that of the flagstate, but also that the "breach of the quiet of the peaceful community" did not have any bearing to the criminality of the undesired occurrence. In fact, similar "awakening of public interest" would have taken place and the same disturbance would have been created, had the criminal offence been conducted, for instance, immediately over the border in a neighbouring state. Would it then be permissible for the "affected" state to take cognizance of the event on the basis of "criminal effect"?

Thirdly, it has been said that in order that a state may lawfully exercise authority over a criminal event, there must be an explicit authorization to that effect by its own municipal law. As to the passive personality principle of jurisdiction, most legal systems acknowledge the right of the state to assert competence if the victim in the crime is one of its nationals or a juristic person having its national character.[72] In this context, it should be noted that despite the fact that any criminal offence is by its very nature a violation against the public, the community, or the state which by itself may be considered a corporation having legal personality, nevertheless, the principle should naturally not be applied to cover every infringement of the law unless the state as such is actually and directly the victim in the event, such as in the case of destruction of public property, pollution of public reservoirs, public nuisance, or the common offences of larceny and fraud, involving public possessions. Otherwise, in addition to competence on account of territorially, by reason of the passive personality principle, a crime committed within a state against a foreigner would provide that state with the right to exercise jurisdiction, whereas it is evident that it is only the foreign state of nationality which should be allowed to assume competence on the basis of nationality of the actual victim.

Finally, as a general rule, no state — whatever may be its relationship to a given offence — should exercise criminal jurisdiction in those cases where conventional or non-conventional international law has accorded personal immunity to the alleged perpetrator. This is a universally acknowledged principle, the application of which is to be determined by reference to the law governing the matter.

a. (i) Claims *by individuals.* However paradoxical it may appear, but the broader the basis on which states exercise penal competence and,

71. 120 U.S. 1 (1887)|, see *ante,* at p. 71.

72. See Art. 6 of the Turkish Penal Code quoted *ante,* p. 246, note 69.

consequently, the greater the possibilities of jurisdictional conflicts, the more the individual criminal offender seems tempted to escape punishment by abusing the opportunity. Especially in this age of international criminal syndicates, there is no doubt that certain crimes are planned and carried out with the thought of evading justice on account of jurisdictional intricacies.

Therefore, in order that criminal law does not defeat its own cause and its principles not be misused to the detriment of the general public, no interstate conflict of competence should under ordinary circumstances lead to impunity of the malefactor whose criminality is in the least eradicated by jurisdictional difficulties. Accordingly, it seems appropriate to adopt the rule that in those cases where there is at least one linking point by reason of which criminal jurisdiction may be lawfully exercised, states should basically be permitted to ignore claims made by private individuals on the allegation that the offence should fall within another jurisdiction. For, if the foreign government under whose authority the case is supposed to be administered does not show any interest in prosecuting the offender, such an individual claim then means nothing more than a misplaced as well as disdainful effort to elude the wages of criminal justice by using means entirely irrelevant to the wrongfulness of the conduct.

Thus, in *United States* v. *Flores,*[73] the District Court of Eastern Pennsylvania rejected the defendant's claim that the offence, which was committed on board an American vessel while at anchor in the Port of Matadi, in the Belgian Congo, should not fall within the United States' jurisdiction but under the Belgian authority. Similarly, in the *Cutting* case,[74] the jurisdiction of the Mexican court asserted on the basis of the territorial and passive personality principles was unsuccessfully contested by the defendant, an American citizen who was accused of the penal offence of defamation against a Mexican subject. In general, judges are indeed reluctant in cases of concurrent competence to recognize the validity of claims by individuals which are merely based on the argument that courts "of the other jurisdiction" should take cognizance of the case.

Consequently, the only type of jurisdictional claim which may successfully be presented by an accused individual is that relating to the complete absence of the court's and the state's competence. Such a claim is in fact similar to a complete denial of the presence of any relationship, any connecting factor, between the prosecuting state and the alleged offence. In the *Rebeca* case,[75] the United States-Mexican General Claims Commission accepted the claim to exception from local jurisdiction, since the American schooner was by the bad weather conditions forced to enter the Mexican port thereby violating the customs regulation. Less successful, however, was the defendant in *Skiriotes* v. *Florida*[76] who

73. 289 U.S. 137 (1933); see also *Regina* v. *Anderson,* (1868), 11 Cox's Criminal Cases 198; both cases discussed at p. 72, *ante.*

74. U.S. For. Rel., 761 (1887), see *ante,* at p. 72.

75. *U.S. on behalf of Kate A. Hoff* v. *United Mexican States,* Gen. Claims Comm'n, Opinions 174 (1929), see *ante,* at p. 69.

76. 313 U.S. 69 (1941, see *ante,* at p. 68.

asserted that his offence, *viz.* the taking of sponges by using forbidden diving equipment, was conducted outside the territorial sea limits of the United States and hence outside the territorial jurisdiction of the State of Florida. It should be noted that with respect to this type of claim, it is in any case the state which under the generally accepted rules of evidence should substantiate the existence of the nexus between the state and the respective criminal event.

a. (ii) *Claims by states.* Considerably less in number but, nevertheless, far more complicated in nature are the cases of concurrent jurisdiction in which two or more states simultaneously are interested in prosecuting and punishing a person for a given criminal offence. If under the concept of *non bis in idem* only one state can lawfully take cognizance of the event, how then should the system of mono-jurisdiction be designed to determine that single competence?

Obviously, it should be the state whose interest is the most affected which should be accorded the exclusive right to exercise authority. But, as with any problem of this nature, the main difficulty of course is that for the purpose of identifying the most seriously affected interest, there is no available mathematical criterion that can be used without qualifications and, perhaps, re-evaluation of its applicability in a concrete situation.

Since it is the "connecting factor" which under the generally recognized policy is the only justification for the exercise of penal competence, in order to avoid arbitrary decision-making, the most logical formula to follow in identifying the state with the most right to predicate jurisdiction is naturally to sum up the relevant "points of contact" that connect each of the interested states with the crime at issue. The state that procures the most point and, accordingly, shows the greatest interest as well as the most reasons to prosecute the malefactor should then be regarded as having the primary right to assume competence.

So, the basic tenet is relatively simple and there is no doubt that many scholars have contemplated in this direction. However, more difficult but certainly important is the formulation of the additional rules which should be taken into account in order to forestall less reasonable inferences in the application of the formula.

First, where the practice in most countries usually recognizes some jurisdictional principles as of greater significance than the others, the question may be asked whether the linking points as enumerated earlier should not be ranked in terms of importance. Especially since the emphasis in the administration of national criminal justice is generally placed upon the notion of territorial sovereignty, one may be inclined to consider the principle of territoriality and the various modes of its application as paramount to all other bases of penal competence. For example, Article 1 of the 1889 Montevideo Treaty on International Penal Law explicitly provided that "Crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, of the victim, or of the injured party".

The provision as such does not solve problems arising from complex crime situations where the conduct, result, and effect occur in different states; in order to prevent prejudicial judgment it seems also unwise *in abstracto* to discriminate between the various nexus. True, it is quite possible that in a given situation one connecting factor turns out to be more important than others, but in the light of the relevant interests at stake, no one can claim *a priori* that a community whose member was slain in a foreign land has less interest in punishing the murderer than the country where the slaying took place. No one can say that the state in which a crime is committed has a better cause to take cognizance of the matter than the state whose political integrity was jeopardized by that crime. Even within the scope of application of the territoriality principle itself it is hard to say that the community in whose territory a crime is commenced should be given a priority higher than the nation within whose frontiers the crime is consummated.

Hence, from general policy perspective it appears unsound to disparage the importance of one connecting factor in favour of the other, for the extent to which each factor represents the interest of the affected state in a given situation is usually difficult to evaluate. As a general rule, therefore, each nexus should be deemed as important as the other; the burden of proof is with the party who claims to the contrary.

Secondly, in accordance with the previous rule, if a person shoots from state A and the victim is hit in state B, but dies later on in state C, all the three states then may equally claim jurisdiction on the basis of the territorial principle as applied with reference respectively to "conduct", "result", and "effect". Consequently, if both result and effect had taken place in state B, this state would under the proposed point-system have obtained two points; and three points would have to be attributed to state A, had all those three elements of the crime occurred within its domain. It cannot be denied that this mode of reasoning is in a way correct, for if in another case state C may acquire three points on account of "criminal effect" alone *plus,* for instance, "nationality of the offender" and "nationality of the victim", there is basically no reason why state A should not similarly obtain three points on the basis of conduct, result, and effect. But this apparently reasonable deduction, nevertheless, will clearly present several obstacles which make its general acceptance difficult to attain.

Pursuant to the basic community policy requiring adequate balancing of the various interests at stake, it can be said that such a deduction would make the competitive position of a state in which a crime is commenced and completely consummated so excessively strong, that it would practically exclude the possibility of another state whose interest is perhaps more seriously affected from exercising competence over the offence. Suppose that an assassination of the head of state A — a crime which in civil law countries usually falls under the category of offences governed by the protective principle of jurisdiction — is committed by a national of state A on the territory of state B; state B then would procure three points, by reason of which it would have the primary right to assume competence, whereas state A would merely gain two points, namely that related to the nationality of the assassin and that involving the infringement of its exclusive interest. This means that state A cannot take cognizance of the crime, even when the offender

happens to fall into its effective control. This, of course, is difficult to accept.

The great majority of criminal offences are initiated and consummated in the same state. Recognition of the point system would practically result in the supremacy of the territoriality principle, while the other jurisdictional tenets would be more or less completely devoid of significance. This is certainly again contrary to the overriding community policy requiring adequate acknowledgement of the affected interests.

Certain categories of delicts, such as sexual offences, the offence of slander can be conducted and consummated only simultaneously and only at the same place. Other types of crimes in which commencement and consummation are theoretically divisible may establish a result that in itself represents the criminal effect. In a case of fraud by mail or by deceptive advertisement, for example, at the moment the victim takes the bait (result), he is also deprived of some of his possession (effect). These categories of offences then would under the point system unduly concentrate connecting factors in favour of one state only on account of the various application of the territorial principle.

Moreover, most crimes committed wholly within the state territory, even those conducted by foreigners, are directed against individuals, legal bodies, or the "public" of that particular community. Consequently, beside the principle of territoriality, an additional nexus may in such cases be established on the basis of the passive personality principle.

Finally, identification of the different places of "conduct", "result", and "effect" in fact merely arises from the problem of localization of crime within the sphere of applying the territorial principle as such. The character of the differentiation, therefore, is in principle not to be made equivalent to that of the distinction between the principle of territoriality in the original sense and the other principles of jurisdiction, *i.e.* the active personality, the passive personality, the protective, and the universality principles, each of which is, as it were, derived from different types of state interest.

Hence, in applying the formula of summing up of connecting factors within the operational scope of the territorial principle, it is reasonable to recognize the elements of criminal conduct, result and effect separately only when these specific crime ingredients individually affect the interest of different states due to their separate geographical locations. In the absence of this necessity, recognition of the distinctive elements should also be avoided. Accordingly, whether a crime in its entirety or merely one or two of the constitutional parts fall within the territorial jurisdiction of a state, only one point of contact should be attributed to this state as regards its right to predicate competence by reason of the locus of the offence.

One may naturally disapprove the possibility that under the proposition, a state in whose territory criminal conduct *and* result take place would be in a similar position as another state within whose frontiers only the criminal effect occurs. As a basic rule, however, here too, it does not appear appropriate *a priori* to diminish the interest of the latter state in prosecuting the respective criminal. For no one can say, in

general how great the impact of a given criminal effect upon its public interest can be, since this largely depends upon the nature of the offence, the relevant situational features, as well as the value system of the affected community.

Thirdly, it has been said that for a state to lawfully predicate competence over an offence, it must be specifically authorized by its own municipal law. In this context it should be noted that in addition to the principle of territoriality which is commonly considered as a general basis of the state's penal jurisdiction, most legal systems logically recognize the remaining tenets, *i.e.* the active personality, passive personality, protective, and universality principles as merely auxiliary in character in the sense that they are deemed pertinent exclusively to offences committed outside the national boundaries. Thus, *stricto sensu* this would imply that under the suggested point-system, a state in whose territory a crime is perpetrated and consummated may acquire only one point on the basis of "criminal conduct", "result", and perhaps "effect", whereas with reference to the same crime another state may obtain several points depending upon the applicability of the non-territorial principles which that state recognizes with respect to extra-territorial crime. For example, a *delictum juris gentium* committed in state A against citizens of state A would provide this state only with one point on the basis of the locus of the event because under its municipal law the passive personality principle and the universality principle are applicable only to offences outside its territory, whereas B, the state of nationality of the perpetrator, may acquire two points on the basis of the active personality principle and the universality principle that are applicable to offences outside state B's territory.

This, of course, is difficult to accept, simply because such an inference would not only defeat the entire proposal, but also because its outcome will not reflect the actual competing state interests. The propriety of a state to assert jurisdiction under the active personality, passive personality, protective and universality principles is not dependent upon geographical settings and is tenable with regard to offences whether they are committed inside or outside the state's territory.

Hence, without the least prejudice to the validity of the legality principle, in order to maintain a proper balance of the interests involved in a jurisdictional conflict, it seems necessary for the purpose of applying the proposed concept of mono-jurisdiction to disregard a reference in the municipal law confining the applicability of the non-territorial tenets to criminal offences perpetrated outside the national boundaries. In the example pictured above, apart from the two points that state B may obtain, state A should — in spite of the language of its municipal law — be allowed to acquire three points on account of the *locus delicti commissi,* the nationality of the victim, and the violation of the inclusive interest of mankind.

Finally, in weighing the interests of the states involved in an jurisdictional dispute, which state then should be accorded the primary right if after summation of the relevant connecting factors, two or more states turn out to have acquired a similar number of points?

Although it has been pointed out that effective control over the body of the criminal offender *qualita qua* does not provide the state with the right to assume competence, yet (1) whereas in this particular situation the interests of the state concerned are presumed to be equally eminent, (2) whereas the basic policy in a public order of human dignity requires that only one state should exercise authority over the event, and (3) whereas no other relevant ground is available to determine the single jurisdiction, there is consequently no other way to designate the state with the primary right other than to acknowledge the value of custody over the person of the malefactor.

Thus, in a competential conflict where several states have to be afforded the same number of linking points, it is the state where the culprit is apprehended which should have the sole authority to administer the case. This is from practical point of view also acceptable, for under the circumstances where several states are equally interested and equally entitled to take cognizance of the criminal offence, it would be obviously absurd if for some unrelated reasons a state which does not have the body of the offender should predicate jurisdiction.

How should the single competence then be determined if none of these interested states exercises control over the body of the offender? Since the basic rights to assert jurisdiction are equal, the most adequate solution naturally is to recognize the competence of the state which first seeks extradition of the wrongdoer. This rule should also apply in a case where the state which has the body of the individual as well as the primary right, for one reason or another, relinquishes this right.

b. *Application of the concept to jurisdictional claims by states.* Although on the one hand it seems both necessary and justifiable for states to maintain a rather liberal concept of competence for the purpose of protecting their complex interests, on the other hand it is obvious that assertion of penal jurisdiction on a too broad basis inevitably results in various conflicts. Whereas nations today are more or less compelled to participate in the ever increasing interstate traffic and communication and hence cannot refrain from exercising authority beyond national frontiers, jurisdictional disputes arising particularly from the invocation of the principle of territoriality become more and more complicated.

b. (i) *Claims involving ordinary invocation of different types of nexus in geographically non-overlapping spheres.* Certain complex crime situations may result in concurrent state competence, while the respective jurisdictional spheres are not actually or geographically overlapping. As indicated earlier, on the basis of the territoriality principle alone, a crime may fall within the competential domains of two or more different states, *i.e.* if one state asserts competence on account of the locus of criminal conduct, the second state on account of the situs of criminal result, and the third state by reason of the place of criminal effect. Thus, in the *Lotus* case,[77] both Turkey and France claimed jurisdiction on the ground that the disputed event took place within each own domain. What

77. P.C.I.J., Ser. A, No. 10, Judgm. No. 9 (1927); see also *People* v. *Werblow,* 241 N.Y. 55 (1925); *Queen* v. *Nillins,* 53 L.J.M.C. 157 (1884), discussed in (1967) N.Y. 55 (1925); *Queen* v. *Nillins,* 53 L.J.M.C. 157 (1884) see *ante,* at pp.45 and 75 respectively.

is then the solution to such problems in the light of the offered proposal?

Here again, the principle is that the mono-competence should be accorded to the state with the greatest interest in the prosecution of the criminal offender. Suppose that in a hypothetical case a national of state A shoots from state A a national of state D who happens to be hit in state B but dies subsequently in state C. Under the suggested point-system, state A should have the primary right of jurisdiction on the basis of both nationality of the perpetrator and locus of the criminal conduct. As regards the primary right, the situation would be identical if the victim had died in state B, for on the basis of criminal result *and* effect alone, state B, as agreed, would still maintain one point. But, had the victim been a national of state B, then states A and B would both have acquired two points and in such a case, the right to exercise mono-jurisdiction would have to be conceded to the state which had the custody over the person of the offender. The same rule should *mutatis mutandis* apply in cases where the offence is jointly committed by nationals of different countries or involves victims who are nationals of different countries.

It is apparent that in these situations, it is primarily the complexity of the crime itself which is conducive to the problem of localization, while the respective jurisdictional spheres by themselves do not have to be overlapping. Compared to situations involving geographically overlapping areas as analyzed below, there is one distinction that deserves attention: Where the competential spheres do not cover each other, there must obviously be only one state (or none of them) which actually and exclusively exercises effective control over the body of the criminal.

b. (ii) *Claims involving complexities in the invocation of the same types of nexus especially in geographically quasi-overlapping spheres.* There are, however, ordinary crime situations in which not the constituent parts of the offence itself, but rather the invocation of the relevant jurisdictional tenets gives rise to concurrent competence. For example, an offender may possess double or multiple nationality, or a given crime may fall within the category of offences with respect to which two or more legal systems allow application of the protective or universality principle of jurisdiction.

Pursuant to the proposed point-system, each of the interested states would on the basis of the same jurisdictional principle acquire one point; which of the states should be accorded the primary right would then depend upon the other applicable connecting factors. Accordingly, an offence committed in state A by a person having the nationality of both state A and state B would fall under the competential sphere of state A. Thus, in *Kawakita* v. *United States*[78] where a Japanese-American was convicted of certain treasonable acts against the United States committed during the Second World War, the penal competence exercised by the United States was difficult to dispute. It is true that in the case in question the condemned events took place in Japan, but since these events were not criminal under the local laws and the Japanese government, consequently, could not claim any jurisdiction over the occurrence, there

78. 343 U.S. 717 (1952), see *ante,* at p. 81.

was *in casu* in fact no problem of conflicting competence and the exercise of authority by the United States was justifiably proper.

Rather difficult, indeed, is the situation in which territorial jurisdictions of different states apparently overlap each other. This is the case with foreign vessels and aircrafts, "the floating and flying islands of the state of nationality", as Justice Byles would say,[79] which enter the territory of a particular nation; or with foreign legations, the extra-territoriality of which is often claimed. Also with reference to these situations, the problem of localization of the offence itself does not have to occur. For instance, in a case of an ordinary crime committed wholly on board a foreign ship, the locus of the delict is apparent; only the question as to which state this locus is geographically within may create some confusion due to the concurrent territorial sovereignties over the very place.

Thus, in *Regina* v. *Anderson,*[80] the British court predicated jurisdiction over a crime committed on a British vessel while sailing in the river Garonne in France. Although with respect to the question of jurisdiction the court admitted that the offence was perpetrated within the French territory, nonetheless it was said: "(B)ut at the same time, in point of law, the offence was also committed within the 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".[81]

The difficulty is of course that, on the one hand, states may lawfully exercise jurisdiction within their own territory which includes not only the land masses, but also the national waters, territorial seas and even contiguous zones as well as the air space above all of them, whereas on the other hand with respect to events occurring on board foreign ships, being within these territorial frontiers, the foreign states whose flags these vessels fly may equally claim the right to prescribe and apply their own policies. Which state then should under the proposed system of mono-jurisdiction be allowed the competence on account of the principle of territoriality? Should both littoral and flag states each be permitted to acquire one point on the basis of the locus of the offence such as it is suggested with reference to a case of multiple nationality of the perpetrator or of the victim? Unfortunately, the relevant policies adopted in actual practice do not appear very clear and the answer to the question seems largely to depend upon circumstantial factors which happen to surround each issue.

The exterritoriality of war vessels (or at least its immunity with respect to actions involving ownership over the craft) was already recognized in 1812 in the case of *The Schooner Exchange.*[82] In this case, an action was brought by two Americans to regain possession of a ship which previously had belonged to them, but which was captured by the

79. See in *Regina v. Anderson* (1868), 11 Cox 198.

80. *Ibid.*

81. *Ibid,* at p. 204.

82. 11 U.S. 97 (Cranch) 116 (1812).

French, converted into a French man-of-war, and was visiting in the port of Philadelphia. Speaking for the Supreme Court of the United States, Chief Justice Marshall stated:[83]

> She (a warship) constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place, without affecting his power and his dignity. The implied licence, therefore, under which such a vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

On the other hand, in the cited case of *Chung Chi Cheung* v. *The King*[84] the British courts refused to accept a claim made by the individual defendant based upon exterritoriality of the foreign governmental vessel where the crime was perpetrated.

In the *Wildenhus* case,[85] the United States Supreme Court upheld the competence of the local court in taking cognizance of an offence committed on board a Belgian private ship at the port of Jersey City. However, in *United States* v. *Flores,*[86] a case involving a murder committed on an American vessel at anchor in the port of Matadi in the Belgian Congo, the court maintained that "(I)n 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 citizens on vessels flying its flag, its own statutes. . . ."

It has been said that so far as jurisdictional claims by individuals are concerned, there is basically no reason for a state to refrain from exercising penal competence if there exists at least one valid nexus that may indicate the presence of an adequate interest. But, what should be the solution in the cases delineated above if both coastal state and flag state in the absence of treaty regulation insist upon their exclusive right to prosecute and punish the criminal offender?

Professor McDougal and Burke evidently advocated that the impact theory should apply:[87]

> The crucial factor for policy is whether or not the events occurring on board ship have effects upon the public order of the coastal state. Where that public order is substantially affected it seems wholly reasonable that local officials should be authorized to prescribe and apply policy to the conduct involved. . . .
>
> If events aboard a ship do not have impacts, or only inconsequential impacts, the competence of the flag state would appear to merit priority. The legitimate concern of the flag state for maintaining order and discipline aboard its vessels and, to that end, for applying its own policies and sanctioning measures seems overriding when coastal value processes are largely unaffected.

83. 11 U.S. 97 (Cranch) 116 at p. 118 (1812).

84. (1939) A.C. 160 (P.C.):, see *ante,* at p. 73.

85. 120 U.S. 1 (1887), see *ante,* at p. 71.

86. 289 U.S. 137 (1933), see *ante,* at p. 72.

87. McDougal & Burke, *The Public Order Of The Oceans* (1962), p. 162.

The difficulty with the impact theory as such is of course that in the absence of more definite and appropriate criteria as to when the littoral public order is "substantially affected" and when events on board foreign ships have "consequential impact" upon coastal value processes, the exercise of jurisdiction by either the territorial state or flag state (or both) may remain a matter of power rather than authority or be governed by purely accidental factors. Is the local public order to be considered "largely affected" if the criminal offence, which is wholly committed on board a foreign vessel, has "alarmed" the local public like in the *Wildenhus* case? For a satisfactory answer to such a question, an analysis of the relevant interests at issue seems necessary.

Indeed, from the point of view of a littoral state, there is in the light of the traditional idea of territorial sovereignty no reason, for the purpose of criminal jurisdiction, to exempt individuals liable for crime committed within the state boundaries merely because the undesired occurrence has taken place on a foreign vessel. For, the fact that a foreign ship, whether a man-of-war, a governmental civil vessel, or a private craft enters the national waters certainly does not in the least affect the sovereignty of the coastal nation over its territory. As the late Professor Brierly pointed out, the person of a criminal "is, in fact, within, and not outside the territory".[88] The local authority, therefore, should within the geographical limits of the state have the competence to control all modes of individual behaviour in defence of the local interest.

However, where flag states pursuant to their municipal law often insist upon their authority over occurrences on board their vessels, where interstate traffic and communication has become an essential tool in national as well as international value processes, and where host states in their own interest have to welcome the visits of foreign ships, the exclusive littoral competence must necessarily be limited. From the general community perspective, there is no doubt that it is the state of nationality which is most interested in the well-being of the craft, crew and passengers, wherever they may be. In fact, the legitimate concern of the flag state for the maintenance of peace and order on board is clearly manifest in the unambiguous assumption by most states of the right to consider national vessels, irrespective of type or character, as portion of their territory particularly in respect of the applicability of domestic penal law.

The basic freedom of the state of nationality to prescribe and apply policy on board a ship passing through the territorial sea of a foreign nation is universally recognized.[89] But, the legal and factual relationship between flag state and vessel also continues even when the latter enters foreign internal waters. The link does not cease simply because permission of the coastal state must be obtained in order that the vessel may make use of a port. The limited competence of the harbour authority and customs officials with respect to the vessel, as well as the courtesy extended by way of medical care and police assistance, are only common conditions that both coastal and ship-authorities accept,

88. Brierly, *The Law Of Nations* (1963), p. 222.

89. See Art. 19 of the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone.

but which certainly should not be interpreted to imply a "cession" of "the floating territory" by the state of the flag. On the contrary, the special authorization usually required for a foreign vessel to enter a harbour in fact indicates that the littoral state recognizes the foreign character of the ship and the authority of the home state over the craft. Hence, even Chief Justice Waite, despite the controversial outcome of the court's decision, pointed out in the *Wildenhus* case that:[90]

> ... by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace and dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the Laws of that nation or the interests of its commerce should require.

Accordingly, where the crime is committed wholly on board a foreign ship, where none of the crime elements is to be located on shore and hence, where nothing of the littoral interest is affected, no penal jurisdiction should be predicated by the coastal state on the basis of territoriality, regardless of whether the ship is a man-of-war, a governmental civilian vessel, or a private craft. This proposition actually suggests that for the purpose of criminal competence, the relationship between a coastal nation and a foreign vessel is to be equated with that between two neighbouring countries or, in more accurate terms, between a state and an enclave in its territory belonging to a foreign sovereign. Indeed, where no single constituent part of the offence, whether the criminal conduct, result or effect occurs outside the ship, there is as discussed earlier[91] no reason for coastal officials to claim jurisdiction, either by way of "subjective", "objective" or "effective" application of the territorial principle.

Thus, if in regard to a crime commenced and consummated on board a foreign vessel, the littoral state is to be accorded the primary right of jurisdiction, such accordance then should not be based upon the principle of territoriality but rather upon other applicable competential tenets. On the bases of the "active" and "passive" personality principles, for instance, a coastal state may acquire this primary right if the criminal offender and the victim are its nationals, even though the crime is entirely conducted on board a foreign warship. On the other hand, if only the offender is a member of the local community whereas the victim is a subject of the flag state, then it is the flag state to whom the primary right should be afforded on the bases of the territorial and passive personality principles, even though the offence is perpetrated on board a private craft.

To answer the question why both states should not be allowed in such a case of quasi-overlapping territorial jurisdiction to assume competence by the same reason of the locus of the delict, such as was suggested in respect of cases where the culprit is a national of more than one state, the following observation can be made. From a theoretical perspective, it is evident that unlike a case of double nationality in which on account of personality of the criminal, both states are on equal footing as regards their interest in prosecuting the individual, in a case where

90. 120 U.S 1 at p. 12 (1887).

91. See *ante*, p. 245, under C. 3.

a crime is wholly perpetrated on board a foreign ship, the interest of the flag state is comparatively paramount to that of the littoral nation whose interest is in the least affected. Moreover, from a practical point of view, if both states were to obtain equally one point on the ground of territoriality, then the situation in which a crime is entirely conducted on board would under the suggested proposal lead to the same outcome as when it was partly committed on shore, in which case each of the states involved would, as discussed hereafter, also acquire that single point.

Similarly, the question of effective control over the body of the criminal offender, which may become significant for the establishment of the primary right if both coastal and flag states acquire the same number of points of contact, should be solved along the same lines. Here, too, the policy of metaphorically equating a foreign ship with a portion of the state of the flag merits recognition, not only to reduce the possibility of unauthorized action to the minimum, but also to protect the private individual against unexpected arbitrary use of coercion.

Especially where both the host-state and flag-state have equal right to prosecute the offender and where both are interested in invoking that right, there can certainly be no justifiable reason for the one, without the consent of the other, to take official steps in the other's domain in order to secure the custody of the malefactor. Just as a governmental agent is not supposed to abduct a wanted criminal from a foreign territory, no coastal official should, as a rule, be allowed to take deprivational measures against an individual aboard a foreign vessel without the authorization of the responsible ship-authority; and reciprocally, the latter should refrain from arresting criminal suspects on shore.

What then can be done if the malefactor is on board, but his crime falls within the jurisdiction of the coastal state; or if the flag-state which has the primary right of competence for one reason or another declines to invoke this right; or if the man is simply a criminal escapee from shore? For sure, no state would allow its public order system to be jeopardized by permitting foreign vessels to become sanctuaries for criminals, whether or not they have the licence to enter the territory.

Yet, to permit the coastal government to take official action on board a foreign vessel without agreement of the ship-authority would — even in such cases — still be contrary to the general community policy requiring minimization of unnecessary and unproportional use of force. Without prejudice to the rules of extradition, however, it would appear adequate if the ship-authority should be obliged to deliver up voluntarily any person whose body is demanded by the littoral state in connection with a crime that falls within its jurisdiction. It need not be emphasized that failure to fulfill this obligation would not only endanger the friendly relationship with the coastal government, but would also be bad faith on the part of the ship-authority, violative of the general expectation of international cooperation in the suppression of crime and prevention of impunity of the criminal.

On the other hand, the same rule should of course reciprocally apply whenever a criminal suspect escapes from board to shore. That the ship-authority is not expected on its own to capture a criminal from shore is

demonstrated in the *Vincenti* affair[92] in which the U.S. Department of State had to apologize for the unlawful transfer of a suspect on a motor-boat by American agents from the Bahama islands, British West Indies, to the United States. Nevertheless, the local government should similarly cooperate in rendering the necessary assistance in the arrest of the individual who is sought for a crime committed aboard the ship. Only through such a cooperation can a minimum public order in relation to the exercise of penal jurisdiction be secured.

On account of the analogous situation, similar policy should *mutatis mutandis* be extended to crime conducted and consummated on board a foreign aircraft, a military establishment or a legation within the state boundaries. These entities also should for the purpose of criminal jurisdiction be considered as parts of their state of nationality. Particularly the "extraterritoriality" of legations has evidently found universal recognition, though its meaning in some respects remains ambiguous and often even confusing. However, at least with regard to the question of penal competence, the feigned fiction of "a separate bit of foreign territory" still seems to be a useful metaphor for the identification of the relationship between the territorial state and all these types of foreign objects in the light of the relevant interests.

b. (iii) *Claims involving complexities in the invocation of different types of nexus in geographically quasi-overlapping spheres.* The situation is different if an offence committed on board a foreign vessel within the territorial waters of a state, by one or more of its constituent parts, directly affects the public order of the coastal community. If a state on the basis of both "objective" and "effective" application of the territorial principle may lawfully assume competence over a crime initiated in a foreign land, *a fortiori* it may rightfully predicate jurisdiction over offences commenced on board a foreign ship if the criminal result or effect takes place on shore, or at least off-board within the state's domain. Similarly, on the basis of the "subjective" application of the territorial principle a state should be allowed to assert the right to take cognizance of an offence conducted on shore, even though the criminal result or effect occurs on board a foreign craft.

Accordingly, in the *Lotus* case, the Permanent Court of International Justice also recognized the right of Turkey, the respondent state, to exercise authority over a violation of its law. ". . . (I)t is certain", the tribunal said,[93] "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 effects, have taken place there".

Consequently, with reference to crime perpetrated on board a foreign ship, the fact that the vessel is in inland waters, on the territorial sea, in the contiguous zone, or even on the high seas, is in fact irrelevant for

92. See I Hackworth, *Digest Of International Law* (1940-44), p. 624, discussed *ante,* p. 235, note 44; see also the *Eichmann* case, discussed *ante,* p. 235, note 45.

93. P.C.I.J., Ser. A, No. 10, Judgm. No. 9, at 23 (1927).

the assertion of penal jurisdiction by the coastal state on the basis of the territorial principle, so long as the offence is commenced *or* consummated outside the ship, within the territorial boundaries. As Judge Morton observed in the case of *The Grace and Ruby*[94] which involved the forfeiture of a British schooner for violating the American National Prohibition Act: "The mere fact . . . 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".

By way of either "subjective", "objective" or "effective" application of the principle of territoriality, therefore, both littoral and flag-states should in this type of a situation be permitted to predicate competence and the question as to which state should under the proposed point-system be accorded the primary right is to be answered on the basis of the other existing connecting factors. "The offence for which Lieutenant Demons appears to have been prosecuted", the international court stated in the *Lotus* "was an act . . . having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt* .... (I)t is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole".[95]

Some difficulty, however, arises in connection with the matter of effective control, whenever a crime that affects the public order of the coastal community is perpetrated by the foreign vessel as a whole, such as in *The Grace and Ruby* and other cases involving violation of local tariff regulations. Apart from the right of the flag-state to take cognizance of the offence, it would of course be difficult for the coastal state, as suggested earlier, to defer from taking official action against the vessel the skipper of which has proven to be a culprit himself.

Hence, independent from the question of primary right which may be solved subsequently, in defence of its own interest as well as the interest of justice at large, the coastal state should in such cases be allowed to arrest the foreign ship, whether it is a public or a privately owned vessel. In fact, the coastal state should be permitted to take appropriate deprivational measures not only within its own territorial waters, but also on the open sea so far as the pursuit is not extended to violate the territorial frontiers of another state, for freedom of the sea is not for those who abuse it to the detriment of the territorially organized community.

Finally, the suggested proposals should again *mutatis mutandis* apply with respect to crime committed on board foreign aircrafts, military establishments and legations, if one or more of its constituent elements affect the public order of the local community.

The tabular diagram presented in the following page, though it obviously does not purport to cover all possible crime situations, will illustrate how the proposed system of mono-jurisdiction will operate in practice.

94. 283 F. 475 (1922), see *ante,* at p. 67.

95. *Ante,* p. 258 note 91.

Tabular Diagram: CONFLICTING JURISDICTIONAL CLAIMS BY STATES

Locus of Delict (*a*)			Personality of Parties Involved (*b*)		Specific Interests Affected (*c*)		Control over the Person of the Offender	State Claimants	Number of Nexus Acquired	Primary Right to be Accorded to State:
Conduct (*a*1) occurs in state or craft/mil. establishm./ of state:	Result (*a*2)	Effect (*a*3)	Nationality Perpetrator (*b*1)	Nationality Victim (*b*2)	Exclusive (Protective pr.) (*c*1)	Inclusive (Universality pr.) (*c*2)				
A	A	A	B	C	common offence	common offence	A	A B C	*a*1,2,3 (1) *b*1 (1) *b*2 (1)	A (by reason of effective control)
A	B	C	A	D	common offence	common offence	B	A B C D	*a*1 (2) *b*2 *a*2 (1) *a*3 (1) *b*2 (1)	A
A	B	B	A	D	common offence	common offence	B	A B C	*a*1 (2) *b*1 *a*2,3 (1) *b*2 (1)	A
A	B	C	A	B	common offence	common offence	B	A B C	*a*1 (2) *b*1 *a*2 (2) *b*2 *a*3 (1)	B by reason of effective control)
A	B	C	A+B (participation)	D	common offence	common offence	B	A B C D	*a*1 (2) *b*1 *a*2 (2) *b*1 *a*3 (1) *b*2 (1)	B (by reason of effective control)
A	A	A	A+B (double nationality	C	common offence	common offence	A	A B C	*a*1,2,3 (2) *b*1 *b*1 (1) *b*2 (1)	A
A	A	A	B	B	B (assass of Head State)	—	A	A B	*a*1,2,3 (1) *b*1 *b*2 (3) *c*1	B (apart from the question of extraditability of the pol. offence
on the open sea			A	B	—	(piracy) A+B	A	A B	*b*1 (*a*1) (2) *c*2 *b*2 (*a*1,2) (2) *c*2	A (by reason of effective control)

c. *The question of effective control.* There is no doubt that under the suggested system of mono competence, there will be a number of instances in which disputes concerning effective control arise because of the fact that states, though having the primary right to exercise jurisdiction, may not be able to exercise that right on account of the absence of the criminal offender. Despite the fact that the presence of the accused is not a *conditio sine qua non* for the imposition and execution of economic and reputational sanctions, yet as indicated earlier, many legal systems definitely prohibit criminal trial *absente reo.* Moreover, it would also appear contrary to the universally accepted principles of fair trial to prosecute and punish a person *in absentia.*

As the practice shows, difficulty in solving jurisdictional conflicts and assuring accessibility of the law-breaker has often induced states to take unilateral action to obtain the body of the criminal offender from a foreign country where he happens to be found. In some cases the person of the wanted malefactor is acquired through devious ways and means such as in the *Vincenti* affair;[96] on other occasions through the sheer use of force as in the *Eichmann* case.[97]

c. (i) *Interstate cooperation; an indispensable postulate.* It was said that if under the proposed point-system two or more states in a given situation turn out to have acquired a similar number of points, the primary right of competence should then be given to that state which has the lawful custody over the person of the wrongdoer.[98] This seems to be also the only instance in which the question of lawfulness relative to the acquisition of effective control becomes relevant to the exercise of penal jurisdiction, for no primary right should obviously be established on the basis of irregularities in obtaining the body of the accused individual. In general, however, the way in which effective control over the person of the offender is procured is commonly deemed irrelevant to the right of a state to predicate criminal competence. Indeed, so far as the jurisdictional relationship between state and individual is concerned, the circumstances surrounding the arrest of the suspect and the eventual transference of his body from the foreign territory where he is found should basically not have any bearing on the state's competence to take cognizance of the matter, because questions pertaining to infringement of the rights of a foreign state solely concern the relationship between the respective governments. As the District Court of Jerusalem in the *Eichmann* case observed:[99] "It is an established rule of law that a person standing trial for an offence against the laws of the land may not oppose his being tried by reason of the illegality of his arrest or of the means whereby he was brought to the area or jurisdiction of the country".

Nevertheless, from international public order perspective, it cannot be denied that exercise of criminal jurisdiction by resorting to objectionable modes of acquiring the body of the offender can hardly be deemed

96. Discussed *ante,* p. 235, note 44.

97. Discussed *ante,* p. 235, note 45.

98. See *ante,* p. 249, under C, 3, a(ii).

99. Disrict Court of Jerusalem, Criminal Case No. 40/61, at p. 37 (1961).

compatible with the accepted principles of interstate relations requiring mutual deference between governments and reciprocal abstention from taking official action in each other's territory without the approval of the local authority. Hence, the Security Council of the United Nations has deplored the "abduction" of Eichmann by Israeli agents from the Argentine Republic by declaring that such acts "which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security"; accordingly, the Council requested the government of Israeli "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law".[1] Similarly in the *Vincenti* affair, the U.S. Department of State had to express its regret for the arrest made by American agents in the waters of the British West Indies.

Consequently, the only way in which the somewhat troublesome problem of effective control can reasonably be solved without interstate dissension is that states should be prepared to cooperate and to assist each other in respect of matters of criminal jurisdiction. Since under the suggested concept of mono-jurisdiction, the right to prescribe and apply policy with regard to crime is basically separate from the actual control over the criminal, it is very well possible that a state which exercises control completely lacks authority or is destitute of the primary right of competence. It is then certainly peremptory that such a state be willing to deliver the accused person to the state in which he should stand trial, not only in order that justice may prevail or merely to satisfy the demand of the prosecuting state, but also to protect its own community, its values and institutions, against the criminality of the respective individual. Especially where there are strong indications that the person is a criminal, it is naturally unwise for such a state to allow him to rove freely on its territory without his alleged wrongs having been settled by the competent court of justice, no matter where those wrongs have been committed. From the viewpoint of self-interest, there is indeed no need for that state to wait until he again shows his anti-social mentality before measures can be taken against him. And simply to declare him a *persona non grata* would be nothing but allowing him to escape and roam at large in other countries, which means that the menace has merely been transferred to another state.

Unfortunately, according to today's generally recognized rules of extradition, surrender of criminal offenders by one state to another is not always a simple matter; on the contrary, certain procedural features are even obstructive for the implementation of adequate jurisdictional policies. Furthermore, in those cases where extradition is permitted, the proceedings are slow, cumbersome, and often too technical.

It is true that Article 14 Section 1 of the Universal Declaration of Human Rights provides that "(E)veryone has the right to seek and enjoy in other countries asylum from prosecution"; but, as Section 2 of the article points out: "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". Moreover, as expressed in the numerous treaties and conventions, it is evident that

1. See Resolution of June 6, 1960 (Doc. S/4349); see also District Court of Jerusalem, *ibid*., at pp. 36-37).

international cooperation in the suppression of crime has become an objective of paramount importance for all nations alike.

c. (ii) *The need for more liberal extradition proceedings.* As the practice especially in the common law countries demonstrates, extradition of criminal offenders is usually allowed only in pursuance of a treaty regulation between the nations concerned. The surrender of a person, moreover, will not be granted if the respective offence is not expressly mentioned in the applicable agreement, and the difficulty is that a considerable number of offences are considered non-extraditable. Due to these obstacles, many lawbreakers who manage to cross the state boundary become practically immune from arrest and punishment.

There is no doubt, however, that to consider extradition as a matter solely governed by conventional international law is not only detrimental to the general community interest in the suppression of crime, but it is certainly also erroneous. Of course, states are free to enter into special agreements stipulating the more specific conditions under which the matter of extradition between the parties concerned is to be administered. But, it should also be borne in mind that on account of general practices throughout the centuries, certain "general principles of law recognized by civilized nations" should be deemed to have been established, according to which states are basically obliged, even in the absence of specific treaties, to surrender an individual whose delivery is for the purpose of criminal prosecution requested by another state. "All periods of history", the Harvard drafters observed, "afford examples of surrender of refugees as a matter of courtesy or of subservience on the part of one sovereign towards another, and extradition in the absence of treaty is practiced today by some States, though usually under regulation of municipal statutes".[2]

Consequently, the interpretation that extradition should be allowed only for criminal offences explicitly indicated in the applicable treaties should similarly be liberalized. Naturally, no man should be surrendered for the pettiest misdemeanor which little affects the public order of the demanding state. It is conceded, indeed, that the institution of extradition should be kept from abuses that impede the fundamental rights and freedoms of the individual. Yet, particularly where it has been said that delivery of criminals should not be based only upon conventional regulation, the orthodox idea requiring explicit treaty stipulation of extraditable offences should obviously be revised as to allow states to extradite wanted individuals who are accused of committing crimes that are classified as felonies.

Another aspect which usually hampers the lawful exercise of penal jurisdiction is the doctrine of "double criminality", on the basis of which an act or an omission is extraditable only if it is criminal according to the laws of both the requesting and requested states. It should be realized, however, that since the ultimate goal of extradition is to serve justice at large by surrendering the delinquent to the nation whose laws he has violated, it does not seem appropriate to make such surrender dependent upon the laws of the requested state. For, each community

2* Harvard Draft Convention on Extradition, 29 *Am.J.I.L.* 15 at p. 41 (1935 Supp.).

has its own type of public order whose values and institutions need to be protected; these values and institutions are not necessarily similar from place to place. While the one penal system cannot *a priori* be considered superior or inferior to the other, due respect should basically be accorded to the criminal rules of any community so long as they do not infringe the generally accepted minimum standards of criminal justice. Therefore, even from a humanitarian perspective, there is no reason for a state to become a sanctuary by refusing the delivery of a malefactor on the ground that the alleged crime is not punishable according to its laws. It is the criminal law of the requesting nation which the man has broken and to this law he should be held liable.

More delicate, however, is the question whether states should extradite their own nationals. It is admitted that one of the important bases of power of a nation-state is its people over whom the government in principle prefers to exercise authority and control to the greatest extent possible. Hence, most states are reluctant for the purpose of criminal prosecution to surrender their own subjects.

Nonetheless, taking into consideration the pros and cons that may be posited on the basis of both the exclusive and inclusive interests at stake, it appears that the question whether nationals should be subject to extradition should, as a matter of policy, be resolved in the affirmative. Where the requested state for one reason or another is not in the capacity to take cognizance of the offence or lacks the primary right of competence, it seems unwise — even in the light of its national interest — *a priori* to exempt the malefactor from being extradited merely because of his nationality. From the point of view of the internal social order, an individual who has shown to be a criminal, though he has violated the laws of a foreign country only, can certainly not be said to be a commendable asset to his own community. Since the wrong committed is indicative of anti-social tendencies, there is no reason to assume that such a person will not break the social norms of his own people. True, anyone is entitled to be protected by his own government, but this protection should certainly not be extended to safeguard the individual against consequences of his misdeeds. By granting him asylum, the state will encourage him and perhaps other individuals to obstruct justice by abusing the opportunity.

From the point of view of the state's international relations, by committing the crime in violation of the law of a foreign land, the criminal has also disgraced his own country. Furthermore, the fact that the wrongdoer goes scott-free under the protection of his own government may become a valid reason for the affected foreign nation to be mistrustful or even to be hostile. Hence, it is doubtful whether it is worthwhile for some chauvinistic considerations to defend the culprit, thereby jeopardizing the international reputation of the country as well as the interests of the government and other nationals in the requesting state.

In this context it should be noted that most civil law countries which have adopted the active personality principle of jurisdiction are reluctant to accept the idea of nationals being extradited. The *raison d'être* is of course that under their legal system, most offences committed by nationals abroad will automatically fall within the state's penal competence. It

should be observed, however, that under the proposed concept of mono-jurisdiction, recognition of the active personality tenet alone will not guarantee acquisition of the primary right of competence, so that the need to maintain the possibility of surrendering nationals still remains.

The generally acknowledged rule prohibiting extradition of persons accused of military and political offences presents another subtle problem which requires careful solution. As to the non-extraditability of military offences, the Harvard drafters who recognized the principle admitted that "(T)he practice . . . has not gained such a universal acceptance — or at least has not been so universally incorporated in treaty and statute law . . ."[3] Indeed, it is rather peculiar why so many authors take the non-extraditability of this type of offences so much for granted.

It is evident that in most countries, military penal rules are no more than supplementary to the general criminal law. They are adopted merely because of the extraordinary milieu of the armed forces which entails certain crimes that cannot be committed under ordinary circumstances. Therefore, apart from military crimes having political flavour, there is *prima facie* no reason for the purpose of extradition to discriminate crimes governed by the military penal code, such as desertion, insubordination and refusal to perform a duty, from common offences such as murder and larceny, since the malicious motives behind military crimes are usually not much different from those behind ordinary crimes.

Moreover, an additional characteristic of typical military offences is that they are primarily, if not exclusively, conducted against the interest of the state of nationality in general and the military unit of which the man is a member in particular. Hence, with reference to the question of extradition, the interest of the demanding state in respect of the punishment of the criminal is usually far more greater than the interest of the requested state or that of humanity as a whole with regard to impunity of the man.

A different case, however, can be made with reference to so-called political offences, the commission of which is presumed to be solely motivated by the perpetrator's convictions concerning governmental processes rather than based upon sheer criminality. The main difficulty in this respect is that almost all of these offences are *délits complexes* involving other than pure political ingredients. One may suggest, as it has been done, that identification of these offences should be conducted on the basis of the general nature of the motives; whether it is more political or more criminal. As Mr. Justice Cave stated in *In re Meunier*:[4] ". . . (I)n order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not".

3. Harvard Draft Convention on Extradition, 29 *Am.J.I.L.* 14 at pp. 119-20 (1935 Supp.).

4. [1894] 2 Q.B. 415.

Yet, the problem undoubtedly presents many more inherent intricacies than are perceived by the learned judge for the simple reason that political and criminal essentials of a crime are not always mutually exclusive as one may partake the elements of the other. Query, would a homicide committed in the course of a civil right action be political?

Because of this inter-relationship, it is rather surprising that the International Court of Justice in the *Asylum* case concerning the Peruvian Haya de la Torre,[5] without further qualifications declared that "Columbia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru", thereby apparently conveying that the nature of the offence should be identified in cooperation with the government of Peru. For, if the question whether an offence is political or criminal is to be answered by the state whose laws have been violated, then no crime would from the perspective of any national penal law be non-extraditable on political grounds, since political offences are at the same time commonly identified, legislatively as well as judicially, as ordinary crimes covered by the general criminal statutes or other penal rules of the land.

Perhaps an appropriate solution to the problem can only be found by a carefully drafted multifactoral analysis of each instance, including the examination of all the relevant situational and personal features. No doubt, however, that in those cases where extradition is demanded, the ultimate decision with respect to this complex question should definitely not rest in the hands of the requesting state; it is rather the requested state or a neutral party who should finally resolve the extraditability of the individual in question. On the other hand, however, the non-extradition of a person accused of a political offence should of course not be motivated by the political interest of the requested state. It is the humanitarian interest, an inclusive interest of the community of nations, that should prevail.

The suggested liberalization of extradition proceedings should obviously not be interpreted to permit states to impinge upon the universally recognized fundamental freedoms of movement and choice of residence. In addition to its purpose to adjust the traditional rules with the current demands, it is merely intended to pave the way for states to exercise criminal jurisdiction in the most proper manner without being hampered by less reasonable extradition prescriptions. Meanwhile, the requested state should still be able to use its discretion to discern arbitrary action against the individual by the requesting state. In conjunction with the suggestions made, a minimum inquiry should therefore be conducted as to (1) whether the requesting state has the primary right to assume jurisdiction over the matter at issue, (2) whether the alleged act or omission is a crime constituting a felony under the penal system of the requesting state, (3) whether the alleged crime is to be considered a non-extraditable political offence, (4) whether the alleged person is the perpetrator, and (5) whether to satisfy the requirement of *prima facie* evidence, an acceptable warrant issued by the competent authority, affidavits of witnesses or other authentic documents, or confessions by the person himself are submitted.

5. I.C.J. Rep. 266 (1950).

Finally, in order to prevent abuses, the principle of speciality should be maintained to bar the requesting state from prosecuting an individual for a crime other than that for which his extradition was originally demanded and granted. In a public order of human dignity *in viridi observantia,* it is the universal interest both to suppresss crime and preserve the individual's fundamental rights and freedoms which should be prevalent in matters of criminal jurisdiction as well as extradition.

ROBERT THE*

* B.Sc.; LL.B..; M.Sc.; J.S.D. (Yale).