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Criminal Jurisdiction Over Visiting Armed Forces

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## CHAPTER I

# JURISDICTION

In the vast majority of cases, crimes take place wholly in one state, involve only citizens of that state and have no discernible impact beyond that state's borders. There is nothing new, however, in what may be called multinational crime. In such instances, the acts constituting a crime may take place in more than one state, or their impact may be felt outside the state in which they occur. Concretely, such crimes may range from a traffic violation to murder, from smuggling to counterfeiting to high treason. The accused, or the victim, may be a member of another state's armed forces, a tourist, a merchant seaman, a diplomat, or a foreign business man negotiating a single transaction. The accused or the victim may be a casual visitor or, on the contrary, may be residing more or less permanently in the country. Crime, in brief, involves a whole complex of relationships. Any one or more of its facets may so concern a state as to prompt it to assert jurisdiction, or to protest the assertion of jurisdiction by another state.

In situations so complex, it would be surprising if simple rules had been or could be formulated which made possible the ready, frictionless resolution of controversies; especially since supranational institutions empowered authoritatively to formulate rules circumscribing the competence of states are largely lacking.<sup>1</sup> Traditional analysis<sup>2</sup> of the problem of criminal jurisdiction

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<sup>1</sup> See, generally, Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," 32 *Temp. L. Q.* 295 (1959).

<sup>2</sup> See Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 *A.J.I.L.*, Supp., pt. II, 439 (1935) [hereinafter cited as Harvard Research, *Crime*]; and the American Law Institute, Restatement, *The Foreign Relations Law of the United States*, (Proposed Official Draft, May 3, 1962), [hereinafter cited as Restatement, *Foreign Relations Law*]. It is not suggested that these careful analyses do not adequately recognize the many qualifications and limitations on the recognized bases of criminal jurisdiction. It is submitted, however, that any approach in terms of such principles is necessarily too rigid and hence to a degree misleading.

nevertheless suggests that such rules exist in terms of the territorial principle, the nationality principle, etc. This analysis has the virtue of accenting the power of a state to assert jurisdiction in a wide variety of circumstances; and since the specific bases of jurisdiction are sufficiently vague, a state may shape its claims to bring the great majority of cases under one or the other principle. The added scope afforded by the position taken in the *Lotus* case,<sup>3</sup> that a state's competence is limited only by prohibitive rules, merely emphasizes the almost plenary power of a state to assert the applicability of its criminal law.

Confronted with the firmly established rule that no state enforces the criminal law of another state,<sup>4</sup> states may try to extend the reach of their law, in part because they must either apply their own law or forego prosecution altogether.<sup>5</sup> They have not, however, characteristically claimed the full range of competence which the *Lotus* case views as tolerable. The fact that the recognized bases of jurisdiction are not mutually exclusive seemingly invites controversy, but such has not been common. Rather, self-restraint on the part of states, prompted by considerations of comity, feasibility, and fairness, has resulted in a tolerable accommodation of the conflicting interests involved. The Restatement (Second) *Conflict of Laws* summarizes the situation realistically with this statement: "A state has legislative jurisdiction if its contacts with a person, thing or occurrence are sufficient to make it reasonable to apply that state's law to create or affect legal interests."<sup>6</sup>

## TERRITORIAL JURISDICTION

Since the emergence of the territorial state, states have claimed criminal jurisdiction with respect to conduct taking place in their territory. Every state exercises jurisdiction on this basis and all states recognize that other states may do so, subject only to cer-

<sup>3</sup> Case of the S.S. *Lotus*, P.C.I.J., ser. A, No. 10 (1927).

<sup>4</sup> Harvard Research, *Crime, supra*, note 2, at 439. The rule may also serve to obscure the degree to which states are prepared to defer to foreign law since, if the offense is not extraditable, a state can evidence such willingness to defer only by releasing the accused.

<sup>5</sup> Trautman, Appendix to Chapter 11 of Brewster, *Antitrust and American Business Abroad*, 339, (1958). Acquiescing in a request for extradition may be a third alternative.

<sup>6</sup> Restatement (Second) *Conflict of Laws*, sec. 43 e (Tent. Draft No. 3, 1956).



tain narrow limitations.<sup>7</sup> It is implicit that jurisdiction so based extends to foreigners. "When the nationals of one state enter the territory of another state, whether for business or pleasure, they subject themselves to the laws of the latter state and, although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home state, so long as such laws and rules are not below the standard generally obtaining in well-ordered states and are administered fairly and impartially, neither the aliens nor their governments have a right to complain."<sup>8</sup>

The soundness of this approach becomes evident when one considers the consequences should any rule of international law make all aliens immune from the local law, so that any alien a state admitted to its territory could obey or disobey its laws at his pleasure.<sup>9</sup> These consequences have been given laboratory demon-

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<sup>7</sup> "It is universally recognized that States are competent, in general, to punish all crimes committed within their territory. \* \* \* The general principle of territorial competence is too well-established to require an extended discussion of authorities. The principle is basic, of course, in Anglo-American jurisprudence. It is incorporated in all modern codes." Harvard Research, *Crime, supra*, note 2, at 480, 481; Article 17, Restatement, *Foreign Relations Law*, p. 49.

But "[T]he original conception of law was personal, and it was only the rise of the modern territorial state that subjected aliens—even when they happened to be resident in a state not their own—to the law of that state. International law did not start as the law of a society of states each of omniscient jurisdiction, but of states possessing a personal jurisdiction over their own nationals and later acquiring a territorial jurisdiction over resident non-nationals." Brierly, *The Basis of Obligation in International Law*, 144 (1958).

<sup>8</sup> 2 Hackworth, *International Law*, 84 (1941). See also Moore, dissenting opinion in the *Lotus* case, *supra*, note 3, at 69; Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 1925 *Brit. Yb. Int'l. L.* 45.

<sup>9</sup> "When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction

stration in the countries that have accorded extraterritorial rights to particular classes of foreigners.

Some have found justification for the territorial principle in the concept of sovereignty. Others have pointed out that sovereignty is much too vague a concept to serve as an effective tool in making the subtle differentiations called for in delimiting criminal jurisdiction.<sup>10</sup> There are, nevertheless, the soundest of policy reasons for recognizing the primary jurisdiction of the state in which the acts occurred as the norm. The allocation of competence in the world is predominantly in terms of geography, and political and social institutions are shaped largely by the concept of the territorial state.

Maintaining public order within its borders is a necessary function of the modern state. More broadly, the state is recognized as entitled to determine the kind of social and economic order which is to prevail in its territory, in keeping with its responsibility to promote the welfare of its citizens.<sup>11</sup> Criminal law, both in what it prohibits and what it permits, is one of the means of shaping that order. The competence of the territorial state to proscribe and its privilege to permit certain activities, by aliens

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of the country in which they are found, and no one motive for requiring it." Marshall, C.J., in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 144 (1812). It is to be noted that when this was written, Americans already enjoyed extraterritorial rights in some countries. See p. 15 et seq. *infra*.

<sup>10</sup> "So long as we know no more of international sovereignty than that it is equivalent to independence, it will be vain to try, often as the attempt has been made, to deduce the answers to these questions from sovereignty itself; it is precisely in reconciling the independence of different authorities, in the circumstances in which the territories, ships and persons subject to them may be placed, that the difficulties arise." 1 Westlake, *International Law*, 237 (1904). Brierly observed that "\* \* \* [S]overeignty is merely a term that we find convenient when we wish to refer collectively to a number of particular powers that states have traditionally claimed for themselves the right to exercise." Brierly, *op. cit. supra*, note 7, at 350.

<sup>11</sup> "There is general agreement that a state is primarily interested in events that affect its own safety, public order, and the integrity of its social system; that is, the distribution of values among those who, by virtue of citizenship or residence, identify themselves with a particular community and seek the protection of its laws." Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law," 65 *Yale L.J.* 1087, 1133 (1956). See also Donnedieu de Vabres, *Les Principes Modernes de Droit Penal International* 11-13 (1928).



as well as its nationals, should be respected. This is so commonly understood that both look first to the territorial state for protection of their persons and property and for the rules by which they govern their own conduct. Respect for law and order may well require that all who commit like offenses in the same place be tried in the same courts under the same law.<sup>12</sup> Again, elementary notions of fairness—and of personal liberty—may be violated if an individual is held subject to the criminal law of any state other than that which he is in, even a state of which he is a national.<sup>13</sup> Conversely, charges of unfairness toward an alien on grounds of lack of notice are in part met by the consideration that, since he was aware that he was subject to the local law, he should have informed himself of its prohibitions. Lack of sympathy for, or understanding of, local attitudes reflected in local law may affect the alien's conduct, but should not be confused with lack of notice.

Anglo-American adherence to the territorial principle apparently has its roots in considerations of purely domestic law stemming from the early status of jurors as witnesses as well as triers of issues of fact.<sup>14</sup> At common law, venue was laid at the place of the crime<sup>15</sup> and the right to be tried where the crime was committed is still a fundamental protection accorded the accused.<sup>16</sup> By the same token, perhaps the most persuasive argument for the territorial principle is that trial at the place of the crime is essential to the effective administration of justice. This argument is based on such factors as investigation, availability and attendance of witnesses, and production of evidence. All of the considerations which bear upon venue in domestic law are pertinent. Trial

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<sup>12</sup> *Westchester County v. Ranollo*, 187 Misc. 777, 67 N.Y. Supp. 2d 31, (City Ct., New Rochelle, 1946), 41 A.J.I.L. 690 (1947).

<sup>13</sup> It seems overdramatic to refer to "[T]he system of tying the entire criminal law of a country around the neck of a subject, and of making him liable to its operation in whatever part of the world he may be \* \* \*." Lewis, *Foreign Jurisdiction and the Extradition of Criminals* 29 (1859). But see *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); Bar, *International Law*, 631, 662 (Gillespie transl., 1883).

<sup>14</sup> Cook, "The Logical and Legal Bases of the Conflict of Law," *Selected Readings on Conflict of Laws*, 71, 74 (1956); Berge, "Jurisdiction and the Territorial Principle," 30 *Mich. L. Rev.* 238, 239-240 (1931).

<sup>15</sup> "At common law venue was laid at the 'place' of the crime and \* \* \* venue merged into jurisdiction and joined forces with sovereignty." Katzenbach, *op. cit. supra*, note 11, at 1141.

<sup>16</sup> *Travis v. United States*, 364 U.S. 631 (1961).

at a distance may, moreover, cause delays and thus introduce another element of unfairness to the accused.<sup>17</sup>

These considerations emphasize the legitimate concern of the territorial state with activities taking place within its territory and suggest that its primary competence to apply its criminal law should be respected. States are moved to exercise jurisdiction over acts taking place within their territory not primarily because they take place there—though that may be the rationalization—but because, since they take place there, they affect the primary interests of the state or of its citizens.

This is far from saying, however, that only the territorial state can have such interest and competence, or even that in every case they are primary. A state is too concerned with the activities abroad of its private citizens, its representatives and its armed forces; with its foreign trade and commerce and the foreign investments of its citizens; with the flow of the means of payment; with the gathering and dissemination of information; with, in short, everything which affects its position in the world, not to be vitally interested in many matters occurring beyond its borders.<sup>18</sup> Geographical isolation, which may have been a factor in the traditional Anglo-American adherence to the territorial principle, no longer protects a state from the impact of acts outside its borders. The result has been, and is, increasing pressure by individual states to extend the application of their law to activities taking place abroad.<sup>19</sup>

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<sup>17</sup> Donnedieu de Vabres, *op. cit. supra*, note 11, at 11. 1 *Pitt Cobbett's Cases on International Law* 44, (5th ed., Grey, 1931). Lewis, *Foreign Jurisdiction and Extradition of Criminals* 30 (1859).

<sup>18</sup> "Within the world community, methods of policy prescription and application are territorially organized within a framework of separate sovereignties. But the values that states seek to achieve jointly and severally as well as the means of achievement are not so easily related to geography. Policy is conceived in functional terms, and the basis of power—persons and wealth—move across state lines with relative ease." Katzenbach, *op. cit. supra*, note 11, at 1151, note 11, at 1095.

<sup>19</sup> "In earlier days, when there may have been an attempt to delimit transactions, to assign them to exclusive regulating jurisdictions, and, at the same time, when there was perhaps less felt need and less energy for the enforcement of regulations beyond geographical boundaries, *Locus regit actum* was a perfectly rational working principle, both as an explanation of the assertion of jurisdiction and as a restraint on the undue extension of jurisdiction." Trautman, *op. cit. supra*, note 5, at 315.



In reviewing the context in which the status of forces problem arises, it is useful to consider the efforts of states to extend the reach of their laws and to resist such efforts by other states. It should be borne in mind, however, that the claim of a receiving state to try a member of a visiting armed force involves no effort to extend the reach of its law; its claim is rooted in the territorial principle in its simplest, geographical sense. The sending state resists invocation of the territorial principle because it believes other factors outweigh those which reinforce the territorial principle and claims the right to apply its law extraterritorially to its troops.

States moved to extend the range of application of their criminal law have asserted jurisdiction that is in substance extraterritorial, without acknowledging its essentially extraterritorial character, by expansion of the territorial principle. It has been pointed out that improvements in transportation and communication facilities and the increasing complexity of criminal acts required and justified such expansion. Courts and legislatures have responded; courts have interpreted statutes punishing crimes committed in the state to include situations in which the crime took place only partly within the state, and legislatures have participated in expanding the principle through statutes broadening the definitions of specific crimes, i.e., larceny, to include possession within the state of goods stolen outside. Theories regarding the nature of and locus of crime, e.g., the French principle of *indivisibilité* and *connexité*, have been formulated or developed in aid of the process. Jurisdiction on the objective territorial principle relating to crimes begun outside but consummated within a state has been more widely asserted than on the subjective principle relating to crimes begun within a state but consummated outside. This is understandable because the former centers on the impact of criminal acts, the latter on the intention with which acts are undertaken. Assertions based on either principle are, however, recognized as valid. Generally, a criminal engaged in exporting crime may be called to account in either the state from or to which he exports. Jurisdiction has been extended to cover participation within a state in a crime committed abroad, even though participation is, in domestic law, frequently treated as a separate crime. Jurisdiction has even been asserted with respect



to an unsuccessful attempt outside a state to commit a crime within that state.<sup>20</sup>

The effort of states to extend the application of their laws to situations in which the territorial link is so tenuous suggests a need to protect the state and its citizens, regardless of where the acts prejudicing their interests take place. The motivation is sufficiently compelling to lead states to assert jurisdiction which is explicitly extraterritorial. The contrary effort to enshrine the territorial principle as the exclusive basis of jurisdiction never prevailed.<sup>21</sup>

Under the traditional analysis, assertions of extraterritorial jurisdiction are rationalized under the headings of the nationality, protective, passive personality and universality principles—to list them in the declining order of their acceptability. Such an analysis of problems of extraterritorial jurisdiction in terms of these principles can be most misleading for it suggests that the only relevant inquiry is whether there is a discernible link to the state asserting jurisdiction. An inquiry so limited fails to take into account that a balancing of the interests of states, not the interest of a single state, should determine the propriety of an assertion of jurisdiction. This type of analysis also fails to place proper emphasis on the self-restraint which states in fact exercise in asserting extraterritorial jurisdiction.<sup>22</sup>

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<sup>20</sup> Articles 17 and 18, Restatement, *Foreign Relations Law*, pp. 49, 52. Restatement (Second), *Conflict of Laws*, sec. 43 f, comment h (Tent. Draft No. 3, 1956); Harvard Research, *Crime, supra*, note 2, at 480–508. 29 A.J.I.L., Supp., pt. II, 480–508; Trautman, *op. cit. supra*, note 5, at 315–321; Katzenbach, *op. cit. supra*, note 11, at 1142.

<sup>21</sup> 1 Hyde, *International Law* 726 (2d ed. 1947); 2 Moore, *International Law* 225 (1906).

The prevailing view was stated in the *Lotus* case, *supra*, note 3, at 20: “Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offenses committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.”

<sup>22</sup> Mr. Justice Jackson, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), involving the reach of the Jones Act, put the point admirably, saying, at 581 *et seq.*:

“[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact

The link between a state and an isolated occurrence may be so insubstantial as in itself to raise a due process or denial of justice question. The link may, however, be inherently adequate and the assertion of jurisdiction nevertheless objectionable because of the conflicting interests of other states. A major consideration is whether the conduct is offensive to the law of all the states involved, or is permitted, protected, or even compelled by the law of the state in which the act or acts occurred or of which the accused is a national, or the like. It is one thing for Belgium to acquiesce in the United States' trying an American sailor for murder committed on an American ship at anchor in a port on the Congo River 250 miles from the sea,<sup>23</sup> and another for England to acquiesce when an American court orders a British corporation to reconvey patents to an American corporation in contradiction of a contractual obligation to a second British corporation.<sup>24</sup> It is one thing for Brazil to acquiesce in the United States' trying an American for defrauding a United States

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to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts \* \* \* have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

"International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. \* \* \* [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

<sup>23</sup> *United States v. Flores*, 289 U.S. 137 (1933).

<sup>24</sup> *United States v. Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951); 105 F. Supp. 215 (S.D.N.Y. 1952); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1952], 2 All E.R. 780; *British Nylon Spinners v. I.C.I. Ltd.* [1954], 3 All E.R. 88.



Government corporation in Brazil,<sup>25</sup> another for, say, England to acquiesce in prosecution by some dictator of a British publisher for criticizing the dictator in a British newspaper. A valid generalization may be made that, for the reasons already suggested, the state in which the activity occurs has the primary interest, but at best it is only a generalization. Unhappily it is in precisely those instances in which their policies diverge the most that one state is most likely to seek to extend the application of its law and another state to resist that extension. Efforts of the United States to extend the reach of the Volstead Act<sup>26</sup> are illustrative. A nice question, more of policy than law, is raised, how far a state should seek to implement its own policies by extending the reach of its criminal law against the vigorous opposition of a state with contrary views. Fairness, in terms of notice, should be a factor. Here again, a generalization may be made that the fairness of an assertion of extraterritorial jurisdiction varies, depending on whether the conduct is or is not commonly regarded as criminal. Perhaps another generalization can be made that trial at the place where the acts occurred is more feasible, and hence likely to be fairer, than trial elsewhere.

The right to assert extraterritorial jurisdiction over nationals for their acts abroad is often broadly affirmed,<sup>27</sup> but is used only

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<sup>25</sup> "Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance." *United States v. Bowman*, 260 U.S. 94, 102 (1922).

<sup>26</sup> *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923).

<sup>27</sup> Article 30, Restatement, *Foreign Relations Law*, p. 87. Restatement (Second), *Conflict of Laws*, sec. 43 f(1)(c). (Tent. Draft No. 3, 1956); Harvard Research, *Crime*, *supra*, note 2, at 519.

Mr. Justice Holmes, in *American Banana Co. v. United Fruit Company*, 213 U.S. 347 (1909), indicated at least antipathy towards the exercise of jurisdiction based on nationality, but the issue was the interpretation of a statute rather than the reach of Congressional power, and the case was further complicated because the action complained of was that of the Costa Rican government. After noting that governments, including the British and American, had exercised jurisdiction so based, Mr. Justice Holmes said at p. 346: "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. \* \* \* For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign,



sparingly, particularly by those states in the common law tradition.<sup>28</sup> It can be rationalized as derived from allegiance, as a kind of *quid pro quo* for the protection accorded citizens and activities abroad. The rationalization is more convincing where the offense is against the state itself, e.g., treason, than where it is against an individual, e.g., murder of robbery.<sup>29</sup> Cases of the latter type in which jurisdiction is asserted when nationality is the only link are relatively rare. Usually, there is a discernible impact on or activity in the state's territory, or the requirement may be imposed that the offense be against a fellow national. Moreover, a willingness to defer to foreign law is frequently manifested, either by a requirement that the offense be punishable also by the *lex loci delicti*, or by recognizing the primary right of the territorial state to prosecute.<sup>30</sup> The nationality principle may, on the other hand, because of its respectability, be invoked in situations in which it is not strictly applicable, as in the case of seamen not nationals of the flag state or alien members of an armed force abroad. One can, of course, speak of assimilated nationality, in terms of temporary allegiance and a correlative claim to the state's protection abroad. The real justification and motivation is,

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contrary to the comity of nations, which the other state concerned justly might resent." See *Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280 (1952).

Any doubt as to the American position with respect to the nationality principle was long since resolved. See *United States v. Bowman*, 260 U.S. 94 (1922); *Blackmer v. United States*, 284 U.S. 421 (1932); *Skiriotes v. Florida*, 313 U.S. 69 (1941).

<sup>28</sup> Delaume, "Jurisdiction over Crimes Committed Abroad: French and American Law," 21 *Geo. Wash. L. Rev.* 173 (1952).

<sup>29</sup> See the court's discussion in *United States v. Bowman*, 260 U.S. 94, 98 (1922), *et seq.*, stating that statutes relating to crimes against private individuals or their property are to be interpreted as not extending to "those committed outside of the strict territorial jurisdiction" unless Congress has expressly said so, but "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents," and distinguishing *American Banana Co. v. United Fruit Co.*, *supra*, note 28, as relating to "acts done by citizens of the United States against other such citizens in a foreign country." See also Trautman, *op. cit. supra*, note 4, at 312 and 324-326.

<sup>30</sup> See generally on the nationality principle and the limitations generally recognized in the laws of the several states, Harvard Research, *Crime*, *supra*, note 2, at 523-535; Trautman, *op. cit. supra*, note 5, at 327 *et seq.*

however, surely protection of those primary interests of a state; the operation of its merchant marine and its national security. If, as is normally the case, the seamen or members of the armed forces are nationals, this may be an added factor, but its real significance is likely to be in minimizing the conflicting interests of another state.

The traditional analysis recognizes the competence of states explicitly to utilize the protective principle to reach the activities of aliens abroad when the security, territorial integrity, or independence of the state is threatened.<sup>31</sup> The argument for the assertion of jurisdiction is essentially two-fold: (1) offenses of

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<sup>31</sup> The arguments for and against the exercise of jurisdiction on the protective principle are set forth in Brierly's Report on "Criminal Competence of States in Respect of Offences Committed Outside their Territory," Committee of Experts for the Progressive Codification of International Law, and in DeVisscher's observations on the Report, Publications of the League of Nations, 1926, V. 7, p. 2, 20 A.J.I.L. (Spec. Supp.) 252, at 255 (1926), and in the Comments to Articles 7 and 8 of the "Draft Convention on Jurisdiction with Respect to Crime," Harvard Research, *Crime, supra*, note 2, at 543-563. See also Article 33, Restatement, *Foreign Relations Law*, p. 94.

Both the Draft Convention and the Restatement, *Foreign Relations Law*, Article 33, distinguish between the crimes of counterfeiting or falsification of the seals, currency, etc., and other crimes against the security, etc., of the state. Both recognize the propriety of the exercise of jurisdiction in the first class of offences (Article 8 of the Draft Convention and Article 33 of the Restatement), the Restatement noting that the United States has no laws relating to such crimes committed outside its territory, other than 34 Stat. 100 (1906), 22 U.S.C. Sec. 1203 (1952), making it a crime to commit perjury before consular and diplomatic officials of the United States. Exchange controls have created an offense comparable to counterfeiting, with respect to which a state may seek to exercise jurisdiction on the protective principle. See *Public Prosecutor V. L.*, Supreme Court, Holland, Nov. 13, 1951, [1951] Int'l. L. Rep. 206 (No. 48).

The Draft Convention recognizes a qualified jurisdiction in the second class of cases also, providing in Article 7: "A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed." The Restatement is more guarded in that it both limits the jurisdiction to "conduct outside its territory that threatens its security as a State," and attaches a proviso that "the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." See also Comment d to Article 33.



this nature threaten the vital interests of the state; and (2) the state in which they occur is likely to be indifferent regarding them even if they are criminal under its law.<sup>32</sup> Reliance on the principle in all except the narrow range of offenses indicated is, however, vigorously—perhaps too vigorously—resisted. It is suggested that the difficulty is not with the basic idea, which may indeed be the fundamental justification for any claim of jurisdiction. The difficulty is rather that a state may assert jurisdiction in reliance on the principle in circumstances in which the territorial state or a third state either believes it has a superior claim to assert jurisdiction or, of more importance, permits, protects, or even compels the acts of the accused. The basic difference between counterfeiting a state's currency abroad and broadcasting attacks on its government from a foreign radio station is not in the threat to the state attacked. The threat may be of equal magnitude, and even of like kind, since counterfeiting can be utilized for political ends as well as private gain. The essential difference lies rather in the protection which countries such as our own properly accord to the right of free speech.

Much the same may be said of assertions of jurisdiction on the passive personality principle,<sup>33</sup> predicated on the nationality of

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<sup>32</sup> In *Rex v. Holm* and *Rex v. Pienaar*, Appellate Division, Union of South Africa, [1947] Ann. Dig. 91, 92, (No. 33) involving treason by nationals committed abroad, the court observed: "[S]o far as high treason committed by a subject is concerned, there exists no international custom or comity which debars a state from trying and punishing the offender no matter where the offence has been committed. The reason for this is clear: it is because high treason, committed outside the territory of the state concerned, is an offence only against such state. No other state is interested in punishing the offender, and the punishment of the offender by the state concerned does not encroach upon the rights of other states."

The Court of Cassation of France held, in *Re van den Plas* [1955] Int'l. L. Rep. 205, that a Belgian national could be prosecuted in France for treasonable activities against Belgium committed in Belgium, under decrees which applied the French criminal law governing crimes against the security of the state to similar crimes against any state allied with France.

<sup>33</sup> The argument for the passive personality principle may be stated simply: A state cannot be expected to tolerate the presence in its territory, unpunished, of an alien who, while abroad, committed an offense against one of its nationals which, if committed in its territory, would have been punishable under its law. The opposing argument was stated by Judge Moore in the dissenting opinion in the *Lotus* case, *supra*, note 3, at 92, 93:

"It is evident that this claim is at variance not only with the principle



the victim, and the universality principle,<sup>34</sup> predicating jurisdiction simply on custody of the accused. If the assertion of jurisdiction on either of these grounds is objectionable, it is not because the state can have no discernible interest, though that interest is

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of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.

“No one disputes the right of a State to subject its citizens abroad to the operation of its own penal laws \* \* \*. But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject.”

The issue was raised in the well-known *Cutting Incident*, and Moore's Report, [1887] *Foreign Relations*, U.S. 751, is a brief in opposition to the assertion of jurisdiction by Mexico on this basis in that case. The issue was raised again but not decided in the *Lotus* case; Moore's dissent reflects his adherence to the views he had expressed forty years earlier. The widespread criticism of the decision in the *Lotus* case culminated in its being superseded in Article 11 of the Convention on the High Seas, 13 UST 2312, TIAS 5200.

Both the Harvard Research, *Crime, supra*, note 2, at 579 and Article 30(2) of the Restatement, *Foreign Relations Law*, p. 87, reject the passive personality principle. Cf. *In re Gonzalez* (Mexico, Sup. Ct.), [1931-1932] Ann. Dig. 151 (No. 79). The decision in *The Attorney General of the Government of Israel v. Eichmann*, 56 A.J.I.L. 805 (1962), and the comment that case provokes may well result in a change in attitudes toward the assertion of jurisdiction on the passive personality and universality principles.

<sup>34</sup> Moore reserved his bitterest contempt for the assertion of jurisdiction on this basis: “It is unnecessary to discuss this theory specifically, because \* \* \* it is so rhapsodical and cosmopolitan in its character, and, while intended to be benevolent, is so impractical and intrusive, that it has never assumed a legislative guise.” Moore's Report, [1887] *Foreign Relations*, U.S. 751.

It has been observed, however, that “One could, however, reasonably maintain that there is a common interest in punishing ‘crime,’ irrespective of where it takes place, at least to the extent that there is agreement on what acts are ‘criminal,’ what is reasonable punishment and what constitutes fair procedure. The policy that crimes committed in one state are of no concern to others is a short-sighted and self-defeating one that, absent treaty, results only in harboring and protecting criminals.” Katzenbach, *op. cit. supra*, note 11, at 1143.

likely to be less than overwhelming. After all, there is no bright line between these principles and the objective territorial principle, since impact is necessarily a vague concept and objection must come primarily from other factors. Conspicuous among these is not only whether the states involved take the same or different attitudes towards the accused's activities but also considerations of feasibility and fairness, which are always very much at the fore whenever extraterritorial jurisdiction is in issue.<sup>35</sup>

The greater the depth of inquiry into the problems of jurisdiction, the greater the appreciation of its many possible facets. A situation is rarely encountered which presents one facet in isolation. A cumulation of factors on one side must be balanced with those on the other. The only logical conclusion seems to be reached by the Restatement (Second), *Conflict of Laws* (Sec. 43 e), that a state has jurisdiction “\* \* \* \* [I]f its contacts with a person, thing or occurrence are sufficient to make it reasonable \* \* \*.” Certainly this is true in a problem so complex as that raised by visiting armed forces.

### EXTRATERRITORIALITY

It is implicit in all discussions of the problem of criminal jurisdiction that jurisdiction in the sense of the right to enforce or execute the law is exclusively territorial. That jurisdiction in this sense, which includes the right to arrest, charge, try and punish, is, with only the narrowest exceptions, exclusively territorial has been recognized in a wide range of situations.<sup>36</sup> This

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<sup>35</sup> “To the extent that the conduct itself is commonly considered criminal, jurisdiction amounts to no more than broadened venue and is objectionable only in so far as it might, on particular facts, put an unfair burden on defendant in terms of securing evidence, or possibly, be a less efficient place to prosecute for the same reason.” Katzenbach, *op. cit. supra*, note 11, at 1144. See also Harvard Research, *Crime*, 29 *supra*, note 2, at 580–581, quoting the opinions of Fusinato, Mercier and Donnedieu de Vabres; Article 34, Restatement, *Foreign Relations Law*, p. 96.

<sup>36</sup> “Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.” The *Lotus* Case, *supra*, note 3, at 18, 19. “It is, of course, universally accepted that no state can perform acts of sovereignty inside the territory of another, nor



precludes seizure of a foreign merchant vessel on the high seas,<sup>37</sup> or in the territorial waters of another state,<sup>38</sup> or of a vessel of the captor's nationality in a foreign port.<sup>39</sup> The disability to exercise police power in a foreign territory<sup>40</sup> extends to transporting a prisoner through the territory of another state without its consent.<sup>41</sup> The right to exercise such jurisdiction within the

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can it send its officials on to foreign soil to arrest, try, or punish offenders there, whoever they may be or whatever they may have done." Beckett, "The Exercise of Criminal Jurisdiction Over Foreigners," 1925 *Brit. Yb. Int'l. L.* 44. See also Article 20, Restatement, *Foreign Relations Law*, p. 64.

<sup>37</sup> Chief Justice Marshall, in *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) said: "It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in which that law operates. A power to seize for the infraction of a law, is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power." See also *Church v. Hubbard* 6 U.S. (2 Cranch) 234 (1804). Cf. *Hudson and Smith v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

<sup>38</sup> *The Appollon*, 22 U.S. (9 Wheat.) 362, 371 (1824); *The Anne*, 16 U.S. (3 Wheat.) 435 (1818); Mr. Clay, Sec. of State, to Mr. Vaugh, Brit. Min., Feb. 1828, M.S., Notes For. Leg. III 430, 2 Moore, *International Law* 21 (1906). Chargé Lindsay to Secretary Colby, No. 230, Apr. 12, 1920, M.S. Department of State, file 611.44 e 244/5, 2 Hackworth, *International Law* 320 (1941).

<sup>39</sup> Mr. Buchanan, Secretary of State, to Mr. Wise, Minister to Brazil, Sept. 27, 1845, M.S. Inst. Brazil, XV, 119, 2 Moore, *International Law* 4 (1906).

<sup>40</sup> *In re Jolis*, France, Tribunal Correctionnel d'Auesnes, [1933-1934] Ann. Dig. 191 (No. 77), and authorities cited in the editorial note on 192. For cases involving actions of police of the Canal Zone in the Republic of Panama, see 2 Hackworth, *International Law*, 311 (1941). The United States expressed its regrets when a Captain Haddock arrested a deserter in Canadian territory; the Captain was dismissed and the deserter discharged. Mr. Seward, Secretary of State, to Mr. Stanton, Secretary of War, April 15, 1863, 60 *Dom Ltr* 231, 2 Moore, *International Law*, 370 (1906).

<sup>41</sup> [1877] *Foreign Relations*, U.S. 266, *et seq.*, 2 Moore, *International Law* 371 (1906). The Department of State later abandoned this supersensitive attitude and indicated that, although the United States reserved its right to object, it would ordinarily not do so. It could not, of course, undertake to prevent a prisoner from bringing *habeas corpus* and, absent a treaty or statute under which he could be held, he could obtain his liberty. Memorandum from the Department of State to the Japanese Embassy, Mar. 2, 1907, M.S. Department of State, File 4904, 2 Hackworth, *International Law* 317, 318 (1941). See also Ed. Note, Transit in Extradition Cases, 1 A.J.I.L., Part 1, 465 (1907); 4 Hackworth, *International Law* 216 (1942).

F.E. Hall, "Foreign Powers and Jurisdiction of the British Crown," 81 (1894) states that: "If a person on board a British ship commits a crime



territory of a state is in fact so jealously guarded and meticulously respected that a consul may not serve process unless the authorities of the state to which he is accredited interpose no objection.<sup>42</sup>

The principle that enforcement jurisdiction may, generally speaking, be exercised only within a state's own territory needs no elaborate justification. The effectiveness of a government would be undermined, and the security of individuals in their liberties threatened, if the law enforcement authorities of another state, deriving their powers from another source and exacting obedience to a foreign law, were free to operate at will within a state. One may regret that these considerations have been so persuasive as to lead states to deny even minimal assistance to other states in law enforcement, except within the narrow limits of the operation of extradition treaties; however, this is far from saying that it would be desirable for states to be permitted to exercise wide enforcement jurisdiction in other states. Experience suggests, rather, that where enforcement jurisdiction is so exercised, by consent, not all the problems discussed above disappear—in fact, some of them become more acute and new problems arise.

Given their traditional adherence in theory and in practice to the territorial principle, some may consider it remarkable that the Anglo-American countries should have exercised extraterritorial jurisdiction, in the full—and common—sense of the term for so long and in so extensive an area.<sup>43</sup> No logical difficulty is presented here—the extraterritorial jurisdiction was exercised by consent—but the Anglo-American position rests on policy con-

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on the high seas and is brought in custody into a foreign port, the territorial authorities will not interfere with his being kept in custody on board, nor with his being transferred to another vessel for conveyance to England." Cf. *Regina v. Lesley* [1858–1860], Bell's C. Cas. 220, 8 Cox Crim. Cas, 269 (1860), where an indictment was sustained against the master of a British ship who contracted with the Chilean government to convey to Liverpool certain Chileans who had been ordered banished, for continuing to detain the prisoners on the high seas, after leaving Chilean waters. Chile was, of course, not the flag state nor could it claim territorial jurisdiction. For a criticism of the holding, see 2 Moore, *International Law* 215 (1906). See also Restatement (Second), *Conflict of Laws*, sec. 43 f (Tent. Draft No. 3, 1956), which is expressly *contra*.

<sup>42</sup> 2 Hackworth, *International Law* 119 (1941).

<sup>43</sup> See Justice Frankfurter's review of the history of extraterritoriality in his concurring opinion in *Reid v. Covert*, 354 U.S. 58–64 (1956).

siderations as well as logic. Factually it is accurate to say that they departed from the territorial principle when circumstances so dictated.

The United States at one time exercised extraterritorial jurisdiction in a broad belt of countries stretching from Morocco to Japan. It did so for varying periods in different countries but collectively for more than a century and a half. The first treaty conceding American extraterritorial jurisdiction was that of 1787 with Morocco,<sup>44</sup> and Morocco was the last major country in which it was surrendered;<sup>45</sup> but at one time the list included Borneo, China, Japan, Korea, Madagascar, Muscat, Morocco, Persia, the Samoan Islands, Siam, Tripoli, Tunis and Turkey.<sup>46</sup>

The scope of extraterritorial jurisdiction exercised by the United States—and correlatively, the immunity enjoyed by its nationals—varied from country to country. In China, from 1844 to 1943, it was virtually complete, although for the redress of injuries suffered at the hands of a Chinese an American was dependent on local law.<sup>47</sup> The conduct of American nationals was subject to the regulation only of American law.<sup>48</sup> Since the reach

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<sup>44</sup> Hinckley, "American Consular Jurisdiction in the Orient," 18 (1906).

<sup>45</sup> On October 6, 1956. Young, "The End of American Consular Jurisdiction in Morocco," 51 A.J.I.L. 402 (1957).

<sup>46</sup> 2 Moore, *International Law* 593 (1906).

<sup>47</sup> The present comment will be limited largely to the China experience as adequate to illustrate the nature of the jurisdiction exercised and the problems to which the system gave rise.

<sup>48</sup> The Treaty of Wang-Hiya of July 3, 1844, 8 *U.S. Statutes at Large* 572, 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers 1776-1909*, 196-202 (1910), the first Chinese-American treaty conceding extraterritoriality, provided, in Article XXI, that "\* \* \* citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul, or other public functionary of the United States, thereto authorized, according to the laws of the United States." Hinckley notes that Japan took the position that it had full sovereign power to prohibit the commission of any crime; that the provisions of the Japanese treaty related only to trial and punishment—to the remedy, not the obligation. It was United States policy to require its citizens to observe the regulations laid down by the local governments relating to security, good order, health and general welfare, and to enforce them in the consular courts, but other treaty powers took the position their nationals were subject only to their country's laws, and in 1879 were "indisposed to enforce quarantine restrictions prescribed by Japan for preventing the bringing in of cholera from other countries of the Far East." But the United States cooperated.



of American criminal law is normally limited to American territory, and under the federal system criminal law is largely state law, this raised a difficult problem, never quite satisfactorily solved.<sup>49</sup> Judicial authority was exercised primarily by the American consuls,<sup>50</sup> but they were required in some instances to utilize the assistance of other citizens, and limited jurisdiction, original and appellate, was given the ministers.<sup>51</sup>

Consuls were authorized to issue warrants for the arrest of any American,<sup>52</sup> and the arrest was made by the consular marshal or, where none was available, by a special constable or marshal appointed by the consul or by the local authorities at the request of the consul. It appears that Americans could, on the other hand, be arrested by the local police only in the act of committing flagrant crime; that even then they could not be jailed by the local authorities, but had to be immediately turned over to their consul; and that the dwelling, place of business or ship of an American could be entered to search for or arrest even native offenders, only with the assent of the consul and, if he thought necessary, only in the presence of a consular officer.<sup>53</sup>

The institution of proteges was never established in China.

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Hinckley, *op. cit. supra*, note 44, at 98. The Treaty of 1858 read: “\* \* \* [C]itizens of the United States, either on shore or in any merchant vessel, who may insult, trouble or wound the persons or injure the property of Chinese, or commit any other improper act in China, shall be punished only by the Consul or other public functionary thereto authorized, according to the laws of the United States. Arrests in order to trial may be made by either the Chinese or the United States authorities.” 1 Malloy, *Treaties*, Article XI, 211, 215 (1910).

<sup>49</sup> The first statute implementing the exercise of extraterritorial jurisdiction by the United States was that of 1848, 9 Stat. 276; a more comprehensive act was passed in 1860, 12 Stat. 72. There were several amendments, and these enactments were in 1878 consolidated in the Rev. Stat. Secs. 4083-4130.

<sup>50</sup> There is reason to doubt such jurisdiction could now be constitutionally conferred on consuls, in view of the comments on *In re Ross*, 140 U.S. 453 (1891) in *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>51</sup> Rev. Stat. Secs. 4089, 4090, 4109, 4095, 4106, 4102, 4103.

<sup>52</sup> Rev. Stat. 4087.

<sup>53</sup> Hinckley, *op. cit. supra*, note 44, at 103. The scope of the right of the Chinese police to arrest Americans, and of the correlative immunity of Americans from arrest by them, is not clearly spelled out in the treaties. It appears that the relative immunity of Americans from arrest by the Chinese police was fortified and extended by custom. See 2 Moore, *International Law* 599 (1906).

Protection was, however, given and American jurisdiction asserted not only with respect to citizens of the United States by birth or naturalization and native inhabitants of its insular possessions, but also with respect to seamen on American ships, whatever their nationality. At least limited protection seems also to have been accorded employees of American citizens.<sup>54</sup>

The century of American experience of extraterritorial jurisdiction in China, although not without its defenders,<sup>55</sup> seems to be viewed by many as evidencing a dubious choice between two evils. Among the reasons which are said to have led to the insistence on extraterritorial privileges are: (1) The Chinese law of homicide was not sufficiently discriminating, and in dealing with foreigners the existing discriminations were not observed; (2) the system of punishment involved severe penalties and humiliations, without thought of reformation or deterrence except through fear and force, by such sanctions as death by slicing, decapitation and strangulation; (3) torture both of the accused and of witnesses was used, the accused being presumed guilty but no punishment being possible without a confession; (4) conditions in the prisons, used primarily for the detention of the accused and of witnesses before trial, rather than for punishment, were intolerable, and many of the imprisoned died; (5) the principle of vicarious responsibility was applied, to the family, the town or other group, in criminal cases; (6) the administration of

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<sup>54</sup> Hinckley, *op. cit. supra*, note 44, at 78, 85; 2 Moore, *International Law* 588 (1906).

<sup>55</sup> Hinckley apparently viewed it as in the nature of a missionary enterprise. His work, *op. cit. supra*, note 44, opens with the statement: "The extension of European domination throughout much of the orient has, in our own day, opened a prospect of wonderful development of eastern peoples in general civilization, in methods of government necessary for protection of life and property, and in conceptions of justice and of the utility and authority of courts of law.

"Only one oriental nation, the Japanese, is thus far admitted actually to have assimilated enough of western jurisprudence to entitle its government to exercise full responsibility for the protection of foreigners within its territory."

See also Denby, "Extraterritoriality in China," 18 A.J.I.L. 667, (1924) for a vigorous defense of the system. The author, a one-time minister to China, answers the argument sometimes made that traders in China in pre-treaty days did not demand extraterritorial privileges with the observation (p. 670) that "Foreigners sacrificed all personal considerations to secure permission to trade."



justice was in the hands of administrative officials, there being no separate judiciary, and was notoriously corrupt; and (7) there was a prejudice against foreigners.<sup>56</sup>

It is not surprising that the United States should have been reluctant to see its nationals subjected to a system of justice which had, or was said to have, these attributes. American extra-territorial jurisdiction in actual operation has, however, been criticized with perhaps equal vigor. The principal criticism was that in practice American law-breakers enjoyed immunity from punishment, at the same time that they demanded the most vigorous enforcement of Chinese law against such Chinese as offended against them. This is said to have produced great resentment among the Chinese and intensified their anti-foreign attitude.<sup>57</sup>

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<sup>56</sup> Williams, "The Protection of American Citizens in China: Extraterritoriality," 16 A.J.I.L. 43; (1922) Quigley, "Extraterritoriality in China," 20 A.J.I.L. 46 at 50 (1926). Quigley notes that on the Chinese side it was said that most foreigners did not understand Chinese legal procedure, in general the penalties imposed were no more severe than in European countries, torture was not applied to foreigners, and decisions involving foreigners were given in accordance with Chinese law.

<sup>57</sup> "The strongest plea for the abolition of extraterritoriality lies in the abuse of this privilege on the part of subjects of foreign Powers who use it as a cloak for illegal acts. The continued smuggling of opium and morphine into China is but a single example, although the most striking, of the wrong that is being done to China under the cloak of a foreign extra-territorial jurisdiction." Bishop, quoted in Quigley, *op. cit. supra*, note 56 at 59. Burlingame, Minister to China, wrote the State Department with reference to the execution of one Buckley for murder: "Such men as \* \* \* Buckley had so long escaped punishment that they had come to believe that they could take life with impunity. The United States authority was laughed at and our flag was made the cover for all the villains in China." [1864] *Foreign Relations*, U.S. Part 3, p. 400; Williams, chargé d'affaires, wrote the following year: "Cases have already occurred in China of aggravated manslaughter, and even of deliberate killing of the natives by foreigners, whose crimes have been punished by simple fines or mere deportation or short imprisonment; while foreigners strenuously insist on full justice when life is taken by the natives; or maiming with intent to kill." [1865] *Foreign Relations*, U.S. Part 2, p. 454. The Consul General at Shanghai wrote in 1871: "It would be difficult to say that the extra-territorial system is not often productive of injustice to the Chinese. \* \* \* A few years ago the Viceroy at Nanking, in presenting a case on behalf of some poor boat people, whose vessel had been sunk by a foreign steamer, declared that the frequency of such accidents had so aroused the people that he feared they would endeavor to make reprisals should the foreign courts

It has been said that partial and lax law enforcement are inherent characteristics of extraterritoriality.<sup>58</sup> Again, the assignment of judicial functions to consuls, untrained in the law, primarily concerned with protecting the interests of their nationals and occupied with other duties, has been pointed to as a fundamental weakness of the system.<sup>59</sup> The inability of the consul to

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continue to refuse redress." [1871] *Foreign Relations*, U.S. 170; Williams, *op. cit. supra*, note 56, at 49. In 1904, an unoffending Chinese of good standing was thrown into the water by a group of drunken sailors, identified as Americans, and drowned, but no one was ever brought to justice. Williams says of this case that "A great deal of intense feeling was aroused in Canton \* \* \* and the native and foreign press was very caustic in commenting on this apparent breaking down of justice. The native press in particular contrasted the indifference of the American enforcement of the law in this case with the unusual energy displayed in demanding redress for crimes committed against foreigners by Chinese. The American government finally paid an indemnity of \$1,500 to the family of the murdered man. But the feeling was only partially allayed; and in the case of the Lienchou murders a year later, when five Americans were killed, the Canton correspondent of the *North-China Herald* attributed the anti-American feeling, which was a partial cause of the crime, to the failure of justice in the case of the murder at Canton." Williams, *op. cit. supra*, note 56, at 50.

<sup>58</sup> "[T]here are strong reasons for expecting an indifferent administration of the law under a system of extraterritoriality. A crime is an offense against society which society must punish. An aroused public opinion gives vigor to the enforcement of the law, demands adequate police protection and jail facilities and upholds the hands of the judiciary. With public opinion awakened the machinery of the law will operate smoothly; but when the public slumbers an inevitable inertia results. Under a system of extraterritoriality the injured society is powerless to apply punishment to foreigners who offend against it. Foreign officials must pass judgment upon them. There is no aroused public sentiment urging the foreign government to a vigorous enforcement of its laws. An indifference results, which is only increased by the element of racial prejudice." Williams, *op. cit. supra*, note 56, at 48, 49.

The strongest of proponents of the territorial principle observed: "The privileged consular jurisdiction produces the desired effect of insuring the European against the dangers of a barbarous criminal and civil tribunal; but the advantages of an exemption from the natural system of territorial jurisdiction can only be purchased at the price of much countervailing evil. All foreign criminal jurisdiction, even that exercised by a civilized on the soil of an uncivilized nation, is a feeble and defective instrument, and the tendency of the privileged European jurisdiction in the Turkish Empire is stated, in general, to be the impunity of the European criminal." Lewis, *Foreign Jurisdiction and the Extradition of Criminals*, 16 (1859).

<sup>59</sup> "The first duty of a Consul is to protect the interests of his sovereign's subjects; it is scarcely consistent to add to that duty the task of adminis-



compel the attendance of witnesses or to punish for perjury witnesses not of American nationality, and other limitations on his authority inherent in a jurisdiction based on nationality rather than territorial sovereignty was another defect of the system.<sup>60</sup> The same limitation gave rise to inequality in the treatment accorded the nationals of the several powers exercising extra-territorial jurisdiction in China for the same acts. The small number of consuls made the prosecution of offenses committed at a distance from any consulate subject to the common shortcom-

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tering justice when a complaint is brought against that subject; and the duties of protection of a class and the administration of impartial justice between that class and others cannot but clash. Only too often is the verdict of the extraterritorial court a formula as of course, 'judgment for the defendant,' and the defendant has then every reason to be satisfied that he has an efficient consular service." Latter, quoted in Williams, *op. cit. supra*, note 56, at 53.

"[I]n addition to his commercial functions, the consul of a treaty state performs the numerous roles not only of a judge sitting over civil and criminal actions instituted against his fellow nationals, of a coroner, registrar, probate judge, and police magistrate, but also that of an advocate in the court of the native defendant on behalf of his aggrieved fellow-national. \* \* \*

"\* \* \* They are unfitted for the task [of exercising judicial functions] for three principal reasons: (1) Their first duty is to protect the interests and persons of their nationals; (2) they are generally men not trained in the law; and (3) their national bias often creeps unconsciously into their action and decisions." Mah, "Foreign Jurisdiction in China," 18 A.J.I.L. 676 (1924), at 685, 688. See also Williams, *op. cit. supra*, note 56, at 51, 52.

<sup>60</sup> "The jurisdiction of the ministers and consuls usually is limited to proceedings against persons of their own nationality. In this sense nationality operates as a limitation upon the jurisdiction; and in the same way the nationality of the plaintiff, or even of a witness, may, in certain contingencies, raise an obstacle to the effective exercise of jurisdiction." 2 Moore, *International Law*, 600 (1906).

"[T]he consular courts are empowered to take cognizance only of the acts of their own nationals. In short, their jurisdiction is personal. This defect conduces to the compromising of justice, because the court has no power to compel a witness of another nationality to testify. Nor has the court power to inflict punishment, either by fine or imprisonment, for perjury committed by a person of another nationality." Mah, *op. cit. supra*, note 59, at 688.

"The United States consul at Kanagawa [Japan] having fined for contempt a British subject who, as a witness, refused to answer certain questions, the British consul, to whom application was made for the enforcement of the penalty, refused to require either the payment of the fine or to impose the alternative of imprisonment for non-payment \* \* \*." 2 Moore, *International Law*, 604 (1906).

ings of trials remote from the place where the crime was committed.<sup>61</sup> The lack of prison facilities on occasion led to the freeing of convicted criminals.<sup>62</sup>

The foregoing review of our experience of exercising extra-territorial jurisdiction in China is not intended to suggest that the exercise of court-martial jurisdiction over our troops abroad is subject to the same criticisms. It does, however, warn that there are inherent difficulties in any exercise of extraterritorial jurisdiction which can, at best, only be minimized.

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<sup>61</sup> Minister Reed is quoted as saying: "The foreigner who commits a rape or murder a thousand miles from the seaboard is to be gently restrained, and remitted to a Consul for trial, necessarily at a remote point, where testimony could hardly be obtained or ruled on." Williams, *op. cit. supra*, note 56, at 53, quotes from a pamphlet of the Chinese National Welfare Society in America, "The Shantung Question, A Statement of China's Claims, etc.," (1919), p. 164:

"But if the latter [the consul] is stationed, as he generally is, at a great distance from the scene of the crime, the accused is practically assured of his liberty because the personal appearance at court of native witnesses is made most difficult, if not impossible, owing to the poor communications, and the time and expense required to make the trip. Insufficiency of evidence has too frequently resulted in the denial of justice."

<sup>62</sup> Minister Reed, referring to the situation after fourteen years of the exercise of extraterritorial jurisdiction in China, said: "We extort from China 'ex-territoriality', the amenability of guilty Americans to our law, and then we deny to our judicial officers the means of punishing them. There are consular courts in China to try American thieves and burglars and murderers, but there is not a single jail where the thief or burglar may be confined. \* \* \* I consider the exaction of 'ex-territoriality' from the Chinese, so long as the United States refuse or neglect to provide the means of punishment, an opprobrium of the worst kind. It is as bad as the coolie or the opium trade." Sen. Doc. 30, 36th Cong., 1st Sess., p. 355, Williams, *op. cit. supra*, note 56, at 49.