PART II

JURISDICTION WITH RESPECT TO CRIME

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DRAFT CONVENTION ON JURISDICTION WITH RESPECT TO CRIME

ARTICLE 1. USE OF TERMS

As the terms are used in this Convention:

(a) A "State" is a member of the community of nations.

(b) A State's "jurisdiction" is its competence under international law to prosecute and punish for crime.

(c) A "crime" is an act or omission which is made an offence by the law of the State assuming jurisdiction.

(d) A State's "territory" comprises its land and territorial waters and the air above its land and territorial waters.

(e) A "national" of a State is a natural person upon whom that State has conferred its nationality, or a juristic person upon whom that State has conferred its national character, in conformity with international law.

(f) An "alien" is a person who is not a national of the State assuming jurisdiction.

ARTICLE 2. SCOPE OF CONVENTION

A State's jurisdiction with respect to crime is defined and limited by this Convention; but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements.

ARTICLE 3. TERRITORIAL JURISDICTION

A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends to

(a) Any participation outside its territory in a crime committed in whole or in part within its territory; and

(b) Any attempt outside its territory to commit a crime in whole or in part within its territory.

ARTICLE 4. SHIPS AND AIRCRAFT

A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character.

This jurisdiction extends to

(a) Any participation outside its territory in a crime committed in whole or in part upon its public or private ship or aircraft; and

(b) Any attempt outside its territory to commit a crime in whole or in part upon its public or private ship or aircraft.

ARTICLE 5. JURISDICTION OVER NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or

(b) By a corporation or other juristic person which had the national character of that State when the crime was committed.

ARTICLE 6. PERSONS ASSIMILATED TO NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By an alien in connection with the discharge of a public function which he was engaged to perform for that State; or

(b) By an alien while engaged as one of the personnel of a ship or aircraft having the national character of that State.

ARTICLE 7. PROTECTION—SECURITY OF THE STATE

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.

ARTICLE 8. PROTECTION—COUNTERFEITING

A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority.

ARTICLE 9. UNIVERSALITY—PIRACY

A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.

ARTICLE 10. UNIVERSALITY—OTHER CRIMES

A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6, 7, 8 and 9, as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed,

if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

ARTICLE 11. IMMUNITIES

In exercising jurisdiction under this Convention, a State shall respect such immunities as are accorded by international law or international convention to other States or to institutions created by international convention.

ARTICLE 12. ALIENS—PROSECUTION AND PUNISHMENT

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination.

ARTICLE 13. ALIENS—NON BIS IN IDEM

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.

ARTICLE 14. ALIENS—ACTS REQUIRED BY LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission.

ARTICLE 15. ALIENS—ASSISTING ADMINISTRATION OF JUSTICE

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien during his presence within its territory or a place subject to its authority at the request of officials of that State for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice, except for crimes committed while present for such purpose.

ARTICLE 16. APPREHENSION IN VIOLATION OF INTERNATIONAL LAW

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.

ARTICLE 17. INTERPRETATION OF CONVENTION

The provisions of the present Convention shall in no case be interpreted

(a) To impose upon a State an obligation to exercise the jurisdiction which it is entitled to exercise under this Convention;

(b) To invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds;

(c) To foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention.

ARTICLE 18. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

JURISDICTION WITH RESPECT TO CRIME

INTRODUCTORY COMMENT

From its beginning, the international community of States has had to deal in a pragmatic way with more or less troublesome problems of penal jurisdiction. In exercising such jurisdiction, each in its own way and in accordance with such principles as national experience had developed, States became increasingly aware of the overlappings and the gaps which produced conflicts and required coöperation. The solution of problems of penal jurisdiction became primarily a matter of the avoiding or resolving of conflicts. The trend toward coöperation found expression in treaties of extradition and judicial assistance.

In the 19th century, with the increasing facility of travel, transport and communication, and with the crystallization in national codes of the several principles upon which States had become accustomed to proceed in dealing with crime, the problems of conflict between the different national systems became progressively more acute. There appeared, in consequence, an extensive literature on international aspects of the law and practice governing penal jurisdiction. John Bassett Moore's *Report on Extraterritorial Crime and the Cutting Case* (1887) was the outgrowth of an historic international controversy. More recently, in the monumental work of Maurice Travers, *Le Droit Pénal International* (1920–1922), in five volumes, there was attempted a comprehensive and scientific treatise on the whole subject. The works of Moore and Travers are among the more notable of a long list of contributions which has included every type of study, ranging from highly specialized monographs on topics of limited scope to treatises emphasizing the historical, analytical or functional aspects of the problems presented. During the same period, a significant coöperative effort found expression in the international agreements incorporated in the Treaty of Lima of 1878, the Treaty of Montevideo of 1889, and the Convention of Habana, the so-called Bustamante Code, of 1928; and the subject was studied and important resolutions adopted by the Institute of International Law in 1883 and 1931, by the International Prison Congress at Brussels in 1900, by the Conference of Warsaw for the Unification of Penal Law in 1927, by the International Congress of Comparative Law at The Hague in 1932, and by the International Congress of Penal Law at Palermo in 1933. In short, the record of the last two generations reveals an increasing awareness of the importance of problems of penal jurisdiction for the international society of States, a growing tendency to attack those problems through coöperative effort, and a well-defined trend toward that maturity of development which marks a subject as "ripe" for codification.

The contemporary importance of problems of penal jurisdiction is suggested by the development of the literature and by the progress of coöperative effort which has been noted above. It has been indicated in a dramatic way by the famous Cutting incident, between Mexico and the United States, and by the case of the *S.S. Lotus*, submitted by France and Turkey to the Permanent Court of International Justice. It is demonstrated most conclusively, however, by the experience of national administrations in dealing with an infinite variety of workaday matters of international import. Such experience, unfortunately, has been imperfectly recorded and insufficiently studied. Were more adequate records available, their content would probably reveal that there are few subjects of international concern with respect to which a common understanding would do more to mitigate normal friction at the international frontiers which delimit authority in the administration of national law. Whether the subject is yet "ripe" for codification may be debatable; but the desirability of a common understanding formulated in a convention or code will hardly be controverted.

The materials for a codification of this subject have, as a body, certain characteristics which should be noted. In the first place, there is a striking paucity of outstanding international precedents, the Cutting incident and the case of the *S.S. Lotus* standing almost alone as the *causes célèbres* of recent times. The practice of nations has been recorded, rather, in hundreds of national adjudications, in petty incidents, and in informal settlements of a more prosaic type. In the second place, of international legislation in the form of general treaties there are a few notable examples; but the aggregate is extremely meager in relation to the scope and importance of the general subject. In the third place, the resolutions of such private international organizations as the Institute of International Law and of such conferences as those held at Brussels, Warsaw, or The Hague, constitute a notable contribution, on the whole more important than similar contributions to the materials of codification available for most comparable subjects. In the fourth place, the literature is extensive, of high quality, and of exceptional significance for the work of codification. The combination of expert knowledge of national penal law, comparative law and international law which is revealed in the works of many of the reliable writers is impressive indeed. Finally, the materials which are clearly of the greatest significance for the work of codification are found in the national legislation on penal law and penal procedure and in the adjudications of national courts. If it is true, as a recent writer has suggested, that "international law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others" (Dunn, *The Protection of Nationals*, p. 21), it follows certainly that an adequate statement of the international law of penal jurisdiction must rest primarily upon a foundation built of materials from the cases, codes and statutes of national law. The best evidence of international law, in brief, is probably to be found in "the general principles

of law recognized by civilized nations"; and the work of codification becomes, in one aspect at least, a search for the greatest common denominator of national law and practice with respect to a matter of international concern.

An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

The plan of the present Convention has been determined primarily by the recognition which must be accorded to the general principles enumerated above. Following Article 1 on the use of terms and Article 2 on the scope of the Convention, Article 3 states the territorial principle in its broadest acceptable terms. Article 4 formulates a similar principle for offences committed on public or private ships or aircraft. Article 5 states the nationality principle in its broadest acceptable terms; and Article 6 formulates a similar principle for offences committed by persons who may be assimilated to nationals for certain purposes or at certain times. The protective principle is incorporated in Article 7 for offences against the security of the state and in Article 8 for offences of counterfeiting. Article 9 states the principle of universality for the offence of piracy; and Article 10 formulates the same principle, in carefully guarded terms, for other crimes. Article 11 incorporates by reference such immunities from the exercise of penal juris-

diction as are accorded by international law or international convention. Articles 12, 13, 14, and 15 incorporate essential safeguards with respect to the prosecution and punishment of aliens. Article 16 forbids the prosecution or punishment of any person of whom custody has been obtained in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated. Article 17 formulates certain general principles of interpretation; and Article 18 provides for the settlement of disputes with respect to the interpretation or application of the Convention.

It is to be emphasized that the Convention deals only with penal jurisdiction and with particular offences only as they provide a special basis for jurisdiction. It does not deal with substantive penal law. Except where certain procedural safeguards have been incorporated to circumscribe the exercise of penal jurisdiction over aliens, it does not deal with penal procedure. It is not a convention for coöperation in the suppression of crime, provision for such coöperation being left to the special conventions which are now in force or which may be concluded in the future. It is a Convention defining and limiting the penal jurisdiction of States in the broadest sense. It recognizes that States may exercise, if they choose, all the penal jurisdiction which its provisions approve; and it excludes the exercise of any penal jurisdiction which might conceivably be asserted outside the limits defined.

While the Convention thus provides each State with a definition of the limits beyond which other States may not go in assuming penal jurisdiction, it is to be emphasized further that it imposes no obligation whatever upon any State to exercise all or any part of the jurisdiction defined. States may be under an obligation to exercise penal jurisdiction in certain cases by virtue of principles of customary international law or international agreement other than those incorporated in this Convention; but the Convention imposes no such obligation. Relatively few States now exercise all of the penal jurisdiction which the Convention would permit. Certain States may be organized under constitutional limitations which would prevent them from exercising to the fullest extent permissible some of the jurisdiction which the Convention approves. The position of such States, or of others whose national policy does not require exercise to the fullest extent permissible, is in no way affected by the Convention.

The Convention is in one sense an epitome of the results of an investigation which has ranged over a wide field and which is reported at some length in the appended comment. The investigation indicates that States have much more in common with respect to penal jurisdiction than is generally appreciated, that the gulf between those States which stress traditionally the territorial principle and the States which make an extensive use of other principles is by no means so wide as has been generally assumed, that there are practicable bases of compromise, without sacrifice of any essential state interest, on most if not all of the controverted questions, and

that it is feasible to attempt a definition of penal jurisdiction in a carefully integrated instrument which combines recognition of the jurisdiction asserted by most States in their national legislation and jurisprudence with such limitations and safeguards as may be calculated to make broad definitions of competence acceptable to all. The Convention is submitted as a statement of the penal jurisdiction of States which should have the advantage, for every State, of substituting for the petty conflicts and uncertainties that have caused irritation in the past the security that comes from a common understanding of general principles.

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ARTICLE 1. USE OF TERMS

[As the term is used in this Convention:]

(a) A "State" is a member of the community of nations.

COMMENT

The term "State" is used in this Convention in a sense substantially similar to the sense in which it is used in the Draft Convention on Competence of Courts in Regard to Foreign States, Art. 1 (a). Research in International Law (1932), p. 475. The present Convention is concerned only with those entities which, by virtue of their nature and organization, are capable of and do in fact enjoy membership in the community of nations, and which, by virtue of such membership, are able to exercise the competence to prosecute and punish for crime which international law accords to members of the international community.

The additional requirement of maintenance of diplomatic relations with other members of the community of nations, included for obvious reasons in the Draft Convention on Diplomatic Privileges and Immunities, Art. 1 (a), Research in International Law (1932), p. 42, would appear to be unnecessary in the present Convention. Indeed, where it can be demonstrated that a "State" claiming jurisdiction is a member of the community of nations, although it does not maintain diplomatic relations with other members of the community (*e.g.*, India), there is no reason why it should not be within the scope of the present Convention.

Thus, as used in this Convention, the term "State" is not confined to communities which are completely independent in the constitutional sense. Member States of the German Reich, certainly prior to 1919, and the British Dominions and India since 1919, may be considered as members of the community of nations, and hence as "States" within the meaning of this Convention, notwithstanding possible doubts as to their status in the constitutional sense. Whenever such member States or Dominions, parties to the present Convention, act in an international capacity in a matter within the scope of this Convention, their action is governed by the principles set forth in this Convention.

On the other hand, this Convention is not concerned with political subdivisions as such. Where a State permits its international competence to be exercised in part through its political subdivisions, as in the United States of America, the activity of the subdivisions is regarded as State activity and this Convention deals with it only as State activity.

In case of political subdivisions which are also members of the community of nations, it is conceivable that the respective competences of the composite member and its subdivisions, or the respective competences of subdivisions

inter se, may be governed in part by international law. Usually, however, there is a constitutional authority, such as the Judicial Committee of the Privy Council for the British Commonwealth of Nations, which resolves such questions according to principles of internal or constitutional law. The principles of internal or constitutional law may be inspired by and practically identical with relevant principles of international law and consequently may afford the most significant of analogies; but it is to be emphasized that references to such principles are by way of analogy only and that the present Convention is not applicable *ex proprio vigore*.

In case of political subdivisions which are not members of the community of nations, such as the states of the United States of America, the respective competences of the State and its subdivisions, or of the subdivisions *inter se*, are governed solely by internal or constitutional law and the present Convention is inapplicable. Nevertheless the internal or constitutional law governing penal competence may be, and sometimes is, so similar to international law as to provide analogies of exceptional significance and utility. The interstate cases arising among states of the United States of America contribute much material which may be used in this way; and consequently they have been cited freely throughout the comment on the present Convention. The use of such materials makes it all the more essential to emphasize that the present Convention is concerned only with the competence of States which are members of the community of nations. It is not concerned with the internal organization of the State or with the distribution within the State of the competence defined.

[As the term is used in this Convention:]

(b) A State's "jurisdiction" is its competence under international law to prosecute and punish for crime.

COMMENT

The term "jurisdiction" is here used to describe the competence of the State. It is used in no other sense. The Convention is concerned only with the international capacity of States and consequently the term "jurisdiction" is never used to describe the competence of courts or other governmental agencies within States. *Cf.* Foster, "Jurisdiction," *Encyclopedia of the Social Sciences*, VIII, 471; van Praag, *Juridiction et Droit International Public* (1915), p. 49. The jurisdiction to prosecute and punish for crime is thus the international capacity of the State to act for a particular purpose. The term is used, in describing the international capacity to prosecute and punish for crime generally, substantially as it is used in the Draft Convention on Piracy, Art. 1 (1), Research in International Law (1932), p. 767, in defining a similar capacity with respect to a particular crime.

The international competence of the State may be regarded, from one point of view, as something with which international law invests States, or

from another point of view, as the result of an absence of legal restrictions upon State activity. The opinion of the Permanent Court of International Justice in the case of the *S.S. Lotus* takes note of these two points of view as follows:

> The French Government contends that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favor of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction wherever such jurisdiction does not come into conflict with a principle of international law. (*Publications of the Permanent Court of International Justice*, Series A, Judgment No. 9, p. 18.)

According to the French view in the *S.S. Lotus*, international law attributes competences to the several States and a State has only that competence with which it is invested by international law. See Rousseau, "*L'aménagement des compétences en droit international*," 37 *Rev. Gén. de Dr. Int. Pub.* (1930), 420. According to the Turkish view in the *S.S. Lotus*, on the other hand, it follows from the very nature of sovereignty that a State must be considered competent unless it can be shown that it is expressly restricted by a rule of international law. The Permanent Court of International Justice appears to have resolved the point, in the case presented, in favor of the Turkish view. On this question the opinion concludes:

> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 19.)

The two points of view presented in the case of the *S.S. Lotus* may be regarded as essentially nothing more than two avenues of approach to a single principle, significant only as the choice between them may determine which contestant should take the initiative in proving the law in the case before the court. One avenue of approach emphasizes the idea of capacity to act in the exercise of competence, the other the idea of limitations upon capacity. Both ideas are implicit in the concept of competence and in the term which is used in this Convention to describe it. It has seemed appropriate, therefore, without further refinement, to use the term "jurisdiction" to denote the competence of States which it is the object of this Convention to determine.

The competence to be determined is the competence "to prosecute and punish for crime." "Prosecute," it should be understood, includes all the stages in a penal proceeding, from preliminary investigation, through trial, to final adjudication on appeal in the tribunal of last resort. "Punish" includes both the execution of sentence and the remission of penalty. The concept of punishment does not include those forms of coercion, such as punitive damages or imprisonment for debt, which are provided primarily to

facilitate civil reparation to injured individuals. On the other hand, the concept does include more than coercion in the form of penalties, such as fines or imprisonment. Punishment may include coercion in the form of preventive, correctional or therapeutic measures. Indeed, in modern penal legislation it is coming increasingly to include such measures.

[As the term is used in this Convention:]

(c) A "crime" is an act or omission which is made an offence by the law of the State assuming jurisdiction.

COMMENT

As already noted in the comment on par. (a) and par. (b) of this article, the term "State" is used throughout the present Convention and comment to designate the subject which has an international penal competence and the term "jurisdiction" to describe that penal competence. The term "crime" is used throughout to designate the object of the competence.

In the first place, since international penal competence is not concerned with the distinctions between major and minor offences which are made in various systems of national law, it is important that the term "crime" be used in a sense broad enough to include every offence (*infraction*) which is a proper object of international penal competence. It should include both the "felony" and "misdemeanor" of Anglo-American jurisprudence. In French legislation, *infraction* includes *contravention*, *délit*, and *crime*. France, Penal Code (1810), Art. 1. Corresponding terms in German legal terminology are *Übertretung*, *Vergehen*, and *Verbrechen*. See Austria, Penal Code (1852), Art. 1; Germany, Penal Code (1871), Art. 1. A "crime" is "an act or omission which is made an offence." See the opinion in *Moore* v. *People of the State of Illinois* (1852), 14 How. (U. S.) 13. On the other hand, it is to be emphasized that the term includes only those acts or omissions which are denounced as offences, *i.e.*, as acts or omissions inimical to the public interest. It never includes mere civil wrongs which may be expiated by restitution or reparation to the injured individual. In short, it describes the object of a competence whose scope may be as exactly defined, in this respect, as the distinction between criminal and civil wrongs permits.

In the second place, as the term is used in this Convention, no act or omission can be a "crime" unless it is "made an offence by the law of the State assuming jurisdiction." This limitation is of fundamental importance. On the one hand, it expressly excludes vicarious enforcement by one State of the penal laws of another. A State may claim jurisdiction only with respect to an act or omission which is made an offence by its own law. On the other hand, it excludes likewise the vicarious enforcement by a State of an international penal law. The concept of an act or omission which is denounced as a crime by international law only is outside the scope of the present Convention.

The concept of an international penal law, under which States as well as individuals might be punishable, has been the subject in recent years of a noteworthy literature. See H. H. L. Bellot, "Draft Statute for the Permanent International Criminal Court," 33 *International Law Association, Report of Conference* (1924), p. 75; Brierly, "Do We Need an International Criminal Court?", *Brit. Yearbook Int. Law* (1927), p. 81; Caloyanni, "The Permanent International Court of Criminal Justice," 2 *Rev. Int. de Dr. Pén.* (1925), p. 326; 3 *ibid.* (1926), p. 492; 5 *ibid.* (1928), p. 261; Caloyanni, "An International Criminal Court," 14 *Transactions of the Grotius Society* (1928), p. 69; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 403–441; Efremoff, "*L'evolution de l'idée de la criminalité internationale*," 9 *Rev. de Dr. Int.* (1932), p. 226; Lévitt, "A Proposed Code of International Criminal Law," 6 *Rev. Int. de Dr. Pén.* (1929), p. 19; Pella, *La Criminalité Collective des Etats* (1925); Politis, *Les Nouvelles Tendances du Droit International* (1927), *passim;* Rappaport, "The Problem of the Inter-State Penal Law," 18 *Transactions of the Grotius Society* (1932), p. 41; Sagone, *Il Delitto Internazionale* (1927); Saldaña, "*La Justice Pénale Internationale*," *Académie de Dr. Int., Recueil des Cours* (1925), III, pp. 227–425; H. von Weber, *Internationale Strafgerichtsbarkeit* (1934); Williams, *Chapters on Current International Law and the League of Nations* (1929), ch. 10; Premier Congrès International de Droit Pénal (Brussels, 1926), *Actes du Congrès*, p. 377; Association international de droit pénal, "*Procès-verbaux des travaux de la commission chargée de la rédaction d'un projet de code pénal international*," 7 *Rev. Int. de Dr. Pén.* (1930), p. 253; 8 *ibid.* (1931), p. 191. Such a concept would appear to have had relatively little effect upon the contemporary practice of States. Whatever significance it may come to have in the future, it is at present too immature for inclusion in a Convention which seeks primarily to reconcile contemporary conflicts and harmonize existing practices. The present Convention has been limited, therefore, to jurisdiction with respect to acts or omissions which have been denounced as offences by the law of the State assuming jurisdiction.

[As the term is used in this Convention:]

(d) A State's "territory" comprises its land and territorial waters and the air above its land and territorial waters.

COMMENT

The term "territory" is used to include, not only the land of the State, but also its territorial waters and the air above its land and territorial waters. The scope of the term "territory" in this Convention is thus the same as the scope of the term "territorial jurisdiction" as used in the Draft Convention on Piracy, Art. 1 (1), Research in International Law (1932), p. 767. This use of the term "territory" is amply justified by national legislation and international practice.

The inclusion of territorial waters finds support in such national legislation as the Penal Code of Chile (1874), Art. 5, which provides:

> Chilean penal law is binding on all the inhabitants of the Republic, including aliens. Crimes committed within the territorial or adjacent sea are submitted to the regulations of this code.

The Territorial Waters Jurisdiction Act of Great Britain (1878), sec. 2, 41 & 42 Vict. c. 73, provides:

> An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

See also Mass. Acts, 1858–59, p. 640; N. J. Laws, 1906, c. 260, p. 542. In *Cunard Steamship Co.* v. *Mellon* (1923), 262 U. S. 100, 122, it was said:

> It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.

See the Draft Convention on the Law of Territorial Waters, Arts. 15, 17, and 18, Research in International Law [23 *Am. Jour. Int. L., Spl. Supp.*] (1929), pp. 241, 297, 299, 307. See also the Treaty of Montevideo (1889), Art. 11.

The inclusion of the airspace above land and territorial waters finds support in the Air Navigation Act of Great Britain (1920), preamble, 10 & 11 Geo. V. c. 80, which asserts that "the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." See also South Africa, Schedule to Act 16 of 1923, Art. 1. The United States Air Commerce Act (1926), c. 344, sec. 6 (a), declares that "the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone." 44 U. S. Stat. L. 568, 572. The International Convention Relating to the Regulation of Aerial Navigation (1919), Art. 1 provides:

> The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto. (11 *League of Nations Treaty Series*, 174, 190.)

In a number of modern penal codes the jurisdiction to prosecute and punish for crime is expressly declared to include crimes committed in territorial waters and in the air above territorial waters. See Chile, Project of Penal

Code (1929), Art. 2, No. 1; Costa Rica, Penal Code (1924), Art. 219, No. 4 (applied in Case of David Johnson Plazen, *Sentencias de la Corte de Casación* (1928, 2° sem.), 711, *Annual Digest of Public International Law Cases*, 1927–1928, Case No. 99); Cuba, *Ley de Extranjería*, Art. 50, discussed in Bustamante, *Derecho Internacional Privado* (1931), III, pp. 35–37, and *Reglamento*, April 31, 1928, Art. 55 (discussed in Bustamante, *op. cit.*, p. 35); Cuba, Project of a Penal Code (Ortiz, 1926), Art. 33; Guatemala, Penal Code (1889), Art. 6; Mexico, Federal Penal Code (1931), Art. 5, Nos. 3 & 4; Nicaragua, Penal Code (1891), Art. 11; Panama, Penal Code (1916), Art. 1, sec. 2; Peru, Penal Code (1924), Art. 4; Poland, Penal Code (1932), Art. 3, sec. 1. See also Gold Coast Colony, Laws (1928), 1, c. 29 (Criminal Code of 1894), sec. 9; Santa Lucia, Criminal Code (1918), sec. 1273. For France, see case of *Jally*, Sirey (1859), I, 183; *Mitras*, Sirey (1874), II, 282; and decision of Tribunal de Police de Marseille (July 11, 1907), Clunet (1908), 147. For Germany, see decision of April 22, 1880, 2 *Entscheidungen des Reichsgerichts in Strafsachen*, 17. See also *Regina* v. *Cunningham* (1858), 8 Cox C. C. 104; *Lewis* v. *Blair* (1858), 30 Scot. Jur. 508; *King* v. *Mickleham* (Ontario, 1905), 10 Can. Cr. C. 382; *King* v. *Schwab* (N. S., 1907), 12 *ibid.* 539; *King* v. *Tano* (British Columbia, 1909), 14 *ibid.* 440; *Commonwealth* v. *Luckness* (1880), 14 Phila. (Pa.) 363; *Wildenhus' Case* (1887), 120 U. S. 1; *King* v. *Parish* (1849), 1 Hawaii 58 (*36); *United States* v. *Diaz & Cumbra* (1903), 1 P.R. Fed. 186; *United States* v. *Bull* (1910), 15 P.I. 7; *People* v. *Wong Cheng* (1922), 46 P.I. 729. See also Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 20; Nachbaur, *"Droit Pénal International,"* in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII, 441, sec. 45 ff; Travers, *Le Droit Pénal International* (1920), I, secs. 186–201.

This use of the term "territory" assumes, of course, that international law and conventions supply principles and rules which make it possible to determine what lands, waters, and airspaces belong to each State. Certainly such questions are quite outside the scope of the present Convention. It is clear enough that "land" includes the underlying subsoil and that "territorial waters" include the underlying land and its subsoil. It may be suggested that the term "territory" is broad enough to include the following: areas actually occupied by a State in case of disputed or undetermined boundaries; areas held in condominium or joint occupation, such as the New Hebrides; see Politis, *Le Condominium Franco-Anglais des Nouvelles-Hebrides* (1908); Travers, *Le Droit Pénal International* (1921), II, secs. 657–659; or the Oregon territory before it was divided between Great Britain and the United States; areas administered by a State though left under the nominal sovereignty of another State, such as Bosnia-Herzegovina before annexation by Austria-Hungary; areas such as the Panama Canal Zone; see *In re Darie Carter and Coke Webb* (1922), 20 *Registro Judicial*, 985 (Panama Supreme Court), *Annual Digest*, 1919–1922, Case No. 59; areas under protectorate and without independent international status; and probably areas acquired by members of the League of Nations under Class B or Class C mandates.

The extent to which foreign territory under military occupation, in peacetime or war, may be treated as territory for the purposes of jurisdiction to punish for crime has been discussed at some length in the literature. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 23–24, 41, 189; Garraud, *Traité du Droit Pénal Française* (3d ed. 1913), I, pp. 356–357; note in Clunet (1882), 511; Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), I, p. 302; Nachbaur, "*Droit Pénal International,*" in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII, 441, secs. 97–109; Travers, *Le Droit Pénal International* (1921), I, secs. 285–358. Territorial jurisdiction in such areas is to be distinguished, of course, from personal jurisdiction over members of the occupying force and from jurisdiction over offences against the occupying force. The Rumanian Project of a Penal Code (1926), Art. 3, asserts a territorial jurisdiction over such areas. The subject appears to be one more appropriately treated in a convention on the law of military occupation or of war than in the present Convention.

The State's embassies, legations, or consulates abroad are not assimilated to territory, for the purposes of the present Convention, though survivals of such an assimilation have appeared in the jurisdiction asserted in Chile, Project of Penal Code (1929), Art. 2, No. 2; Ecuador, Penal Code (1906), Art. 10; Mexico, Federal Penal Code (1931), Art. 5, No. 5; and Spain, Penal Code (1928), Art. 19, No. 2 (including consulates). And see *Case of Zoltán Sz.* (Hungary, Sup. Ct., 1928), *Annual Digest*, 1927–1928, Case No. 252, where a crime committed in the Hungarian legation in Vienna was treated as a crime committed in Hungary. With the practical abandonment of the fiction of exterritoriality, and recognition that diplomatic immunities are personal rather than exterritorial in nature, there is no longer any reasonable basis for assimilating embassies and legations to territory for the purposes of jurisdiction to punish for crime; and the same is true *a fortiori* with respect to consulates. See Tobar y Borgoño, *Du Conflit International au Sujet des Compétences Pénales* (1910), p. 787.

A similar quasi-territorial competence has been suggested with respect to national sections of international expositions held abroad; but it seems clear that, apart from express delegation of territorial competence under international agreement, there is no basis for such a quasi-territorial jurisdiction in a State which maintains a national section in an exposition held in another State. See Tobar y Borgoño, *op. cit.*, p. 805.

[As the term is used in this Convention:]

(e) A "national" of a State is a natural person upon whom that State has conferred its nationality, or a juristic person upon whom that State has conferred its national character, in conformity with international law.

COMMENT

The term "national" is used in this Convention, as to natural persons, in the same sense in which it is used in the Draft Convention on Nationality,

Art. 1 (b), Research in International Law (1929), p. 22, but in a somewhat more restricted sense than in the Draft Convention on Consuls, Art. 1 (i), Research in International Law (1932), p. 227. Should a convention on nationality be ratified, such convention may determine for the contracting parties the circumstances in which a State is permitted, by creating an allegiance of the nature of nationality, to incorporate natural persons in the body of its nationals. Until such a convention is ratified, the circumstances in which it is permissible to confer nationality will continue to be determined by customary international law and existing treaties.

Meanwhile, it is enough to note that the nationality which is recognized as a basis for jurisdiction in this Convention, with respect both to natural and juristic persons, does not necessarily include every relationship which may be called nationality in some system of national law, but does include every relationship of the nature of nationality which is conferred without violation of international law.

[As the term is used in this Convention:]

(f) An "alien" is a person who is not a national of the State assuming jurisdiction.

COMMENT

As the term "alien" is used in this Convention, it includes all persons, either natural or juristic, who are not nationals of the State assuming jurisdiction. Natural persons, at least, may or may not be nationals of other States; hence the term includes stateless persons.

ARTICLE 2. SCOPE OF CONVENTION

A State's jurisdiction with respect to crime is defined and limited by this Convention; but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements.

COMMENT

It is the object of this Convention to incorporate a comprehensive statement of the principles which determine and limit State competence to prosecute and punish for crime. Consequently, if this Convention were ratified, the contracting parties would have in general jurisdiction as provided in this Convention and only as provided in this Convention. There would be competence to do whatever the Convention permits; there would be no competence other than that which the Convention approves.

The Convention incorporates a comprehensive statement, not because of

existing doubts with respect to fundamental doctrines, but as a means of reconciling existing conflicts in matters of less than fundamental importance. There is less disagreement on fundamental doctrines than is sometimes assumed. It is believed that the substantive provisions of the present Convention include every fundamental principle which has substantial support in contemporary practice and that such principles are formulated in terms approximating so closely to contemporary practice as to make them acceptable to States genuinely desirous of reducing the probabilities of conflict by agreement on fundamental principles. It is recognized, on the other hand, that there is considerable disagreement on matters of less than fundamental importance. A number of States now assert in principle a competence which is in some respects more comprehensive than that delimited in the present Convention and a number of States would contend at present for a competence less inclusive in certain respects. Where such conflicts of view have been revealed by a study of contemporary practice, recourse has been had frankly to the device of compromise. States which have asserted a competence in some respects more comprehensive than that delimited in the present Convention are asked to accept a little less in return for the acceptance by other States of a competence at some points a little more extensive than they have hitherto been willing to approve.

The present Convention is thus framed upon the assumption that there exists substantial agreement upon such principles as are fundamental and that it should be possible, through mutual concessions, to obtain agreement upon other principles which are not fundamental. It must be made clear, in consequence, that States are not free to obtain the advantages of this Convention and at the same time, by unwarranted inferences or implications, to repudiate the concessions which are an essential part of its fabric. There should be no possibility of inference or implication that a State may exercise a competence because it has not been expressly denied. The Convention is an integrated document. It is for these reasons that Article 2 begins with the statement that "a State's jurisdiction with respect to crime is defined and limited by this Convention."

The present Convention contains a comprehensive statement of the competence of States to prosecute and punish for crime. It is 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*. But it does not contemplate the exclusion of special agreements between two or more States which have the effect among the States parties to such agreements of either restricting or enlarging their penal competences *inter se*. Consequently the present article adds: "but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements."

Other agreements between two or more States, parties to the present Convention, restricting the competences *inter se* of such States, are consistent with the present Convention. It is expressly recognized in Art. 17 (a) *infra*, that the jurisdiction herein defined and limited is discretionary, not mandatory. A State is under no obligation "to exercise the jurisdiction which it is entitled to exercise under this Convention." If a State may, of its own volition, refrain from exercising as much of the jurisdiction herein defined and limited as it pleases, there is no reason certainly why it may not refrain pursuant to agreement with other States.

Other agreements between two or more States, parties to the present Convention, enlarging the competences *inter se* of such States, are likewise consistent with the present Convention under the terms of this article. So long as only the parties to such other agreements are affected, there can be no valid objection to mutual acceptance of a more comprehensive competence. Thus special agreements or conventions conceding to each of the contracting parties with respect to the nationals of other contracting parties a competence more comprehensive than is recognized in this Convention may be concluded between two States, between a limited group of States having similar penal legislation or special common interests, such as the Baltic States or certain of the Latin American Republics, or between as many States as are prepared to coöperate in the suppression of certain offences. For example, two States, each strongly committed to the protective principle (*cf.* Arts. 7 and 8, *infra*), may wish mutually to concede a special competence with respect to offences against state security or credit committed by their nationals. There is nothing in precedent or principle which forbids such a mutual concession and it should be clear that it is permissible under the present Convention. Again a limited group of States may wish to conclude among themselves such conventions as those of Lima, Montevideo, or Habana (the Bustamante Code). Such agreements should not be affected by the present Convention simply because they concede to the contracting States a special competence with respect to the nationals of other contracting States. Finally, there should be no question of conflict between this Convention and those general multilateral conventions which provide for cooperation in the control or suppression of certain acts and omissions which are of concern to the entire world, such as the slave trade, the traffic in narcotics, counterfeiting, injury to submarine cables, the white slave trade, the traffic in obscene publications, the illegal trade in arms or intoxicating liquor, and the like. Coöperation in the suppression of such offences through general international conventions of legislative effect has made significant progress and the way should be left unobstructed for further development.

It has been urged in some quarters that offences which have been made the object of such coöperative effort should be assimilated to piracy and denounced as *delicta juris gentium*. But the conventions concluded to date do not support so advanced a position. When the protection of submarine

cables was under consideration, prior to the adoption of the treaty of March 14, 1884 (11 Martens, *Nouveau Recueil Général de Traités* (2d ser.), 281), the United States presented a draft (Draft Treaty of 1869, Art. 5) which would have treated wilful destruction of cables as a crime with respect to which jurisdiction might be allowed on the same basis as for piracy (Clark, *International Communications* (1931), pp. 133–136); but this provision was not incorporated in the treaty finally concluded. The Convention on the Suppression of Counterfeiting Currency, signed at Geneva, April 20, 1929 (112 *League of Nations Treaty Series*, 371; Hudson, *International Legislation* (1931), IV, 2692), takes a cautious step in this direction. Art. 9 provides:

> Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.
>
> The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

In so far as the above convention, or any other now in force or hereafter adopted, may include provisions making a contracting State competent to prosecute and punish nationals of other contracting States for an act or omission committed abroad, such competence is expressly recognized and affirmed by the present article. It is immaterial that the jurisdiction thus specially conceded is outside the competence defined in other articles of the present Convention.

Penal legislation in a few States provides expressly that jurisdiction shall be exercised where authorized by treaty. Italy, Penal Code (1930), Art. 7, provides:

> A national or foreigner who commits any one of the following offences in foreign territory shall be punished under Italian law: . . .
>
> 5. Any other offence in respect of which special provisions of law or international conventions prescribe the applicability of Italian penal law.

See also Chile, Code of Penal Procedure (1906), Art. 2, sec. 8; and Russia, Penal Code (1903), Art. 9, par. 2; adopted in Estonia, Penal Code (1929), Art. 7, par. 2; and Lithuania, Penal Code (1930), Art. 9, par. 2. See also Latvia, Penal Code, Art. 9, par. 2.

At least one international convention, a number of national projects of penal codes, and a few national penal codes now in force go further in authorizing the prosecution and punishment of offences which the State has obligated itself by international convention to suppress. The Bustamante Code (1928), now in force as a convention between fifteen of the Latin American republics, provides:

Art. 307.—Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory an offense, such as white slavery, which said contracting State has bound itself by an international agreement to repress.

See also the following projects:

Brazil, Project of Penal Code (1927) Art. 5.—There shall be subject to Brazilian law everyone who commits abroad a crime which Brazil has obligated itself by convention or treaty to punish, when he is found in the country and the Federal Government requests the prosecution.

Cuba, Project of Penal Code (Ortiz, 1926), Art. 37.—Sera jugé et condamné suivant la loi criminelle cubaine, s'il ne l'a pas été à l'étranger, le citoyen ou l'étranger qui se trouvera sur le territoire national, si hors de ce territoire il a commis l'un des délits suivants: . . .

3. Tous autres délits que la République, par une convention internationale est tenue de réprimer, en quelque endroit qu'ils aient été commis.

Rumania, Project of Penal Code (1926), Art. 6, par. 2.—Ces dispositions sont applicables de même à tous les autres étrangers . . . ayant commis à l'étranger une de ces infractions à caractère international que la Roumanie s'est engagée, par traité, à réprimer.

See Czechoslovakia, Project of Penal Code (1926), Art. 7; Poland, Penal Code (1932), Art. 9, sec. h. Possibly permitting the same construction, see Russia, Penal Code (1903), Art. 9, par. 2; adopted in Estonia, Penal Code (1929), Art. 7, par. 2; Lithuania, Penal Code (1930), Art. 9, par. 2; and with modifications in Latvia, Penal Code, Art. 9, par. 2. See also Bustamante, 8 *Rev. Int. de Dr. Pénal* (1931), 295; Aloisi, 8 *ibid.*, 300; Radulesco, 9 *ibid.* (1932), 24. And see Resolutions of the First International Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6, sec. h.

While such texts as the Bustamante Code (1928), Art. 307 and the national projects quoted above provide no certain criteria for determining which offences may be regarded as *delicta juris gentium* for purposes of jurisdiction, it would appear that the following may be among those contemplated by proponents of this principle of competence:

(1) Slavery and the slave trade: see the convention signed at Geneva, Sept. 25, 1926, 60 *League of Nations Treaty Series*, 253; Hudson, *International Legislation* (1931), III, 2010; see also Act of Berlin (1885), 10 Martens, *N. R. G.* (2d ser.), 414; Act of Brussels (1890), 16 *ibid.* 3; and earlier documents collected in 16 *ibid.* 30.

(2) Traffic in women and children for immoral purposes: see convention signed at Geneva, Sept. 30, 1921, 9 *League of Nations Treaty Series*, 415; Hudson, *op. cit.*, I, 726; see also Agreement for Suppression of the White Slave Traffic (Paris, 1904), 1 *League of Nations Treaty Series*, 83; and Convention for the Suppression of the White Slave Traffic (Paris, 1910), 7 Martens, *N. R. G.* (3d ser.), 252.

(3) Counterfeiting: see Convention on the Suppression of Counterfeiting Currency, signed at Geneva, April 20, 1929, 112 *League of Nations Treaty Series*, 371; Hudson, *op. cit.*, IV, 2692, quoted *supra*.

(4) Traffic in narcotics: see Convention on Traffic in Opium and Drugs, signed at Geneva, Feb. 19, 1925, 81 *League of Nations Treaty Series*, 317; Hudson, *op. cit.*, III, 1589; see also Agreement as to Prepared Opium, signed at Geneva, Feb. 11, 1925, 51 *League of Nations Treaty Series*, 337; Hudson, *op. cit.*, III, 1580; and the International Opium Convention, signed at The Hague, Jan. 23, 1912, 8 *League of Nations Treaty Series*, 189.

(5) Injury to submarine cables: see Convention of Paris, March 14, 1884, 11 Martens, *N. R. G.* (2d ser.), 281; see also Declaration of Dec. 1, 1886, 15 *ibid.* 69; and the laws collected in 11 *ibid.* 290 and 15 *ibid.* 71.

(6) Traffic in obscene publications: see Convention on the Suppression of the Circulation of and Traffic in Obscene Publications, signed at Geneva, Sept. 12, 1923, 27 *League of Nations Treaty Series*, 213; Hudson, *op. cit.*, II, 1051; see also Agreement for the Suppression of Obscene Publications, signed at Paris, May 4, 1910, 7 Martens, *N. R. G.* (3d ser.), 266.

(7) Liquor traffic: see Convention for the Suppression of Contraband Traffic in Alcoholic Liquors, signed at Helsingfors, Aug. 19, 1925, 32 *League of Nations Treaty Series*, 73; Hudson, *op. cit.*, III, 1673; see also Convention Respecting the Liquor Traffic in the North Sea, signed at The Hague, Nov. 16, 1887, 14 Martens, *N. R. G.* (2d ser.), 540; and Convention on the Liquor Traffic in Africa, signed at St. Germain-en-Laye, Sept. 10, 1919, 8 *League of Nations Treaty Series*, 11; Hudson, *op. cit.*, I, 352.

(8) Illegal trade in arms: see convention signed at Geneva, June 17, 1925, Hudson, *op. cit.*, III, 1634; 20 *Am. Jour. Int. L.* (1926), 151; see also Treaty of St. Germain-en-Laye, Sept. 10, 1919, 7 *League of Nations Treaty Series*, 331; Hudson, *op. cit.*, I, 323; and Protocol of Brussels (1908), 101 *Br. & For. St. Papers*, 176; 2 Martens, *N. R. G.* (3d ser.), 711.

It may be doubted, on the other hand, whether the principle proposed would include such offences as anarchistic crimes of violence (see Protocol of St. Petersburg, March 1/14, 1904, 10 Martens, *N. R. G.* (3d ser.), 81; and South American Police Convention, Buenos Aires, Feb. 29, 1920, Hudson, *op. cit.*, I, 448), or crimes connected with radio, such as false distress signals (see Convention of Washington, Nov. 25, 1927, 84 *League of Nations Treaty Series*, 97, Hudson, *op. cit.*, III, 2197). Offences against the Canadian or United States game laws, enacted pursuant to the migratory bird treaty between Great Britain and the United States (39 U. S. Stat. L. 1702), would presumably be outside the scope of the proposed principle.

The jurisdiction over piracy, dealt with in Article 9 of this Convention, is the result of a mature development of customary international law. Its scope and significance are in general well understood. *Cf.* Draft Convention on Piracy, Research in International Law (1932), p. 739. But it appears that the only valid or adequate basis for jurisdiction with respect to other

so-called *delicta juris gentium* is found in general international conventions for the repression of certain offences. This is a comparatively recent development. The present article at once allows the unhampered operation of conventional principles now in force and leaves unobstructed the way to further development of similar conventional principles.

It may be noted that similar provisions affirming expressly the competence of two or more contracting States to conclude among themselves special agreements or conventions to govern cases which affect only the parties to such other agreements or conventions have been incorporated in the Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art. 19 *League of Nations Documents* 1930. V. 3, 24 *Am. Jour. Int. L.* (1930), Supp., 192, the Draft Convention on Nationality, Art. 21, Research in International Law (1929), pp. 11, 78, the Draft Convention on Consuls, Art. 33, *ibid.* (1932), pp. 189, 369, the Draft Convention on Competence of Courts in Regard to Foreign States, Art. 27, *ibid.* (1932), pp. 451, 725, and the Draft Convention on Piracy, Art. 17, *ibid.* (1932), pp. 739, 866.

ARTICLE 3. TERRITORIAL JURISDICTION

A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends to

(a) Any participation outside its territory in a crime committed in whole or in part within its territory; and

(b) Any attempt outside its territory to commit a crime in whole or in part within its territory.

COMMENT

With this article the statement of the law of penal jurisdiction begins. Articles 3 to 10, inclusive, set forth the general principles which govern the penal jurisdiction of States. Articles 11 to 16, inclusive, state general limitations or safeguards. Article 17 incorporates certain general principles of interpretation; and Article 18 provides for the settlement of disputes with respect to interpretation or application. The whole constitutes an integrated delimitation of competence and should be construed as such.

The present article states the territorial principle. It is universally recognized that States are competent, in general, to punish all crimes committed within their territory. This is the territorial principle of jurisdiction, or the principle which determines jurisdiction according to the place where the crime is committed. The present article incorporates the territorial principle in broad terms without exceeding the limits established in most modern States by national legislation and practice. The term "territory" is used throughout in the sense indicated in Article 1 (d), *supra*.

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. The following code provisions may be quoted by way of illustrations taken from the laws of different countries and from different periods in the development of modern legislation:

> France, Civil Code (1803), Art. 3.—Les lois de police et de sûreté obligent tous ceux qui habitent le territoire.
>
> Belgium, Penal Code (1867), Art. 3.—L'infraction commise sur le territoire du royaume, par des Belges ou par des étrangers, est punie conformément aux dispositions des lois belges.
>
> Germany, Penal Code (1871), Art. 3.—The penal laws of the German Reich are applicable to all punishable actions committed on its territory, even when the actor is an alien.
>
> Italy, Penal Code (1930), Art. 3.—Italian penal law is binding on all, nationals or foreigners, who are in the territory of the state, saving the exceptions prescribed by the domestic public law or by international law . . .
>
> Art. 6.—Whoever commits an offence in the territory of the state shall be punished according to Italian law.
>
> The offence is considered to be committed in the territory of the state when the action or omission constituting it occurred therein, wholly or in part, or when the event which is the consequence of the action or omission took place therein.

The territorial principle finds expression also in the following national codes: Afghanistan, Penal Code (1924), sec. 18; Albania, Penal Code (1927), Art. 3; Argentina, National Penal Code (1921), Art. 1; Austria, Penal Code (1852), Art. 37; Bolivia, Penal Code (1834), Art. 6; Brazil, Penal Code (1890), Art. 4, and Project of Penal Code (1927), Art. 2; Bulgaria, Penal Code (1896), Art. 3; Chile, Penal Code (1874), Art. 5, Code of Criminal Procedure (1906), Art. 1, and Project of Penal Code (1929), Art. 2; China, Penal Code (1928), Art. 3; Colombia, Penal Code (1890), Art. 20, sec. 1; Congo, Penal Code (1896), sec. 84; Costa Rica, Penal Code (1924), Art. 219, sec. 1; Cuba, Civil Code (1889), Art. 8 (see Bustamante, *Derecho Internacional Privado* (1931), III, p. 19), Project of Penal Code (Ortiz) (1926), Art. 33, sec. 1, Project of Penal Code (Vieites) (1926), Art. 1, No. 1; Czechoslovakia, Project of Penal Code (1926), sec. 5, No. 1; Denmark, Penal Code (1930), Art. 6, sec. 1, No. 1; Ecuador, Penal Code (1906), Art. 10; Egypt, Native Penal Code (1904), sec. 1; Estonia, Penal Code (1929), Art. 4; Finland, Penal Code (1889), Arts. 1 & 2; France, Project of Penal Code (1932), Art. 10; Germany, Project of Penal Code (1927), sec. 5; Greece, Code of Criminal Procedure (1834–5), Art. 1, and Project of Penal Code (1924), Art. 2; Guatemala, Penal Code (1889), Art. 6, sec. 1; Haiti, Extradition Law (1912), Art. 4, No. 2; Honduras, Law of Organization and Attributes of the Courts (1906), Arts. 162 & 170; Hungary, Penal Code (1878), Art. 5; India, Penal Code (1860), sec. 2; Iraq, Bagdad Penal Code (1918), sec. 2 (i); Italy, Penal

Code (1890), Art. 3; Japan, Criminal Code (1907), Art. 1; Latvia, Penal Code (Russian Penal Code of 1903, adopted 1918 & 1920), Art. 4; Lithuania, Penal Code (1930), sec. 4; Luxembourg, Penal Code (1879), sec. 3; Mexico, Federal Penal Code (1929), Art. 3, and Federal Penal Code (1931), Art. 1; Monaco, Code of Penal Procedure (1904), Art. 21; Netherlands, Penal Code (1881), Art. 2; Nicaragua, Penal Code (1891), Art. 11; Norway, Penal Code (1902), Art. 12, No. 1; Panama, Penal Code (1922), Art. 5; Paraguay, Penal Code (1914), Art. 8; Peru, Penal Code (1924), Art. 4; Poland, Penal Code (1932), Art. 3, sec. 1; Portugal, Penal Code (1886), Art. 53, No. 1; Rumania, Penal Code (1865, modified by law of Feb. 15, 1894), sec. 3, and Project of Penal Code (1926), Art. 3; Russia, Penal Code (1903), Art. 4, Soviet Penal Code (1922), Art. 1, Penal Code of R.S.F.S.R. (1926), Arts. 2, 3 & 4, Uzbek S. S. R. Criminal Code (1929), sec. 1; Salvador, Code of Criminal Procedure (1904), Art. 13; San Marino, Penal Code (1865), Art. 3; Siam, Penal Code (1908), Art. 9; Spain, Law of Organization of Judicial Power (1870), Art. 333, and Penal Code (1928), Art. 19; Sudan, Penal Code (1924), Art. 3; Sweden, Penal Code (1864), Arts. 1 & 2, Project of Penal Code (1923), ch. 1, sec. 3; Switzerland, Federal Penal Law (1853), Art. 1, Project of Penal Code (1918), Art. 3, and legislation in the cantons as follows: Aargau, Penal Code (1857), sec. 2a; Appenzell A. Rh., Penal Code (1878), Art. 1a; Baselland, Penal Code (1873), sec. 1; Bern, Law of July 5, 1914, Art. 1; Fribourg, Penal Code (1924), Art. 3; Geneva, Code Crim. Proc. (1891), Art. 7; Glarus, Penal Code (1867), Art. 2a; Graubünden, Penal Code (1851), sec. 1; Luzern, Crim. Code (1861), Art. 2a; Neuchâtel, Penal Code (1891), Art. 5; Obwalden, Crim. Code (1864), Art. 2a; St. Gall, Penal Code (1857, rev. 1886), Art. 4a; Schauffhausen, Penal Code (1859), sec. 3a; Schwyz, Crim. Code (1881), sec. 1; Soluthurn, Penal Code (1874), sec. 4a; Thurgau, Penal Code (1841, modified 1868), sec. 2a; Ticino, Penal Code (1873, modified 1885), Art. 2; Vaud, Penal Code (1931), Art. 5 (c); Zug, Penal Code (1882), sec. 2a; Zurich, Crim. Code (1897), sec. 3a; Turkey, Penal Code (1926), Art. 3; Uruguay, Penal Code (1889), Art. 3, and Project of Penal Code (1932), Art. 9; Vatican, *Loi sur les Sources du Droit* (1929), sec. 18; Venezuela, Penal Code (1926), Art. 3; Yugoslavia, Penal Code (1929), Art. 3.

The same general principle is incorporated in the Treaty of Montevideo on International Penal Law (1889), Art. 1, in the Resolutions of Warsaw adopted by the First International Conference for the Unification of Penal Law (1927), Art. 1, in the Bustamante Code (1928), Arts. 296 & 302, in the Resolutions of the Institute of International Law voted at Cambridge (1931), Arts. 1 & 2, and in the Resolutions adopted by the Fourth Section of the International Congress of Comparative Law at The Hague (1932), Arts. 1 & 2. The Resolutions of the Institute are as follows:

> Art. 1. La loi pénale d'un Etat régit toute infraction commise sur son territoire, sous réserve des exceptions consacrées par le droit des gens.

Art. 2. Une infraction peut être considérée comme ayant été commise sur le territoire d'un État aussi bien lorsqu'un acte (de commission ou d'omission) qui la constitue y a été perpétré (ou tenté), que lorsque le résultat s'y est produit (ou devait s'y produire).

Cette règle est aussi applicable aux actes de participation.

The fundamental justification for the territorial principle is well understood. Lewis says:

> The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in his territory. (*Foreign Jurisdiction and the Extradition of Criminals*, 1859, p. 30.)

Donnedieu de Vabres summarizes the justification of the principle as follows:

> Cette compétence se fonde, traditionnellement, sur des raisons d'ordre *procédural*, d'ordre *répressif*, d'ordre *international*.
>
> Il est conforme à l'intérêt d'une bonne administration de la justice qu'un délit soit jugé le plus près possible des lieux où il a été commis. C'est là, en effet, que l'activité du malfaiteur a laissé des traces, là que se rencontrent les indices, là que les témoins peuvent généralement être trouvés. Lorsqu'il est fait infraction à cette règle, on se figure difficilement les frais énormes qu'entraîne l'administration des preuves, à raison des déplacements qu'elle impose. L'usage des commissions rogatoires est possible. Mais il ne constitue qu'un pis aller. Sous un régime procédural que gouverne le principe de l'intime conviction, il ne donne pas au juge l'impression vivante, la sensation du réel que procure la comparution personnelle des témoins à l'audience. Ces observations ont déterminé les auteurs de notre Code d'instruction criminelle et notre pratique judiciaire à consacrer, en premier lieu, la compétence du *forum delicti commissi*, tout en admettant, ensuite, celle des tribunaux du domicile et du lieu d'arrestation. Une solution semblable se trouve dans la presque totalité des législations étrangères. Elle est aussi recommandable en droit international que dans les rapports de droit interne. La compétence de "l'Etat territorial" fait exactement pendant à celle du *forum delicti commissi*.
>
> Parmi les effets de la sanction pénale, l'opinion commune des criminalistes attache aujourd'hui une importance primordiale à sa force *intimidante*, à son efficacité comme moyen de prévention sociale et collective. Cette observation milite aussi en faveur de la compétence réservée aux juges du lieu du délit, en faveur de l'intervention des lois locales. La peine est d'autant plus *utile* qu'elle est plus proche du délit, et dans le temps et dans l'espace. Bentham est, à notre connaissance, l'auteur qui, dans les temps modernes, a exprimé avec le plus de force cette vérité. Cet argument, comme le précédent, concerne à la fois les rapports entre tribunaux d'un même pays et les relations internationales.
>
> Mais la raison dont se prévalent le plus volontiers, en droit pénal international, les partisans de la thèse "territoriale," procède d'une certaine notion du rôle de l'Etat, en matière répressive. L'idée profondément ancrée dans la mentalité contemporaine est que l'Etat assumant seul la charge de maintenir l'ordre entre ses frontières, toute infraction aux

injonctions qu'il adresse, aux prohibitions qu'il édicte, doit être envisagée et punie surtout comme *une atteinte à son autorité*, qu'il lui appartient seul de sanctionner. Vis-à-vis des Etats étrangers, des juridictions étrangères, le délit commis sur son territoire est en quelque sorte *res inter alios acta*.

Cette conception se rattache à la constitution moderne de la société internationale, formée de grandes unités politiques dont le *territoire* est un élément essentiel.

Elle est féconde en conséquences juridiques. Elle a pour corollaires l'indifférence de la justice territoriale à l'égard de tous précédents judiciaires intervenus à l'étranger, l'application égale de la loi pénale à toutes infractions commises sur le territoire, quelle que soit la nationalité de l'agent, la préoccupation exclusive, dans l'administration de la justice pénale, de l'intérêt national.

Mais elle se heurte, chaque jour plus nettement, aux exigences nouvelles issues du commerce international, de l'interpénétration des souverainetés. (*Les Principes Modernes du Droit Pénal International*, 1928, pp. 11–13.)

The territorial principle has not only been universally accepted by States, but it has had a significant development in modern times. This development has been a necessary consequence of the increasing complexity of the "act or omission" which constitutes crime under modern penal legislation. The "act or omission" need not consist of an isolated action or failure to act. Not infrequently it appears as an event consisting of a series of separate acts or omissions. These separate acts or omissions need not be simultaneous with respect to time or restricted to a single State with respect to place. Indeed, with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace. To meet these conditions, the jurisdiction of crime founded upon the territorial principle has been expanded in several ways.

SUBJECTIVE APPLICATION

In the first place, national legislation and jurisprudence have developed the so-called subjective territorial principle which establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad.

In the United States, where the penal law is a composite of the statutes and decisions of the national authority and of the several state and territorial authorities, the subjective principle has had a notable development. The federal system has made the problem of penal jurisdiction peculiarly difficult. The difficulties have been mitigated by asserting jurisdiction on a subjective test, both with respect to particular crimes and with respect to crimes in general.

The subjective test applied to establish jurisdiction of particular crimes may be illustrated by reference to the New York legislation for the punishment of dueling. The statute provides:

> Sec. 1047. A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried, and convicted in any county of the state. (New York, Cons. Laws, 1923, c. 41.)

The jurisdiction may be based, strictly speaking, upon the appointment for the duel made within the state, but it is clearly established although the duel and all its consequences occur without the state. Similar legislation, limited in its application in some cases to inhabitants or residents of the state, is found in District of Columbia, Code (amended to 1924), secs. 852–854; Kansas, Rev. Stat. (1923), sec. 62403; Kentucky, Carroll's Stat. (1922), sec. 1269; Maryland, Ann. Code (1924), Art. 27, secs. 123 & 124; Minnesota, Gen. Stat. (1923), secs. 10069, 10107–10110; Mississippi, Hem. Ann. Code (1927), sec. 884; Porto Rico, Rev. Stat. and Code (1911), secs. 5646–5651; Virginia, Code (1919), secs. 4416–4418 & 4121–4122; Washington, Rem. Comp. Stat. (1922), secs. 2394 & 2419–2422; West Virginia, Barnes Code (1923), c. 144, secs. 19–21 & 24; Wyoming, Comp. Stat. (1920), sec. 7180.

There is similar legislation in a number of the states of the United States for the punishment of prize fighting, if the appointment or engagement is made within the state, although the fight occur without the state. Some of the statutes apply only to residents of the state, while others apply to anyone. The Vermont statute, for example, provides:

> Sec. 6817. A resident of the state who, by appointment or engagement made in the state, engages in such a fight without the state, shall be imprisoned in the state prison not more than five years or fined not more than five thousand dollars nor less than one thousand dollars. (Vermont, General Laws, 1917.)

Like legislation may be found in Massachusetts, General Laws (1921), c. 265, sec. 11; Missouri, Rev. Stat. (1919), sec. 3465; New York, Cons. Laws (1925), c. 41, secs. 1710–1714; North Dakota, Comp. Stat. (1913), secs. 9815–9819; South Dakota, Rev. Code (1920), secs. 3495–3498; Wisconsin, Statutes (1919), sec. 5422. It would appear that the same subjective test is applied to establish jurisdiction in Indiana legislation punishing treason (Burns Ann. Stat. 1926, sec. 2047), and possibly also in Washington legislation punishing trading without the state in the labor of a person kidnapped within the state (Rem. Comp. Stat. 1922, sec. 2411).

The basis of jurisdiction is similar in legislation which punishes leaving the state with intent to commit a crime outside the state. Thus, the New York laws punishing cruelty to animals contain the following provision:

> Sec. 195. A person who leaves this state with intent to elude any of the provisions of this article or to commit any act out of this state which

> is prohibited by them, or who, being a resident of this state, does any act out of this state, pursuant to such intent, which would be punishable under such circumstances, if committed within this state, is punishable in the same manner as if such act had been committed within this state. (Cons. Laws, 1923, c. 41.)

See also New York, Cons. Laws (1923), c. 41, sec. 712 (punishing masked assemblages); *ibid.*, sec. 165 (punishing criminal anarchy); *ibid.*, sec. 735 (punishing dueling). See also *In re Bigamy Sections* (Canada Sup. Ct., 1897), 1 Can. Cr. C. 172; *King* v. *Brinkley* (Ontario, 1907), 12 *ibid.* 454; *Huddleston* v. *Commonwealth* (1916), 171 Ky. 310 (leaving state to evade liquor laws); *Commonwealth* v. *Crass* (1918), 180 Ky. 794; and *Commonwealth* v. *Collier* (1918), 181 Ky. 319 (leaving state to evade law prohibiting wager). And see *Henfield's Case* (1793), Fed. Cas. 6360; *State* v. *Stickney* (1912), 118 Minn. 64; *Rex* v. *Waugh* [1909] V.L.R. 379.

From reliance upon the subjective test in establishing jurisdiction to prosecute and punish for particular crimes, a number of states of the United States have proceeded to apply the same test in defining jurisdiction of crimes generally. The following are examples:

> California.—Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state. (Penal Code of 1872, amended to 1923, sec. 778a.)

> Mississippi.—Where an offense is commenced in this state and consummated out of it, either directly by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded. (Hemingway's Ann. Code, 1927, sec. 1221.)

> North Carolina.—If any person, being in this state, unlawfully and wilfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state as he would be if the effect had taken place within this state. (Cons. Stat. 1919, sec. 4604.)

See also Alabama, Code (1923), sec. 4893 (upheld and applied in *Green* v. *State* (1880), 66 Ala. 40); Indiana, Burns Ann. Stat. (1926), sec. 2046; Nevada, Comp. Laws (1929), sec. 10707; South Carolina, Code of Laws (1922), Code of Crim. Proc., sec. 109; Tennessee, Code (1917), sec. 6935; Wisconsin, Statutes (1919), sec. 4635a. And see Bahamas, Penal Code (1924), sec. 10; Gold Coast, Criminal Code (1894), sec. 10; Nigeria, Criminal Code (I Laws, 1923, c. 21), sec. 12; Santa Lucia, Criminal Code (1918), sec. 1274. See also New Zealand, Cons. Stat. (1908), I, No. 32, "Crimes", secs. 347–348. And see *Queen* v. *Holmes* (1883), 12 Q.B.D. 23 (false pretenses).

Resort to a subjective test, in expanding the application of the territorial

principle, is common also in the practice of countries deriving their jurisprudence from the Civil Law. The question of the *locus* of crime has been much discussed and a subjective doctrine locating the crime where the criminal's act or omission takes place, wherever it may have its effect, has been widely approved. The subjective doctrine is frequently deduced from attachment of the criminal act to the will of the criminal actor. See Binding, *Die Normen und ihre Übertretung* (1890); Lilienthal, *Der Ort der Begangenen Handlung* (1890). It seldom appears as an exclusive test of jurisdiction, however, but rather in combination with or supplementary to the objective doctrine, discussed *infra*. See the Brazilian case of *The Tennyson* (1917), Clunet (1918), 739 (asserting Brazilian jurisdiction over an explosion on a British vessel on the high seas, the explosive instrumentalities having been placed on board in Brazilian waters); and Binding, *Strafrechtliche und Strafprozessuale Abhandlungen* (1915), p. 129-217. And see the French cases, *R.* (Trib. simple de police, Paris, May 30, 1885), Clunet (1885), 433; *Merz* (Cour de Rouen, Jan. 5, 1907), Clunet (1907), 722; *Thérond* (Cass., June 17, 1910), 6 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* 834; and the Italian case, *Zondini* (Cass. Rome, Dec. 6, 1893), Clunet (1898), 417.

The Spanish Law of Organization of the Judicial Power (1870) asserted jurisdiction over crimes commenced within the State but consummated abroad only if the acts done in Spain were punishable. The provision was as follows:

> Art. 355. The cognizance of crimes begun in Spain and consummated or frustrated in foreign countries falls to Spanish Courts and Judges, in case the acts done in Spain constitute a crime in themselves, and only in respect to those [acts].

See also Spain, Penal Code (1928), Art. 18; Honduras, Law of Organization and Attributes of the Courts (1906), Art. 172. The Ortiz Project of a Penal Code for Cuba (1926), on the other hand, asserts jurisdiction on the subjective principle without the qualification imposed in the Spanish codes. The provision is as follows:

> Art. 38. La loi criminelle cubain s'appliquera si le ministère public le requiert: 1. Aux délits qui, ayant eu leur commencement d'exécution sur le territoire de la République, sont consommés, manqués ou continués à l'étranger, même si les actes accomplis sur le territoire national n'ont pas de sanction criminelle, pourvu que les faits incriminés le soient dans leur ensemble.

It is not to be doubted that States are competent internationally to apply an unqualified subjective test. An inference of international incompetence is not to be drawn from the fact that a few States have elected to impose qualifications in their national legislation.

OBJECTIVE APPLICATION

In the second place, national legislation and jurisprudence have developed the so-called objective territorial principle which establishes the jurisdiction

of the State to prosecute and punish for crime commenced without the State but consummated within its territory. Moore says:

> The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. (*Report on Extraterritorial Crime and the Cutting Case*, 1887, p. 23; *U. S. For. Rel.*, 1887, 757, 771.)

Hyde says:

> The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain. (*International Law*, 1922, I, 422.)

And the same principle has been applied by the Permanent Court of International Justice in the case of the *S.S. Lotus*, where an act or omission done within the jurisdiction of one State produced unintended effects within the jurisdiction of another State. *Publications P.C.I.J.*, Series A, Judgment No. 9; Dickinson, *Cases*, 656; Hudson, *Cases*, 719.

The objective principle has been developed in Great Britain and the United States, in decision and statute, both with respect to particular crimes and with respect to crimes in general. It has likewise had a significant development in the legislation and judicial decisions of States deriving their jurisprudence from the Civil Law.

The objective test as invoked to sustain jurisdiction of particular crimes may be illustrated by reference to American and British cases dealing with the offence of obtaining by false pretenses. *People* v. *Adams* (1846), 3 Den. (N. Y.) 190, (1848), 1 Comst. (N. Y.) 173, is a leading American case. The accused in Ohio had made false representations through an innocent agent in New York whereby money was obtained fraudulently in New York from a New York firm. The New York courts held that they had jurisdiction although the accused had been at all times during the commission of the offence in Ohio. The New York Supreme Court said:

> The fraud may have originated and been concocted elsewhere, but it became mature and took effect in the city of New York, for there the false pretences were used with success. . . . The crime was therefore committed in the city of New York. . . . Personal presence, at the place where a crime is perpetrated, is not indispensable to make one a principal offender in its commission. (3 Den. (N. Y.) 190, 206–7.)
>
> This in no sense affirms or implies an extension of our laws beyond the territorial limits of the state. The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. . . . He was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but he was here in purpose and design, and acted by his authorized agents. . . . Here the crime was perpetrated within this state, and over that our courts have an undoubted jurisdiction. This necessarily gives them jurisdiction over the criminal. *Crimen trahit personam.* (3 Den. N. Y., 190, 210.)

In the case of *Queen* v. *Nillins* (1884), 53 L.J.M.C. 157, the Queen's Bench Division of the English High Court of Justice made an application of the same principle in passing upon an application for habeas corpus by one held for extradition to Germany to answer a charge of obtaining goods by false pretenses in Germany. While the letters containing the false pretenses were written in England, and forged bills of exchange given in payment for the goods were posted there, the goods were obtained in Germany. The petitioner contended that the crime was committed, if committed at all, in England. Extradition to Germany was allowed, however, on the ground that the crime was committed in Germany where the goods were obtained. See, to the same effect, *Reg.* v. *Jacobi and Hiller* (1881), 46 L. T. 595 n. (false pretenses); *King* v. *Godfrey* [1923] 1 K. B. 24 (false pretenses); *Lamar* v. *United States* (1916), 240 U. S. 60 (false personation); *Updike* v. *People* (Col. 1933), 18 P. (2d) 472 (false pretenses); and *State* v. *Devot* (1925), 66 Utah, 307 (false pretenses). See also *Rex* v. *Munton* (1793), 1 Esp. 62 (defrauding the government); *Reg.* v. *Taylor* (1865), 4 F. & F. 511 (uttering forged instruments); *King* v. *Oliphant* [1905] 2 K. B. 67 (falsification of accounts); and the Scotch cases of *H. M. Advocate* v. *Bradbury* (1872), 2 Couper, 311; *H. M. Advocate* v. *Allan* (1872), 2 Couper, 402; and *H. M. Advocate* v. *Witherington* (1881), 8 Sess. Cas. (Rettie), 41 (all three for falsehood, fraud, and willful imposition).

The same principle has been applied in the prosecution of many other offences. Thus, in *State* v. *Wellman* (1918), 102 Kan. 503, the jurisdiction to prosecute in Kansas for abandonment was sustained in a case in which the wife and child of the accused had left him in Missouri, because of his cruelty and failure to support, and had gone to Kansas, where the wife obtained a divorce. It was held that the failure to provide for the child occurred in Kansas; the offence was not the ill-treatment or failure to support in Missouri, but the abandonment in Kansas. See, to the same effect, *In re Fowles* (1913), 89 Kan. 431; *State* v. *Sanner* (1910), 81 Ohio St. 393; *Commonwealth* v. *Hart* (1909), 12 Pa. Super. 605; and *State* v. *Beam* (1921), 181 N. C. 597; see also *Fry* v. *State* (1927), 36 Ga. App. 312; and *Noodleman* v. *State* (1914), 74 Tex. Cr. 611.

In *State* v. *Morrow* (1893), 40 S. C. 221, a conviction in South Carolina for procuring an abortion was sustained in a case in which the accused had mailed pills from Washington to a woman in South Carolina, with advice as to their use, with the result that the woman took the pills in South Carolina and died following the abortion.

In *Simpson* v. *State* (1893), 92 Ga. 41, in which the accused had stood on the South Carolina bank of the Savannah River and shot at a person in a boat on part of the river within the boundaries of Georgia, the bullet missing the objective and striking the water on the Georgia side, it was held that the Georgia courts had jurisdiction of a prosecution for assault with intent to murder. The opinion of the court contains a very extreme statement of the theory of constructive presence. It was said:

> Of course the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual. It may be constructive. The well established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. . . . So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. . . . The act of the accused did take effect in this State. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was therefore, in a legal sense, after the ball crossed the State line up to the moment it stopped, in Georgia. (92 Ga. 41, 43–46.)

See also *County Council of Fermanaugh* v. *Farrendon* [1923] 2 Ir. Rep. 180, *Annual Digest*, 1923–1924, Case No. 55.

In *Ford* v. *United States* (1927), 273 U. S. 593, aliens were prosecuted in the United States for conspiring abroad with persons inside the United States to violate the United States prohibition and tariff laws. Quoting with approval from the opinion in *Strassheim* v. *Daily* (1911), 221 U. S. 280, 285, to the effect that "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power," the United States Supreme Court sustained the jurisdiction on the objective principle. Delivering the opinion of the court, Chief Justice Taft concluded:

> The overt acts charged in the conspiracy to justify indictment under section 37 of the Criminal Code were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction under the principles above settled. (273 U. S. 593, 624.)

See the similar decisions taking jurisdiction over conspiracy on the objective principle in *U. S.* v. *Downing* (1931), 51 F. (2d) 1030; *Noyes* v. *State* (1879), 41 N. J. L. 418; *State* v. *Faunce* (1917), 91 N. J. L. 333; and see also *Hyde* v. *U. S.* (1912), 225 U. S. 347; *Brown* v. *Elliott* (1912), 225 U. S. 392; *Grayson* v. *U. S.* (1921), 272 Fed. 553; *Lucas* v. *U. S.* (1921), 275 Fed. 405; and *Baker* v. *U. S.* (1927), 21 F. (2d) 903.

For further applications of the objective principle, see *Reg.* v. *Blythe* (1895), 4 British Columbia L. R. 276 (abduction); *State* v. *Grady* (1867), 34 Conn. 118 (accessory to theft); *State* v. *Chapman* (1871), 6 Nev. 320 (accessory to robbery); *Benson* v. *Henkel* (1905), 198 U. S. 1 (bribery); *Carter* v. *State* (1915), 143 Ga. 632 (embezzlement); *Queen* v. *Bull* (1845), 1 Cox C. C. 281 (forgery); *Commonwealth* v. *Blanding* (1825), 3 Pick. (Mass.) 304 (libel); *King* v. *Coombes* (1785), 1 Leach 388 (murder); *State* v. *Hall* (1894), 114 N. C. 909 (murder); *Claramont* v. *United States* (1928), 26 F. (2d) 797

(procuring landing of excluded alien); *Commonwealth* v. *Gillespie* (1822), 7 Serg. & Rawle (Pa.), 469 (selling lottery tickets); *United States* v. *Steinberg* (1932), 62 F. (2d) 77 (using the mails to defraud). Compare *Beattie* v. *State* (1904), 73 Ark. 428; and *People* v. *International Nickel Co.* (1915), 168 App. Div. (N. Y.) 245. There are, of course, a great number of British and American venue cases which have applied the same objective test as to the place of the crime.

The development of the objective principle in judicial decision has been supplemented by legislation providing for the same jurisdictional test in case of particular offences. Legislation expanding the jurisdiction of larceny affords a noteworthy example. There has been controversy as to the competence of the State to prosecute for larceny one who has stolen goods abroad and brought the stolen goods within the State. For cases supporting competence, see *Sullivan* v. *State* (1913), 109 Ark. 407; *Foster* v. *State* (1911), 62 Fla. 52; *State* v. *Bennett* (1863), 14 Ia. 479; *Worthington* v. *State* (1882), 58 Md. 403; *Commonwealth* v. *White* (1877), 123 Mass. 430; *Commonwealth* v. *Parker* (1896), 165 Mass. 526 (embezzlement); *State* v. *Morrill* (1896), 68 Vt. 60. For cases *contra*, see *Territory* v. *Hefley* (1893), 33 Pac. (Ariz.) 618; *Gilbert* v. *Steadman* (1792), 1 Root (Conn.) 403; *Beal* v. *State* (1860), 15 Ind. 378; *Van Buren* v. *State* (1902), 65 Neb. 223; *People* v. *Gardner* (1807), 2 Johns. (N. Y.) 477; *State* v. *Brown* (1794), 1 Hay. (N. Y.) 100; *Strouther* v. *Commonwealth* (1895), 92 Va. 789; *Reg.* v. *Madge* (1839), 9 C. & P. 29; *Reg.* v. *Debruiel* (1861), 11 Cox C. C. 207; *Reg.* v. *Carr* (1877), 15 Cox C. C. 131 n. In a number of states of the United States this controversy has been resolved by expanding the definition of larceny to include possession within the state of property stolen outside the state. See, for example, the following statutes or code provisions:

> Missouri, Rev. Stat. (1919), sec. 3685.—Every person who shall steal, or obtain by robbery, the property of another in any other state or country, and shall bring the same into this state, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken in this state, and in any such case the larceny may be charged to have been committed, and every such person may be indicted and punished, in any county into or through which such stolen property shall have been brought.
>
> New York, Cons. Laws (1923), c. 41, sec. 1930.—The following persons are liable to punishment within the state: . . .
> (2) A person who commits without the state any offense which, if committed within the state, would be larceny under the laws of the state, and is afterwards found, with any of the property stolen or feloniously appropriated within this state.
>
> Monaco, Code of Penal Procedure (1904), Art. 8.—Pourra également être poursuivi et jugé dans la Principauté l'étranger qui se sera rendu coupable au dehors: . . . 2. D'un crime ou d'un délit commis même au detriment d'un autre étranger, s'il est trouvé dans la Principauté en possession d'objets acquis au moyen de l'infraction.

Similar to the Missouri legislation, quoted above, see Kansas, Rev. Stat. (1923), sec. 21–103; New Mexico, Stat. (1915), sec. 1530; Rhode Island, Gen. Laws (1923), secs. 6330 & 6331. In *Hemmaker* v. *State* (1849), 12 Mo. 453, arising under the Missouri legislation, goods having been stolen on an ocean vessel in New Orleans harbor and later brought within the state, jurisdiction to prosecute for larceny was sustained. See also *Reg.* v. *Panse* (1897), 61 J. P. 536; *R.* v. *Graham* (1901), 65 J. P. 248. Other states have statutes which are similar to, but somewhat less liberal than, the Missouri statute. And see Field, *Outlines for an International Code* (2d ed. 1876), Art. 643, sec. 1; Fiore, *International Law Codified* (Borchard's transl. 1918), Art. 298.

Further illustration of the same tendency is found in legislation expanding the jurisdiction of bigamy by providing for prosecution where a second marriage, contracted outside the state, is followed by cohabitation within the state. Thus, Missouri, Rev. Stat. (1919), sec. 3508, provides:

> Every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriage would be punishable if contracted or solemnized within this state, and shall afterward cohabit with such other person within this state, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this state.

Similar legislation has been enacted in Delaware, Rev. Stat. (1915), sec. 4785; Kansas, Rev. Stat. (1923), sec. 21–903; and North Carolina, Cons. Stat. (1919), sec. 4342. Decided under the above enactments, see *State* v. *Bacon* (1920), 112 Atl. (Del.) 682; and *State* v. *Stewart* (1906), 194 Mo. 345. Compare *State* v. *Cutshall* (1892), 110 N. C. 538, arising under an earlier statute. Note, also, the type of legislation with respect to kidnapping which is exemplified in the following provisions from New York, Cons. Laws (1923), c. 41, sec. 1930:

> The following persons are liable to punishment within the state: . . .
> (4) A person who, being out of the state, abducts or kidnaps by force or fraud, any person contrary to the laws of the place where such act is committed, and brings, sends or conveys such person within the limits of this state, and is afterwards found therein.

See also Minnesota, Gen. Stat. (1923), sec. 9909, No. 4; North Dakota, Comp. Laws (1913), sec. 9206, No. 3; Oklahoma, Comp. Stat. (1921), sec. 1510, No. 3. See, further, Massachusetts, Gen. Laws (1921), c. 273, secs. 1, 2, 3, 15, 20 & 21 (abandonment); Washington, Rem. Comp. Stat. (1922), sec. 2333 (bribery in connection with public works contracts); Texas, Penal Code (1925), Art. 1009 (punishing forgery outside the state of titles to Texas land), applied in *Hanks* v. *State* (1882), 13 Tex. App. 289; and *ibid.* Art. 1039 (punishing monopolies or trusts formed outside the state in restraint of trade within the state).

From legislation expanding competence with respect to particular offences,

of the type noted above, it is a short step to legislation asserting the objective principle of territorial jurisdiction for all crimes. The latter type of legislation has been widely adopted both in America and in countries deriving their jurisprudence from the Civil Law. The following American statutes are sufficiently typical:

> New York, Cons. Laws (1923), c. 41, sec. 1930.—The following persons are liable to punishment within the state: . . .
> (5) A person who, being out of the state, and with intent to cause within it a result contrary to the laws of this state, does an act which in its natural and usual course results in an act or effect contrary to its laws.
>
> Illinois, Criminal Code (Cahill's Rev. Stat., c. 38, 1927), par. 733.—When the commission of an offense commenced without this State is consummated within this State, the offender shall be liable to punishment therefor in this State, though he was without the State at the time of the commission of the offense charged, if he consummated the offense within this State through the intervention of any innocent or guilty agent, or any means proceeding directly or indirectly from himself; and in any such case he may be tried and punished in the county where the offense was consummated.

See also California, Penal Code (1872, as amended to 1923), sec. 778; Indiana, Burns Ann. Stat. (1926), sec. 2033; Iowa, Code (1924), sec. 13450; Minnesota, Gen. Stat. (1923), sec. 9909, Nos. 3 & 5; Mississippi, Hemingway's Ann. Code (1927), sec. 1220; Montana, Rev. Codes (1921), sec. 11704; Nevada, Comp. Laws (1929), sec. 10706; North Dakota, Comp. Laws (1913), secs. 9206, No. 5, & 10502; Oklahoma, Comp. Stat. (1921), sec. 2426; Oregon, Laws (1920), sec. 1381; see *State* v. *Owen* (1926), 119 Ore. 15; South Dakota, Rev. Code (1919), sec. 4506; Tennessee, Code (1917), sec. 6934; Utah, Comp. Laws (1917), sec. 8645; Washington, Rem. Comp. Stat. (1922), sec. 2254, see *State* v. *Piver* (1913), 74 Wash. 96; Hawaii, Rev. Laws (1925), sec. 3910. And see Nigeria, I Laws, c. 21 (Criminal Code, 1923), sec. 12 (jurisdiction limited to cases where act intended to have an effect in Nigeria); Santa Lucia, Criminal Code (1918), sec. 65.

Among the codes of other countries which affirm the same objective principle, the following may be quoted:

> Argentina, National Penal Code (1921), Art. 1.—This code will be applied: 1. To crimes committed or whose effects are due to be produced on the territory of the Argentine Nation or in places subject to its jurisdiction.
>
> Mexico, Federal Penal Code (1931), Art. 2.—It will likewise be applied: To crimes which are begun, prepared, or committed abroad, when they produce or seek to have effects in the territory of the Republic.
>
> Norway, Penal Code (1902), sec. 12, No. 4.— . . . Dans le cas où la répression a pour objet les conséquences intentionnelles ou fortuites d'un acte, ou que ces conséquences servent à mesurer la peine, cet acte

> est considéré comme commis également là où les conséquences se sont produites ou l'intention était qu'elles se produissent.

See also Denmark, Penal Code (1930), sec. 9; and Brazil, Project of Penal Code (1927), Art. 10. And see Austrian Supreme Court decision of Oct. 26, 1914, in Clunet (1917), 288; French cases reported in Clunet (1892), 1144 and (1911), 1192; and German decisions of Feb. 3, 1881, 3 *Entscheidungen des Reichsgerichts* (*Str.*) 316 (jurisdiction over sending prohibited newspapers from England to Germany); and of March 18, 1889, 19 *ibid.* 147.

In some instances the objective principle is pressed to a point at which its application is distinguished with difficulty from the application of the "principle of protection" upon which Articles 7 and 8, *infra*, are based. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 103–105, and references there cited. New York, Cons. Laws (1923), c. 41, sec. 1933, provides:

> A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state would be a crime, is punishable as if the act were committed within this state.

See also Hawaii, Rev. Laws (1925), sec. 3909; and Washington, Rem. Comp. Stat. (1922), sec. 2254, No. 5. And see Texas, Penal Code (1925), Art. 1009 (punishing forgery outside the state of titles to Texas land), applied in *Hanks* v. *State* (1882), 13 Tex. App. 289. A striking example is the case of *B.*, in which the German Reichsgericht approved (Dec. 23, 1889), the prosecution of one who shouted "Vive la France" in France near the German border and was convicted of sedition on the ground that the cry was heard in Germany and hence took effect there as a crime. 20 *Entscheidungen des Reichsgerichts* (*Str.*) 146; Clunet (1890), 498. Certainly the gap between extreme applications of the objective principle and the protective principle as formulated in Articles 7 and 8, *infra*, is very narrow indeed.

COMBINED SUBJECTIVE AND OBJECTIVE APPLICATIONS

The text of the present article conforms to the modern trend by combining, as complementary, the subjective and objective applications of the territorial principle in a formula widely approved in national legislation and in the drafts of various international bodies. National experience has demonstrated that neither the subjective nor the objective application, taken alone, can be made sufficiently comprehensive to serve as a rationalization of contemporary practice. Where national legislation has been limited to an assertion of territorial jurisdiction over crime committed within the State, judicial practice and legal literature have been forced to the conclusion that a crime is committed wherever any essential element of the crime is accomplished. See Olshausen, *Kommentar zum Strafgesetzbuch für das Deutsche Reich* (11th ed. 1927), p. 58 ff. Such a development has been particularly notable in France, where the conception of the indivisibility of a crime consisting of

many connected acts or omissions has been a means of expanding jurisdiction. Donnedieu de Vabres, *Les Principes Modernes du Droit International Pénal* (1928), p. 44 ff. The modern formula, incorporated in this article, recognizes that there is territorial jurisdiction of any crime which is committed in whole or in part within the territory. A crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part" within the territory when any essential constituent element is consummated there. If it is committed either "in whole or in part" within the territory, there is territorial jurisdiction.

The combination of the subjective and the objective tests to establish jurisdiction over particular offences committed in whole or in part within the territory is exemplified in American statutes with respect to homicide. Thus the laws of Massachusetts (Gen. Laws, 1921, c. 277), provide as follows:

> Sec. 61. If a mortal wound is given, or if other violence or injury is inflicted, or if poison is administered, on the high seas or on land either within or without the commonwealth by means whereof death ensues in any county thereof, the homicide may be prosecuted and punished in the county where the death occurs.
>
> Sec. 62. If a mortal wound is given, or if other violence or injury is inflicted, or if poison is administered, in any county of the commonwealth, by means whereof death ensues without the commonwealth, the homicide may be prosecuted and punished in the county where the act was committed.

Similar legislation is found in England, 9 Geo. IV, c. 31, sec. 8; Delaware, Rev. Stat. (1915), secs. 4699 & 4701; Georgia, Code (1910), secs. 27–28; Maine, Rev. Stat. (1917), c. 133, sec. 4; Michigan, Comp. Laws (1929), secs. 17123–17124; Missouri, Rev. Stat. (1919), secs. 3726–3727; Nebraska, Comp. Stat. (1922), sec. 10053; New Jersey, Comp. Stat. (1910), Crim. Proc., sec. 60; North Carolina, Cons. Stat. (1919), sec. 4605; Oklahoma, Comp. Stat. (1921), sec. 2439; Oregon, Laws (1920), sec. 1382; Pennsylvania, Stat. (1920), sec. 8122; Rhode Island, Gen. Laws (1923), sec. 6329; South Carolina, Code of Laws (1922), Code of Crim. Proc., secs. 108–109; Virginia, Code (1919), secs. 4398 & 4770; West Virginia, Barnes Code (1923), c. 144, sec. 6; Bermuda, Acts of the Legislature (1931), I, ch. 4, sec. 18; New South Wales, Act 40 of 1900, sec. 25; Trinidad and Tobago, Laws (rev. ed. 1925), I, ch. 8, sec. 9. The leading American cases under such statutes are perhaps *Commonwealth* v. *Macloon* (1869), 101 Mass. 1, upholding conviction where deceased was wounded on board a British vessel on the high seas and died in Massachusetts; and *Tyler* v. *People* (1860), 8 Mich. 320, in which deceased was wounded on board an American vessel in Canadian waters and died in Michigan. See also *Hunter* v. *State* (1878), 40 N.J.L. 495; *State* v. *Lang* (1931), 154 Atl. (N. J.) 864; [compare *State* v. *Carter* (1859), 27 N.J.L. 499, holding that under the New Jersey statutes jurisdiction did not extend to manslaughter where the victim died within the State]; *State* v. *Caldwell*

(1894), 115 N. C. 794; *Covington* v. *Commonwealth* (1923), 136 Va. 665; *Ex parte McNeeley* (1892), 36 W. Va. 84; and *Moran* v. *Territory* (1904), 14 Okla. 544.

A somewhat similar combination of jurisdictional criteria is found also in the legislation of American states for the punishment of dueling. Thus Illinois, (Cahill's Rev. Stat. 1927, c. 38), provides:

> Par. 176. Whoever, being an inhabitant or resident of this state, by previous appointment or engagement made within the same, fights a duel without the jurisdiction of the State, and in so doing inflicts a mortal wound upon any person, whereof such person afterwards dies within this State, and every second engaged in such duel, shall be deemed guilty of murder within this State, and may be indicted, tried, and convicted in the county where such death shall happen.

See also Arizona, Rev. Stat. (1913), Penal Code, secs. 810–811; California, Penal Code (1872, amended to 1923), secs. 779–780; Idaho, Comp. Stat. (1919), sec. 8687; Indiana, Burns Ann. Stat. (1926), sec. 2034; Iowa, Code (1924), sec. 13456; Maine, Rev. Stat. (1917), c. 120, secs. 7–12; Massachusetts, General Laws (1921), c. 265, secs. 3–5; Michigan, Public Acts (1931), No. 328, secs. 319–320; Montana, Rev. Codes (1921), secs. 11705–11706; Nevada, Comp. Laws (1929), sec. 10708; North Dakota, Comp. Laws (1913), secs. 10503–10504, 9534–9535, 9542–9543; Oklahoma, Comp. Stat. (1921), secs. 2427–2428, 1728; Rhode Island, Gen. Laws (1923), secs. 6019–6026; South Dakota, Rev. Code (1919), sec. 4507; Tennessee, Thompson's Shannon's Code (1917), sec. 6941; Utah, Comp. Laws (1917), secs. 8646–8647; Vermont, Gen. Laws (1917), secs. 6809–6812; Wyoming, Comp. Stat. (1920), sec. 7068.

American statutes also punish the traffic in women for immoral purposes when any part of the acts incriminated is committed within the state. See Kentucky, Carroll's Stat. (1922), sec. 1215b; New Hampshire, Public Laws (1926), c. 386, secs. 10 & 11; Utah, Comp. Laws (1917), secs. 8095–8096; West Virginia, Barnes Code (1923), c. 144, sec. 16b, Nos. 1 & 2.

The expansion of territorial jurisdiction to comprehend any crime committed in whole or in part within the territory of the State has been asserted in general terms in the modern legislation of a number of countries. For the United States the following statutes may be taken as typical:

> New York, Cons. Laws (1923), c. 41, sec. 1930.—The following persons are liable to punishment within the state:
> (1) A person who commits within the state any crime, in whole or in part.
>
> Wisconsin, Statutes (1919), sec. 4635a.—Any person who commits an act or omits to do an act which act or omission constitutes a part of a crime by the laws of this state shall be punished the same as if he had committed the whole of such crime within this state.

See also Arizona, Rev. Stat. (1913), Penal Code, sec. 25, No. 1; California, Penal Code (1872, amended to 1923), sec. 17, No. 1; Idaho, Comp. Stat.

(1919), sec. 8091, No. 1; Minnesota, Gen. Stat. (1923), sec. 9909, No. 1; Montana, Rev. Codes (1921), sec. 10830, No. 1; North Dakota, Comp. Laws (1913), sec. 9206, No. 1; Oklahoma, Comp. Stat. (1921), sec. 1510, No. 1; Porto Rico, Rev. Stat. and Codes (1911), sec. 5444, No. 1; Utah, Comp. Laws (1917), sec. 7916, No. 1; Washington, Rem. Comp. Stat. (1922), sec. 2254, No. 1; New Zealand, 1 Cons. Stat. (1908), Act 32 "Crimes", sec. 4; Queensland, Criminal Code Act (1899), sec. 12; Tasmania, Criminal Code (1924), sec. 8. Compare United States Judicial Code, sec. 42 (36 U. S. Stat. L. 1100), providing for trial in either district in case of offences begun in one judicial district and completed in another.

As exemplifying the same expansion of territorial competence in countries deriving their jurisprudence from the Civil Law, the following provisions of projects or codes in force may be quoted:

> China, Penal Code (1928), Art. 4.—Une infraction commise à l'intérieur du territoire de la République, mais dont les effets se produisent hors de ce territoire, ou une infraction commise hors du territoire de la République, mais dont les effets se produisent à l'intérieur de ce territoire, est considérée comme une infraction commise à l'intérieur du territoire de la République.
>
> Cuba, Project of Penal Code (Ortiz, 1926), Art. 32.—Tout délit ou faute sera réputé commis au point de vue du présent Code et de la juridiction compétent, tant au lieu où l'auteur a accompli l'acte ou l'un de ses éléments constitutifs qu'au lieu où le résultat complet s'est produit, et au cas où il n'y a pas eu consommation, où le résultat aurait dû se produire d'après l'intention notoire du délinquant.
>
> Germany, Project of Penal Code (1927), sec. 8.—An act is committed at each place in which the elements (*Tatbestand*) of the punishable action have been realized in whole or in part, or where, in the case of attempt, they were to be realized according to the intention of the actor.
>
> Italy, Penal Code (1930), Art. 6, par. 2.—The offence is considered to be committed in the territory of the State when the action or omission constituting it occurred therein, wholly or in part, or when the event which is the consequence of the action or omission took place therein.

See also Costa Rica, Penal Code (1924), Art. 219, sec. 7; Czechoslovakia, Project of Penal Code (1926), sec. 8; Denmark, Penal Code (1930), Art. 9; France, Project of Penal Code (1932), Art. 11; Poland, Penal Code (1932), Art. 3, sec. 2; Sudan, Penal Code (1924), Art. 4, sec. 1; Switzerland, Project of Penal Code (1918), Art. 8 (see also Bern, Law of July 5, 1914, Art. 1; Fribourg, Penal Code (1924) Art. 3).

Legislation asserting jurisdiction over any crime committed in whole or in part within the State has been construed and applied by the courts in some noteworthy cases. From the United States the following cases may be noted. In *People* v. *Botkin* (1901), 132 Cal. 231, the accused sent poisoned candy by mail from California to Delaware, where it was eaten by the deceased. The jurisdiction of the California courts was sustained under a

statute like that of New York, Cons. Laws (1923), c. 41, sec. 1930, No. 1, quoted *supra*. See same case (1908), 9 Cal. App. 244. In *People* v. *Sansom* (1918), 37 Cal. App. 435, the accused was convicted in California of uttering a forged check, though parts of the crime were committed in Arizona and Mexico. See also, upholding jurisdiction under this provision, *People* v. *Chapman* (1921), 55 Cal. App. 192; and *People* v. *Lakeman* (1923), 61 *ibid.* 368. Jurisdiction under the Idaho statute in a case of obtaining by false pretenses was upheld in *State* v. *Sheehan* (1921), 33 Idaho, 553. In *People* v. *Zayas* (1916), 217 N. Y. 78, the jurisdiction of the New York courts was sustained, under the statute, where property had been delivered to the accused in Pennsylvania as a result of false pretenses in New York. In *People* v. *Licenziata* (1921), 199 App. Div. (N. Y.) 106, the accused sold wood alcohol in New York for beverage purposes and the liquor was taken by the purchaser into Massachusetts where it came into the possession of another who drank it and died. The accused was convicted of manslaughter in New York. It was held that the act done in New York was unlawful in itself, constituted a part of the crime, and so founded the jurisdiction of the New York courts. See also *People* v. *Bihler* (1913), 154 App. Div. (N. Y.) 618.

In *People* v. *Werblow* (1925), 241 N. Y. 55, on the other hand, the attempt to establish jurisdiction under the New York statute failed. The accused and two brothers had conspired in New York to defraud a New York corporation having a London branch. One brother in New York sent letters and cablegrams to the accused in China and received others from him. The other brother went to London and received messages there from the one in New York. Then the accused in China sent forged cablegrams to the London branch as a result of which the recipient paid a large sum to the brother in London. When the accused returned to New York, he was convicted on an indictment charging grand larceny by obtaining money by false pretenses. The Court of Appeals reversed this conviction on the ground that what was done in New York did not amount to a part of the crime charged. Delivering the opinion of the court, Judge Cardozo said:

> We are now asked to go farther and to hold that a conspiracy formed in New York gives jurisdiction under the statute to punish for a larceny abroad if only some overt act can be found to have been here committed in furtherance of the conspiracy, even though the act is not a constituent of the executed larceny.
>
> Such a reading of the statute strains it to the breaking point. We think a crime is not committed either wholly or partly in this state unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt. We do not mean that this construction of the statute is the consequence of some inherent limitation upon the power of the Legislature. (241 N. Y. 55, 61.)

The court intimated, however, that if the indictment had been for conspiracy the jurisdiction might have been sustained under the statute. See also *People* v. *Doud* (1923), 202 N.Y.S. 579, holding that no part of the crime

charged had been committed within the state. A similar position was taken by the French courts Feb. 5, 1857, D. P. (1857), I, 132; and June 29, 1906 (Trib. Corr. de la Seine), Clunet (1907), 130; and also by the Italian Court of Cassation of Florence, March 26, 1879, Clunet (1881), 449.

The present article sets no such limitation upon the meaning of "committed in whole or in part" as is suggested by the case of *People* v. *Werblow*. The court in *People* v. *Werblow* concluded that the legislature had not intended to assert jurisdiction unless the part of the crime committed within the state amounted at least to an attempt, but it carefully refrained from intimating that the legislature would have been incompetent to enact a more comprehensive statute. It seems clear that a State is competent internationally, subject to limitations covered by later articles, to take jurisdiction of acts or omissions committed in part within the State, even though the part committed within the State amounts to something less than an attempt and is punishable only because of its association with acts or omissions committed outside the State. A State may not wish to exercise such competence to its fullest extent. But the competence exists. The phrase "committed in whole or in part" is to be construed literally.

The United States statutes and cases are reviewed in Berge, "Criminal Jurisdiction and the Territorial Principle," 30 *Mich. Law Rev.* (1931), 238. See also Lévitt, "Jurisdiction over Crimes," 16 *Jour. Am. Inst. of Crim. Law and Criminology* (1925), 316. Earlier discussions of the United States materials may be found in Bishop, *Criminal Law* (9th ed. 1923), I, secs. 110, 112–116, 136–141; and Wharton, *Conflict of Laws* (3d ed. 1905), II, secs. 811–812, 823–826a.

The courts of other countries have made substantial progress in developing an equally comprehensive definition of territorial jurisdiction, even in the absence of such legislation as that reviewed above. For France, with respect to fraud, see the decisions of the Court of Cassation of Jan. 6, 1872, 77 *Bull. Crim.* 8; March 11, 1880, 85 *ibid.* 97; Dec. 18, 1908, Sirey (1913), I, 116; Aug. 31, 1911, *Rev. de Dr. Int. Privé* (1912) 360; of the Tribunal de Bayonne, Dec. 29, 1887, Clunet (1887), 517; and of the Tribunal d'Avignon, Oct. 23, 1911, *ibid.* (1912), 827; with respect to defamation, the decisions reported in Clunet (1901), 990, and Sirey (1908), I, 553; with respect to extortion, the decisions reported in Clunet (1885), 433; with respect to revelation of trade secrets, the decisions reported in Sirey (1904), I, 105; and with respect to espionage, the decisions reported in Clunet (1912), 1162. See also, for the French law and cases, Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), 43–45, 47–48; Travers, *Le Droit Pénal International* (1920), I, secs. 108–180; Travers, "*Compétence Criminelle*," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1929), IV, 360, 383–388. Some of these cases the French law regards as governed by the principle of *indivisibilité*. See Nachbaur, "*Droit Pénal International*," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII,

441, 442–444; Donnedieu de Vabres, *op. cit.*, 44–45; Travers, *op. cit.*, II, sec. 976 ff. (1921). In others, jurisdiction may be based upon the principle of *connexité*. See the above references and such cases as that of *Stuur* (French Court of Cassation, Aug. 24, 1876), Sirey (1877), I, 385, assuming jurisdiction over a forgery in Brazil which was used in France, and over the burning of a ship on the high seas since the burning was to hide the forgery. The text of the present article would include cases of *indivisibilité* where part of the crime is committed within the State, but would exclude crimes committed wholly abroad though connected with a crime committed in whole or in part within the State, unless the connected crimes were regarded as merely parts of a single crime. See further Garraud, *Traité Théorique et Pratique du Droit Pénal Français* (3d ed. 1913), I, sec. 171; and Ortolan, *Eléments du Droit Pénal* (4th ed. 1875), I, secs. 950–955.

For Germany, note the decision of the Reichsgericht of Dec. 15, 1908, taking jurisdiction of the crime of selling in Austria seditious songs which were brought into Germany, 38 *Juristische Wochenschrift*, 289, Clunet (1911), 285; and the decisions of May 12/19, 1884, 10 *Entscheidungen des Reichgerichts* (*Str.*) 420; June 24, 1884, 11 *ibid.* 20; Feb. 11, 1886, 13 *ibid.* 337. See also March 13, 1880, 1 *ibid.* 274; March 18, 1889, 19 *ibid.* 147; June 14, 1894, 25 *ibid.* 424; March 9, 1916, 49 *ibid.* 421; May 24, 1917, 50 *ibid.* 423. And see the German literature cited *infra*.

For Switzerland, note the case of *Rabbat and Limoge*, in which jurisdiction was sustained over a crime committed in part in Switzerland, although France sought extradition, reported in 13 *Rev. de Dr. Int. Privé* (1917), 605; and see Court of Cassation of Vaud, Feb. 27, 1906, in Clunet (1907), 518. For Belgium, see Court of Cassation, Oct. 29, 1928, in Clunet (1929), 772. For Italy, see Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), I, sec. 168. For Japan, see *Naokawa* v. *Chuan* (1925), *Annual Digest*, 1925–1926, Case No. 104. For Luxembourg, see Supreme Court, May 8, 1926, in Clunet (1929), 481. Laws and cases from some other States are noted in Travers, *op. cit.*

The whole question of the *locus* of crime for the purpose of territorial jurisdiction has been much discussed in Europe. The contribution of the German writers has been especially significant. See Kitzinger, "*Ort und Zeit der Handlung*", *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), Allg. Teil, I, pp. 135–223; and Heymann, *Territorialitätsprinzip und Distanzdelikt* (1914). See also Bar, *Gesetz und Schuld in Strafrecht* (1906), p. 134 ff; Bar and Brusa, in *Annuaire de l'Inst. de Dr. Int.* (1883–1885), VII, 123; Binding, *Handbuch des Strafrechts* (1885), I; Hegler, *Prinzipien des internationalen Strafrechts* (1906); Hippel, "*Zeit und Ort der Tat*", 37 *Zeitschrift für die Gesammte Strafrechtswissenschaft* (1916), 1; Kohler, *Internationales Strafrecht* (1917), pp. 109–137; Meili, *Lehrbuch des Internationalen Strafrechts und Strafprozessrechts* (1910); Rühle, *Ort und*

Zeit der Handlung im Strafrecht (1929); Tafel, *Die Geltung des Territorialprinzips im deutschen Reichstrafrecht* (1902).

It was contended in the case of the *S.S. Lotus*, before the Permanent Court of International Justice, *Publications P.C.I.J.*, Series A, No. 9, that an objective application of the territorial principle is improper where an act or omission committed in one State produces unintended effects within the territorial jurisdiction of another State. And this view was vigorously defended by the dissenting judges. Thus, Judge Loder said:

> It is clear that the place where an offence has been committed is necessarily that where the guilty person is when he commits the act. The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction. It is, however, justified where the act and its effect are indistinguishable, when there is a direct relation between them; for instance, a shot fired at a person on the other side of a frontier; a parcel containing an infernal machine intended to explode on being opened by the person to whom it is sent. The author of the crime intends in such cases to inflict injury at a place other than that where he himself is.
>
> But the case which the Court has to consider bears no resemblance to these instances. The officer of the *Lotus*, who had never set foot on board the *Boz-Kourt*, had no intention of injuring anyone, and no such intention is imputed to him. The movements executed in the navigation of a vessel are only designed to avoid an accident. . . .
>
> In these circumstances, it seems to me that the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 37.)

While the view of the dissenting judges finds support, in case of collisions between ships under different flags, in the British decision in *Queen* v. *Keyn* (1876), 2 Ex. D. 63, and the French decision in the *Ortigia—Oncle-Joseph*, Clunet (1885), 286, the contrary view is supported in the same type of case by the Italian decision in the *Ortigia—Oncle-Joseph*, Clunet (1885), 287, and the Belgian decision in the *Ekbatana—West-Hinder*, Clunet (1914), 1327. The decision in the *S.S. Lotus* clearly supports the conclusion that no principle of international law forbids the localization of an offence, consisting of unintended injury caused through negligence, at the place where the negligence takes effect. This conclusion is in harmony with tendencies clearly manifested in modern legislation. It is approved in modern draft codes, projects, and resolutions. The present article accepts this conclusion and makes no distinction between an act and an omission to act or between an intended and an unintended result.

The situation envisaged, and the scope of the competence which the present article is intended to define, may perhaps be clarified by illustration. Let us suppose that A, in State X, shoots B, who is in State Y, and that B goes into State Z and dies as a result of the wound inflicted. Suppose, further, that B's body is taken into State W where an autopsy is performed.

Under the present Article, State X has jurisdiction to prosecute and punish A for homicide since the act was committed there in part. State Y also has jurisdiction, for the same reason, since the bullet struck B in State Y. State Z has jurisdiction, either on the ground that the homicide was committed in part in State Z where B died as a result of the wound, or upon the ground that the consequence of A's act, being a constituent element of the crime, occurred in State Z. As a matter of fact, contemporary national legislation quite commonly asserts a jurisdiction to prosecute and punish for homicide on the sole ground that the victim died within the territory. On the other hand, State W has no jurisdiction to prosecute and punish for the homicide, on the ground that the victim's body is within the State or that the autopsy has been performed there, since the criminal act was not committed in whole or in part in State W.

The most thorough study of the general subject of jurisdiction of crime is found in the work of Travers, who demonstrates clearly that the commission of the crime in whole or in part within the territory is sufficient to found territorial competence. *Le Droit Pénal International* (1920), I, secs. 108–180. The proposition of Travers is concisely expressed in his draft for insertion in a penal code (*op. cit.*, V, sec. 2739), which reads as follows:

> Art. 1. La loi pénale est applicable à toutes les infractions et toutes les tentatives d'infraction par elle prévues lorsque s'est realisé, sur le territoire, en tout ou en partie, soit un élément constitutif de ladite infraction ou de ladite tentative, soit un fait influant sur la qualification même ou sur la quotité de la peine et tenant à l'activité de l'agent.

It is to be noted, finally, that the comprehensive statement of territorial competence incorporated in the present article is in substantial accord with the drafts recently approved by experts in international conference. The pronouncement of the International Conference for the Unification of Penal Law at Warsaw (1927) is made especially significant by the fact that the Conference membership was recruited primarily from national code commissions and other national bodies having first-hand experience in the drafting of penal legislation. Resolutions voted unanimously by this Conference provide in part as follows:

> Art. 1. Les lois pénales de l'Etat . . . (x) s'appliquent à quiconque commet une infraction sur le territoire . . . (x) . . .
>
> L'infraction sera considérée comme ayant été commise sur le territoire de l'Etat . . . (x), quand un acte d'exécution a été tenté ou accompli sur ce territoire ou quand le résultat de l'infraction s'est produit sur ce territoire.

Resolutions voted more recently by the Fourth Section of the International Congress of Comparative Law at The Hague (1932) include the following:

> Art. 2. Une infraction est considérée comme ayant eu lieu sur le territoire, lorsqu'un des actes d'omission ou de commission qui la constituent y a été perpétré ou tenté.

At its Munich session in 1883, the Institute of International Law approved a closely restricted definition of the territorial principle, but incorporated, nevertheless, a concession of considerable significance in view of the developments in national jurisprudence and legislation since that date. The concession is formulated in Art. 6 of the Munich resolutions as follows:

> Lorsque la loi pénale d'un pays, compétente d'après la principe de la territorialité (Art. 1–3), considère comme infraction une et indivisible dans le sens juridique, des actes commis en partie au dedans des frontières et en partie au dehors, la justice pénale de ce pays pourrait juger et punir même les actes commis à l'étranger.
>
> Il y aurait donc une compétence pénale double ou même multiple, dont l'une, dûment exercée par prévention, exclurait l'autre et serait respectée partout, sauf les cas de délit contre la sûreté de l'Etat et des infractions mentionnées à l'article 8.

In view of the position taken in 1883, there is peculiar significance in the very broad statement of the territorial principle which the Institute approved by an overwhelming majority at its Cambridge session of 1931, reproduced *supra*. The Cambridge resolutions may well be quoted again. "*Prenant en considération l'évolution de la science du droit pénal international et du droit positif,*" the Institute voted:

> Art. 1. La loi pénale d'un Etat régit toute infraction commise sur son territoire, sous réserve des exceptions consacrées par le droit des gens.
>
> Art. 2. La loi d'un Etat peut considérer une infraction comme ayant été commise sur son territoire aussi bien lorsqu'un acte (de commission ou d'omission) qui la constitue y a été perpétré (ou tenté) que lorsque le résultat s'y est produit (ou devait s'y produire).
>
> Cette règle est aussi applicable aux actes de participation.

PARTICIPATION

Up to this point the comment has been addressed to the general proposition that "a State has jurisdiction with respect to any crime committed in whole or in part within its territory." It is now to be noted, in the language of the Institute's resolutions quoted above, that this rule is applicable also to acts of participation (accessoryship, aiding and abetting, *complicité*). It should be clear that jurisdiction with respect to crime committed in whole or in part within the territory includes any act or omission committed within the territory which amounts to participation in a crime committed in whole or in part outside the territory and any act or omission committed outside the territory which amounts to participation in a crime committed in whole or in part within the territory. The two types of situation may be considered separately.

As regards participation within the territory in a crime committed in whole or in part outside the territory, the acts of commission or omission within the territory, amounting to a participation, may be regarded as separate crimes committed within the territory. It is really immaterial where the principal crime is committed. It is to be observed that practice

in some European States, notably in France, does not permit jurisdiction over participation locally where the principal crime is committed abroad. See the decisions discussed in Déprez, *De la Complicité au Point de Vue International* (1913), condemning vigorously the refusal to take jurisdiction; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 46; Travers, *Le Droit Pénal International* (1921), II, sec. 1024 ff. But whether a State wishes to exercise such jurisdiction or not, it seems clear that competence must be acknowledged. There are other States which provide specifically for the exercise of such jurisdiction. See Great Britain, 24 & 25 Vict. c. 94, sec. 7; India, Penal Code (1860), sec. 108A; Rumania, Project of Penal Code (1926), Art. 6; Sudan, Penal Code (1924), Art. 4, No. 1, ii. Some of the states of the United States have similar legislation. And it appears that the common law in the United States has been held to support the same conclusion. See Wharton, *Criminal Law* (12th ed. 1932), I, sec. 333, citing cases. From the viewpoint of international law, there seems to be no doubt that a State may take jurisdiction of participation within its territory wherever the principal crime may be committed.

As regards participation abroad in a crime committed in whole or in part within the territory, the State's jurisdiction may likewise be deduced from the general proposition that "a State has jurisdiction with respect to any crime committed in whole or in part within its territory" if the participation is to be regarded as a part of the crime. If participation were commonly so regarded, it would seem unnecessary to deal with it in special terms. As a matter of national practice, however, participation is commonly treated as an offence separate and complete in itself. It is essential that it receive separate attention, therefore, and the present article expressly includes within the scope of the general proposition "any participation outside its territory in a crime committed in whole or in part within its territory." The rule thus formulated finds support in many statutes and decisions. The following statutes of states of the United States may be noted:

> California.—The following persons are liable to punishment under the laws of this state: . . . 3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.
>
> Every person, who, being out of this state, causes, aids, advises, or encourages any person to commit a crime within this state, and is afterwards found within this state, is punishable in the same manner as if he had been within this state when he caused, aided, advised, or encouraged the commission of such crime. (Penal code of 1872, amended to 1923, secs. 27, 778b.)
>
> New Hampshire.—Whenever a crime shall have been committed in this state, and any person without this state shall have been accessory thereto before the fact, such accessory may be tried and punished in the county where the crime was committed, in the same manner as if the acts done by him had been done in this state. (Public Laws, 1926, c. 395, sec. 8.)

Like the California statute, see Hawaii, Rev. Laws (1925), sec. 4033; Idaho, Comp. Stat. (1919), sec. 8091, No. 3; Minnesota, Gen. Stat. (1923), sec. 9909, No. 3; Montana, Rev. Codes (1921), sec. 10730, No. 3; New York, Cons. Laws (1923), c. 41, sec. 1930, No. 3; North Dakota, Comp. Laws (1913), sec. 9206, No. 4; Oklahoma, Comp. Stat. (1921), sec. 1510, No. 4; Porto Rico, Rev. Stat. and Codes (1911), sec. 5444, No. 3; Utah, Comp. Laws (1917), sec. 7916, No. 3; Washington, Comp. Stat. (1922), sec. 2254, No. 3. Similar legislation is found also in Bermuda, Acts of the Legislature (1931), I, c. 4, sec. 19; Jamaica, The Administration of Criminal Justice Law (1928), sec. 24; Laws of Nigeria (1923), I, c. 21, Criminal Code, sec. 13; Queensland, Criminal Code Act of 1899, sec. 14; Egypt, Native Penal Code (1904), Art. 2, sec. 1; and Sudan, Penal Code (1924), Art. 4, No. 1, i.

The same principle has been applied in the United States in judicial decisions. In *State* v. *Grady* (1867), 34 Conn. 118, where a theft in Connecticut occurred as a result of a conspiracy formed in New York, the Connecticut court upheld jurisdiction over those of the defendants who had aided in New York the committing of the theft in Connecticut. In *State* v. *Chapman* (1871), 6 Nev. 320, the Nevada courts sustained jurisdiction over a defendant who had aided in California the committing of a robbery in Nevada. See also *Elliott* v. *State* (1919), 77 Fla. 611, upholding jurisdiction but reversing the conviction on other grounds; and *Latham* v. *United States* (1924), 2 F. (2d) 208, *Annual Digest*, 1923–1924, Case No. 56. *Contra*, however, in the absence of statute, see *State* v. *Chapin* (1856), 17 Ark. 561; *Johns* v. *State* (1862), 19 Ind. 431; and *State* v. *Wyckoff* (1864), 31 N.J.L. 65.

A similar principle has been applied in countries deriving their jurisprudence from the Civil Law. A notable line of decisions of the Court of Cassation of France has upheld French territorial jurisdiction over participation abroad in crimes committed in France. One of the best known is the case of *Philippe*, Sept. 7, 1893, Sirey (1894), I, 249, Clunet (1893), 1161, in which the French court took jurisdiction over a defendant who had received in Belgium property which had been stolen in France, the court saying:

> lorsqu'un crime ou un délit est commis en France, la compétence de la justice française pour connaître du fait principal s'étend necessairement à tous les faits de complicité, même s'ils se sont produits en pays étranger. (Sirey, 1894, I, 249, 250.)

Similar cases are those of *Laterner*, March 13, 1891, Sirey (1891), I, 240 (theft in France, *complicité* in London); and *Wyzogrocki*, Feb. 17, 1893, Clunet (1894), 118. In the case of *Holden*, Feb. 24, 1883, Sirey (1885), I, 95, an alien committed abroad certain falsifications and forgeries which were used in France and was convicted as an accomplice to their use in France. See also, *Micheli, Chauvet et Martin*, Apr. 30, 1908, Sirey (1908), I, 553. For further information as to French practice, see Déprez, *De la Complicité au Point de Vue International* (1913), pp. 69–95; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), 46; Nachbaur,

"*Droit Pénal International,*" in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII, 441, 447–448; Travers, *Le Droit Pénal International* (1921), II, secs. 1008–1014. The Austrian courts have upheld jurisdiction over participation abroad in crime committed on Austrian territory, in the case of *Stefan H.*, Apr. 27, 1894, 5 *Zeitschrift für Internationales Privat- und Strafrecht* 522; Clunet (1896), 197. So have the Belgian courts: see Haus, *Principes Généraux du Droit Pénal Belge* (1869), 144; the case of *Govaert, Pasicrisie belge* (1925), 189, syllabus in 20 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1925), 553. For Germany, see decisions of June 24, 1884, 11 *Entscheidungen des Reichsgerichts* (*Str.*) 20; March 18, 1889, 19 *ibid.* 147; Dec. 30, 1889, 20 *ibid.* 169; June 14, 1894, 25 *ibid.* 424; and R. von Hippel, *Deutsches Strafrecht* (1930), II, 72. Italian practice is to the same effect: see the cases of *Camponovo,* June 12, 1890, Clunet (1892), 290, *ibid.* (1893), 632, taking jurisdiction of an alien who had participated abroad in the crime of smuggling in Italy; and *Tarnowski e Prilukoff,* Nov. 6, 1909, 62 *Giur. Ital.* (1910), II, 70, taking jurisdiction over an alien for participation abroad in a homicide committed in Italy. See also Diena, *Principii di Diritto Internazionale* (2nd ed. 1914), I, pp. 288–289; and Manzini, *Trattato di Diritto Penale Italiano* (2nd ed. 1926), I, p. 319.

Recognition of the same principle is implicit in the extradition laws of certain countries in which provision is made for the surrender of those who have committed within the territory acts amounting to participation in crimes committed abroad. The laws of Sweden, for example, have provided:

> Lorsque l'extradition d'un individu est réclamée pour complicité d'une infraction commise hors de Suède, l'extradition doit être accordée, malgré les dispositions de l'article 2 du chapitre 1er de la loi pénale, même si l'acte de complicité soit être réputé commis en Suède ou bien à bord d'un navire suédois hors de Suède. (*Annuaire de Législation Etrangère,* 1913, pp. 481, 482.)

The International Prison Congress of 1900 adopted a resolution affirming jurisdiction over participation abroad in crimes committed within the territory in the following terms:

> IV. La loi pénale du pays où une infraction a été commise est applicable non seulement à cette infraction elle-même, mais aussi à tous les actes de participation, eussent-ils été accomplis à l'étranger ou par des étrangers. (*Actes du Congrès Pénitentiaire International de Bruxelles,* 1901, I, 177, 178.)

The resolutions of the Institute of International Law, adopted at Cambridge in 1931 and supporting the same proposition, have already been quoted.

ATTEMPT

Likewise included within the scope of the general proposition that "a State has jurisdiction with respect to any crime committed in whole or in part within its territory" is "any attempt outside its territory to commit a

crime in whole or in part within its territory." As in case of participation, discussed above, there is no difficulty with respect to attempt within the territory to commit a crime outside. As regards attempt outside the territory to commit a crime within, if the attempt succeeds there is jurisdiction on the ground that a crime has been committed at least in part within the territory. If the attempt fails, however, territorial jurisdiction at the place where the crime was to have been consummated requires an explicit recognition. Such an explicit recognition is incorporated in par. (b) of the present article.

Contemporary practice appears to warrant the inclusion. The following penal codes or projects of codes may be quoted:

> Brazil, Project of Penal Code (Sa Pereira, 1927), Art. 10.—An attempt committed abroad is deemed committed in the country, when it was the intention of the perpetrator that its effects should take place within it.
>
> Czechoslovakia, Project of Penal Code (1926), sec. 8.—L'acte est réputé commis à l'endroit où l'agissement punissable a été exécuté. L'acte est aussi réputé commis sur le territoire de la République lorsqu'au moins le résultat prévu par la loi s'est produit sur le dit territoire ou qu'il s'y serait produit si l'acte n'en était resté à la tentative.
>
> Germany, Project of Penal Code (1927), sec. 8.—An act is committed at each place in which the elements of the punishable action have been realized in whole or in part, or where, in the case of attempt, they were to be realized according to the intention of the actor.
>
> Norway, Penal Code (1902), sec. 12, No. 4B.—Dans le cas où la répression a pour objet les conséquences intentionelles ou fortuites d'un acte, ou que les conséquences servent à mesurer la peine, cet acte est considéré comme commis également là où les conséquences se sont produites ou l'intention était qu'elles se produissent.
>
> Poland, Penal Code (1932), Art. 3, sec. 2.—L'infraction est considérée comme commise sur le territoire de l'Etat Polonais, sur un navire ou aéronef polonais, si l'auteur y a accompli l'action ou l'omission délicteuses ou lorsque l'effet délicteux s'y est produit ou devait s'y produire suivant l'intention de l'auteur.
>
> Switzerland, Project of Penal Code (1918), Art. 8.—Une tentative est réputée commise tant au lieu où son auteur l'a faite, qu'au lieu où, d'après le dessein de l'auteur, le résultat devait se produire.

Similar provisions are found in Argentina, Penal Code (1921), Art. 1, sec. 1; Chile, Project of Penal Code (1929), Art. 5; Costa Rica, Penal Code (1924), Art. 219, No. 7; Cuba, Project of Penal Code (Ortiz, 1926), Art. 32; Denmark, Penal Code (1930), sec. 9; France, Project of Penal Code (1932), Art. 11; Mexico, Penal Code (1931), Art. 2; and the Swiss Canton of Bern, Law of July 5, 1914, Art. 1.

While there appears to be very little law in the United States on the subject, Wharton, *Criminal Law* (12th ed. 1932), I, sec. 233, says:

It is clear that such attempt is cognizable in the place where, if not interrupted, it would have been executed; and from the very nature of things, it must be cognizable in the place where the preliminary overt acts constituting the attempt are committed.

The type of situation in which par. (b) of the present article might be invoked appropriately may be illustrated by a hypothetical case. Suppose that A, in State X, mails poisoned candy to B, in State Y, for the purpose of killing B; but suppose that the postal authorities of State X intercept the poisoned candy before it reaches State Y. If A should be tried in State X, State Y would be incompetent under Article 13, *infra*, to try A again for the same offence; but, if A should escape prosecution in State X, then State Y would have jurisdiction under the present article to prosecute and punish for the attempt to commit murder within its territory. Again, suppose that A in State X should shoot at B in State Y, intending to kill B, but that the weapon should prove to have been loaded, without A's knowledge, with a harmless blank cartridge. State Y would have jurisdiction under par. (b) of the present article to prosecute and punish A for an attempt to commit murder within its territory.

The definition of "attempt" in criminal law is of course outside the scope of the present Convention. It may be observed that a criminal attempt is in general a deliberate act done with intent to cause injury to someone or with intent to violate the penal law. It is such an act done outside the territory with intent to commit a crime in whole or in part inside the territory that par. (b) recognizes as within the territorial competence. On attempts, in general, see Arnold, "Criminal Attempts—The Rise and Fall of an Abstraction," 40 *Yale Law Jour.* (1931), 53; Beale, *A Selection of Cases and Other Authorities upon Criminal Law* (3d ed. 1915), pp. 102–132; Beale, *"Criminal Attempts,"* 16 *Harv. Law Rev.* (1903), 491; Bishop, *Criminal Law* (9th ed. 1923), I, secs. 724–772a; Curran, "Criminal and Non-Criminal Attempts," 19 *Georgetown Law Jour.* (1931), 185, 316; Sayre, *A Selection of Cases on Criminal Law* (1927), pp. 318–345; Strahorn, "The Effect of Impossibility on Criminal Attempts," 78 *Univ. Pa. Law Rev.* (1930), 962; Waite, *Cases on Criminal Law and Procedure* (1931), pp. 160–183. See also Ferri, *Principii di Diritto Criminale* (1928), pp. 540–550, 636–640; Frank, *"Vollendung und Versuch," Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), Allg. Teil, V, 163–268; Garraud, *Traité Théorique et Pratique du Droit Pénal Français* (3d ed. 1913), I, pp. 486–506; Hippel, *Deutsches Strafrecht* (1930), II, pp. 392–437; Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), II, pp. 261–305. And see *Conférence Internationale d'Unification du Droit Pénal* (Warsaw, 1927), *Actes de la Conférence, passim.*

ARTICLE 4. SHIPS AND AIRCRAFT

A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character.

This jurisdiction extends to

(a) Any participation outside its territory in a crime committed in whole or in part upon its public or private ship or aircraft; and

(b) Any attempt outside its territory to commit a crime in whole or in part upon its public or private ship or aircraft.

COMMENT

This article recognizes that a State has, with respect to its public or private ships or aircraft, while in its own territorial waters or air, on the high seas or in the "free air," or in foreign territorial waters or ports or air, a jurisdiction as extensive as that recognized in Article 3, preceding, with respect to the State's territory. Ships and aircraft are not territory. It is recognized, nevertheless, that a State has with respect to such ships or aircraft a jurisdiction which is similar to its jurisdiction over its territory. Thus the State's jurisdiction includes crime committed in whole or in part upon such ships or aircraft, participation in crime committed in whole or in part upon such ships or aircraft, and attempts to commit crime in whole or in part upon such ships or aircraft. In case of crime in foreign territorial waters or air, it should be noted, the jurisdiction herein defined is concurrent with the jurisdiction which Article 3 concedes to the littoral or subjacent State. *Cf.* Art. 1 (d), *supra.* It is also to be noted that the provisions of Article 13, *infra,* incorporating the principle of *non bis in idem,* limit the State with respect to crime on its vessels or aircraft if the accused is an alien and has already been tried by the littoral or subjacent State.

The propriety of this assimilation of ships to territory is almost universally recognized. The earlier discussions of ships on the high seas or in foreign waters developed the idea that a ship might be regarded, for the purpose of jurisdiction, as a kind of "floating island" of the flag State. See, for example, the case of the *Costa Rica Packet,* between Great Britain and the Netherlands, in which F. de Martens as arbitrator said:

> Qu'en haute mer, même les navires marchands constituent des parties detachées du territoire de l'Etat dont ils portent le pavillon et, en conséquence, ne sont justiciables des faits commis en haute mer qu'aux autorités nationales respectives. (Clunet, 1897, 624, 625.)

While most modern jurists reject this analysis, as founded upon an unsupportable fiction, the jurisdiction of the flag State over crimes committed on board is justified on grounds of convenience. Thus Hyde says:

> The relation between a vessel and the country to which it belongs is sufficiently close to justify the latter to assert a right of jurisdiction with respect to the ship and its occupants. (*International Law,* 1922, I, 406.)

See Hall, *International Law* (8th ed. 1924), p. 301. A similar view was taken by two judges of the Permanent Court of International Justice in their dissenting opinions in the case of the *S.S. Lotus:*

> A merchant ship being a complete entity, organized and subject to the control of the State whose flag it flies, and having regard to the absence of all territorial sovereignty on the high seas, it is only natural that as far as concerns criminal law this entity should come under the jurisdiction of that State. (Loder, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 39.)

> The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. (Finlay, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 53.)

The point suggested by Judge Loder, that a ship is a self-contained unit under the control and command of its own officers, has doubtless contributed much to the general recognition of the flag State's jurisdiction over its own ships. And the jurisdiction which became well established with respect to ships was extended by analogy to include aircraft when the development of aviation made the jurisdiction of aircraft a practical problem.

Whatever its theoretical basis, the jurisdiction of the State over crime on its seagoing vessels, public and private, has become well established in international law. This jurisdiction was acknowledged by all the judges of the Permanent Court of International Justice, in the case of the *S.S. Lotus*, although they differed as to the reasons for the principle. The majority opinion was explicit in its assertion of the principle applicable to the case presented. It was said:

> A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies. . . . It follows that what occurs on board a vessel on the high seas must be regarded as if it had occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag, or in foreign territory, the same principle must be applied as if the territories of two different states were concerned. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 25.)

Reference may also be made to the dissenting opinions of Judge Nyholm and Judge Moore:

> International law recognizes that a vessel is to be regarded as a part of the territory and subject to the jurisdiction exercised thereon. (Nyholm, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 62.)

> It is universally admitted that a ship on the high seas is, for jurisdictional purposes, to be considered as a part of the territory of the country to which it belongs; and there is nothing in the law or in the reason of the thing to show that, in the case of injury to life and property on board a ship on the high seas, the operation of this principle differs from its operation on land. (Moore, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 69.)

Further support for the general principle is found in its widespread acceptance by jurists and writers from all parts of the world. See Antokoletz, *Derecho Internacional Publico* (1925), II, sec. 291; Baty, *The Canons of International Law* (1930), pp. 54–71; Bevilaqua, *Direito Publico Internacional* (1911), I, sec. 62; Bluntschli, *Das Moderne Völkerrecht* (1878), sec. 317 ff.; Calvo, *Le Droit International* (5th ed. 1896), I, sec. 450 ff.; Cruchaga Tocornal, *Nociones de Derecho Internacional* (3d ed. 1923), I, secs. 471, 473, 474, 479; Despagnet, *Cours de Droit International Public* (4th ed. 1910), secs. 266, 267; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 20–21, 36–39; Fauchille, *Traité de Droit International Public* (1925), I, pt. 2, pp. 888–1172; Fiore, *Traité de Droit Pénal International* (Antoine's transl. 1880), secs. 10–21; Fiore, *International Law Codified* (Borchard's transl. 1918), sec. 309; Gidel, *Le Droit International Public de la Mer* (1932), I, Bk. 3; Hall, *International Law* (8th ed. 1924), p. 301 ff.; Holtzendorff, *Handbuch des Völkerrechts* (1887), II, sec. 94; Jordan, *"De la juridiction compétente à l'effet de connaître des crimes et délits commis en haute mer sur les navires de commerce," Rev. de Dr. Int. Privé* (1908), p. 341; Liszt, *Das Völkerrecht* (12th ed. 1925), pp. 147–9; F. de Martens, *Traité de Droit International* (Léo's transl. 1887), I, p. 497, and II, pp. 336–338; Moore, *Digest of International Law* (1906), I, pp. 930–938; Olivart, *Derecho Internacional Publico* (1903), I, pp. 212–215, 282, 289–290; Oppenheim, *International Law* (4th ed. 1928), I, secs. 146, 190c, 264, 450; Ortolan, *Règles Internationales et Diplomatie de la Mer* (4th ed. 1864), I, pp. 261–278; Pradier-Fodéré, *Traité de Droit International Public* (1891), V, secs. 2401 ff., and 2434 ff.; Rivier, *Principes du Droit des Gens* (1896), I, pp. 141–142, 240, 333–335; Testa, *Le Droit Public International Maritime* (Bontiron's transl. 1886), p. 104 ff.; Travers, *Le Droit Pénal International* (1920), I, secs. 238–279; Vattel, *Law of Nations* (1758), Bk. I, sec. 216; Westlake, *International Law* (1904), I, pp. 163–164, 175; Wharton, *Conflict of Laws* (3d ed. 1905), II, secs. 816–817.

There is general agreement that with respect to crimes committed on the high seas the jurisdiction of the flag State extends to both public and private vessels and to both nationals and aliens. This jurisdiction is asserted in most of the national penal codes. See, in addition to those cited below as asserting a still more comprehensive jurisdiction, the following: Argentina, Code of Penal Procedure (1888), Art. 23, No. 1; Brazil, Penal Code (1890), Art. 4; Chile, Code of Penal Procedure (1906), Art. 2, No. 4, Project of Penal Code (1929), Art. 2, No. 1; Costa Rica, Penal Code (1924), Art. 219, Nos. 1 and 2; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33, No. 4; Denmark, Penal Code (1866), sec. 3 (understood to be in force in Iceland); Denmark, Penal Code (1930), sec. 6, pt. 1, No. 2; Ecuador, Penal Code (1906), Art. 10; Great Britain, Merchant Shipping Act (1894), 57 & 58 Vict. c. 60, sec. 686; Guatemala, Penal Code (1889), Art. 6, No. 1; Hungary, Law XVI (1879); Norway, Penal Code (1902), sec. 12, No. 1; Portugal,

Penal Code (1886), Art. 53, No. 2; Treaty of Montevideo on International Penal Law (1889), Art. 8.

There is likewise general agreement that a State has jurisdiction over all crimes committed on its warships in foreign waters. Jurisdiction over crimes committed on national warships in foreign ports is expressly affirmed in Brazil, Penal Code (1890), Art. 4; Chile, Code of Penal Procedure (1906), Art. 2, No. 4, Project of Penal Code (1929), Art. 2, No. 1; Costa Rica, Penal Code (1924), Art. 219, No. 1; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33, No. 4; Portugal, Penal Code (1886), Art. 53, No. 2. National codes which limit this competence over crimes committed on national warships in foreign ports to crimes committed by a person connected with the vessel are distinctly exceptional. See Colombia, Penal Code (1890), Art. 20, No. 6; Peru, Penal Code (1924), Art. 4; and Treaty of Montevideo on International Penal Law (1889), Art. 9.

There is not the same approach to unanimity, however, with respect to crimes committed on private merchant vessels in foreign ports. See Fedozzi, "*Des délits à bord des navires marchands dans les eaux territoriales étrangères,*" 4 *Rev. Gén. de Dr. Int. Pub.* (1897), 202. Many States, including perhaps the most important maritime countries, assert in the broadest terms a competence with respect to crimes committed on their vessels, both public and private, whether on the high seas or in foreign territorial waters. The following may be noted by way of example:

> Germany, Project of Penal Code (1927), sec. 5, par. 2.—The penal laws of the Reich apply to acts which are committed on a German ship or aircraft, even if the ship or aircraft at the time of the act is not within the territory.
>
> Japan, Criminal Code (1907), sec. 1, par. 2.—The law is also applicable to persons who have committed offences on board Japanese ships outside the Empire.
>
> Netherlands, Penal Code (1881), Art. 3.—La loi pénale néerlandaise s'applique à quiconque, hors du royaume en Europe, à bord d'un navire néerlandaise, se rend coupable d'un fait punissable.
>
> United States, Criminal Code (1909), sec. 272.—The crimes and offenses defined in this chapter shall be punished as herein prescribed: First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. (35 U. S. Stat. L. 1142.)

Legislation of like effect is found in China, Penal Code (1928), Art. 3; Danzig, *Stafprozessordnung* (1927), sec. 10; Finland, Penal Code (1889), Arts. 1 and 2; Italy, Penal Code (1930), Art. 4, par. 2; Mexico, Federal Penal Code

(1931), Art. 5, I and II; Poland, Penal Code (1932), Art. 3; Rumania, Penal Code (1865), Art. 3; Rumania, Project of Penal Code (1926), Art. 3; Spain, Penal Code (1928), Art. 19; Sweden, Penal Code (1864), Arts. 1 & 2; Yugoslavia, Penal Code (1929), Art. 3. See also Resolutions of the Warsaw Conference for the Unification of the Penal Law (1927), Art. 1; Field, *Outlines of an International Code* (2d ed. 1876), Art. 642.

Other States do not assert an unrestricted competence over crimes committed on national merchant ships in foreign ports. In some codes the competence asserted is limited to crimes which do not disturb the tranquillity of the foreign port, or to crimes committed by persons who are members of the ship's personnel or passenger list, leaving jurisdiction in other cases exclusively to the littoral State. Norway may be noted, by way of example:

> Norway, Penal Code (1902), sec. 12.—A moins de dispositions contraires, le Code pénal norwégien est applicable aux actes condamnables commis:
> 1. A l'intérieur du pays, y compris les navires norwégiens en pleine mer;
> 2. Sur un navire norwégien où qu'il se trouve, si l'auteur de l'acte appartient à l'équipage du navire, ou est une autre personne accompagnant le navire.

Like the Norwegian code, in restricting the jurisdiction asserted to persons identified with the vessel, see Colombia, Penal Code (1890), Art. 20, Nos. 6 and 7; Denmark, Penal Code (1930), Art. 6, pt. 1, Nos. 2 and 3; Nicaragua, Penal Code (1891), Art. 13, No. 2; Panama, Penal Code (1922), Art. 8; Venezuela, Penal Code (1926), Art. 4, Nos. 7 and 8. And asserting jurisdiction over crimes on merchant ships in foreign ports only under certain conditions, see Costa Rica, Penal Code (1924), Art. 219, No. 3; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33, No. 4; Portugal, Penal Code (1886), Art. 53, No. 2.

The decisions of British and American courts assert jurisdiction without qualification over crimes committed on national ships in foreign territorial waters as well as on the high seas. Jurisdiction over crimes committed on British vessels on the high seas was affirmed in *Reg.* v. *Jones* (1845), 2 C. & K. 165; *Reg.* v. *Lopez* (1858), D. & B. 525; *Reg.* v. *Sattler* (1858), 7 Cox C. C. 431; *Reg.* v. *Lesley* (1860), 8 Cox C. C. 269; *Reg.* v. *Peel* (1862), 9 Cox C. C. 220; *Reg.* v. *Seberg* (1870), L. R. 1 C. C. 264; *Reg.* v. *Dudley* (1884), 15 Cox C. C. 624; *King* v. *Neilson* (1918), 52 N. S. (Canada), 42. See also *Reg.* v. *Menhan* (1856), 1 F. & F. 369; *Marshall* v. *Murgatroyd* (1870), 6 Q. B. 30; *King* v. *Heckman* (Nova Scotia, 1902), 5 Can. Cr. C. 242. Jurisdiction over crimes committed on British vessels in foreign waters was asserted in *Reg.* v. *Anderson* (1868), L. R. 1 C. C. 161; and *Reg.* v. *Ross* (1854), 1 N.S.W.S.C.R. app. (Australia) 43. See also *Reg.* v. *Allen* (1837), 7 Car. & P. 664; *Queen* v. *Sharp* (1869), 5 P. R. (Ontario), 135; *Reg.* v. *Armstrong* (1875), 13 Cox C. C. 184; *Reg.* v. *Carr and Wilson* (1882), 10 Q.B.D. 76. The

English law is summarized in Stephen, *Digest of the Law of Criminal Procedure* (1883), Art. 3, as follows:

> The criminal law of England extends to all offences committed on British ships either by British subjects or by foreigners, either on the high seas or in foreign harbours or rivers below bridges where great ships go.

Courts in the United States have likewise held consistently that their jurisdiction extends to crimes committed on national ships both on the high seas and in foreign waters. Jurisdiction over crimes committed on American vessels on the high seas was asserted in *United States* v. *Holmes* (1820), 5 Wh. (U. S.), 412; *United States* v. *Arwo* (1873), 19 Wall. (U. S.), 486; *St. Clair* v. *United States* (1894), 154 U. S. 134; *Anderson* v. *United States* (1898), 170 U. S. 481; *United States* v. *Sharp* (1815), Fed. Cas. 16624; *United States* v. *Thompson* (1832), 1 Sumn. 168; *United States* v. *Gilbert* (1834), Fed. Cas. 15204; *United States* v. *Holmes* (1842), Fed. Cas. 15383; *United States* v. *Plumer* (1859), Fed. Cas. 16056; *United States* v. *Gordon* (1861), Fed. Cas. 15231; *United States* v. *Demarchi* (1862), Fed. Cas. 14944; *United States* v. *Beyer* (1887), 31 Fed. 35; *Oliver* v. *United States* (1916), 230 Fed. 971; *Pedersen* v. *United States* (1921), 271 Fed. 187. See also *United States* v. *Townsend* (1915), 219 Fed. 761. To the effect that United States courts have such jurisdiction over crimes committed in part on an American vessel on the high seas and in part in the sea, see *Miller* v. *United States* (1917), 242 Fed. 907 (certiorari denied, 245 U. S. 660). Jurisdiction over crimes on American vessels in foreign waters was taken in *United States* v. *Rodgers* (1893), 150 U. S. 249; *United States* v. *Flores* (1933), 289 U. S. 137; *United States* v. *Keefe* (1824), Fed. Cas. 15509; *United States* v. *Stevens* (1825), Fed. Cas. 16394; *United States* v. *Roberts* (1843), Fed. Cas. 16173; *United States* v. *Seagrist* (1860), Fed. Cas. 16245; *United States* v. *Bennett* (1877), Fed. Cas. 14574. See also *In re Ross* (1891), 140 U. S. 453 (British seaman on United States vessel held within jurisdiction of United States consular court). *Cf. United States* v. *M'Gill* (1806), 4 Dall. 426, and *United States* v. *Davis* (1837), Fed. Cas. 14932 (holding that essential parts of the crimes charged were not committed on the vessel); *United States* v. *Wiltberger* (1820), 5 Wh. (U. S.), 76 (holding that manslaughter committed on a vessel on a Chinese river thirty-five miles from the sea was not committed on the "high seas"); *United States* v. *Jackson* (1843) Fed. Cas. 15457, and *Mathues* v. *United States ex rel. Maro* (1928), 27 F. (2d) 518 (likewise holding that the crime was not committed on the "high seas"). The three cases last noted would seem to have been clearly overruled, however, by *United States* v. *Flores, supra* (sustaining jurisdiction of crime committed on an American vessel anchored two hundred and fifty miles from the sea on a stream in the Belgian Congo).

Indicating that the French courts assume a similar jurisdiction of crimes committed on French vessels, see *Maréchal* c. *Denechaud*, Sirey (1839), II,

38; *Amad-ben-Maroufou*, Sirey (1882), I, 433. To the same effect, in Germany, see the decision of Oct. 21, 1892, 23 *Entscheidungen des Reichsgerichts (Str.)* 266; and see also decision of Jan. 15, 1917, 50 *ibid.* 218, 220. For Italy, see Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), I, 296 ff; and Ravizza, in *Giur. Ital.* (1914), II, 463–480; and see the case of *Tarasco* (1930), 25 *Rev. de Dr. Maritime Comparé*, 350.

In view of the consistent tendency of national legislation and jurisprudence to assert an unqualified jurisdiction with respect to crime on national ships, of the rather obvious considerations of convenience upon which the practice rests, and of the unanimity of opinion among writers, it has seemed clear that a principle which assimilates competence over ships to the State's territorial competence is well founded. A similar solution for the problem of aircraft, while of course impossible to support by an equally impressive array of practice and opinion, seems warranted by similar considerations of convenience and by such authority and opinion as has found expression during the relatively short interval in which the problem has been one of practical importance.

As regards aircraft, the most recent national legislation tends to support the principle of the present article. The following may be noted:

> Germany, Project of Penal Code (1927), sec. 5, par. 2.—The penal laws of the Reich apply to acts which are committed on a German ship or aircraft, even if the ship or aircraft at the time of the act is not within the territory.
>
> Great Britain, Air Navigation Act (1920), 10 & 11 Geo. V. c. 80, sec. 14 (1).—Any offence under this Act or under an Order in Council or regulations made thereunder, and any offence whatever committed on a British aircraft, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.
>
> Sec. 17 (1). An Order in Council under this Act may be made applicable to any aircraft in or over the British Islands or the territorial waters adjacent thereto, and to British aircraft wherever they may be.
>
> Mexico, Federal Penal Code (1931), Art. 5.—There will be considered as committed on the territory of the Republic . . . IV. Those committed on board national or foreign airships which are on the territory or in national or foreign air or territorial waters, in cases analogous to those which the preceding sections prescribe for vessels.

See Great Britain, Air Navigation (Consolidation) Order, 1923, sec. 2, Stat. Rules & Orders, 1923, p. 14; McNair, *Law of the Air* (1932), p. 93. See also Italy, Penal Code (1930), Art. 4, par. 2; Poland, Penal Code (1932), Art. 3; Spain, Penal Code (1928), Art. 19; Yugoslavia, Penal Code (1930), Art. 3. And see Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 21–22, 39; Travers, *Le Droit Pénal International* (1920), I, secs. 280–284. Supporting the jurisdiction of the flag State, see P. de Damlovics and V. de Szondy, "*Les infractions à la loi pénale commises à*

bord des aéronefs," 14 *Droit Aérien* (1930), 402; Niemeyer, *"Crimes et délits commis à bord des aéronefs,"* 13 *ibid.* (1925), 285; Volkman, *"Crimes et délits à bord des aéronefs en droit international,"* 15 *ibid.* (1931), 26; and Resolutions of the Congrès Juridique International de l'Aviation (Geneva, 1912), Arts. 18 and 21.

The best-considered draft seems to be that of the Congrès Juridique International de l'Aviation (Budapest, 1930), incorporating the following provisions:

> 2. La compétence pénale de droit aérien appartient, d'une part, à l'Etat de pavillon et, d'autre part, à l'Etat survolé.
> 3. Les effets de la compétence pénale de droit aérien sont les mêmes que ceux de la compétence territoriale.
> 4. La compétence pénale de droit aérien n'exclut pas l'exercice de la répression sur d'autres bases que celles de la territorialité.
> 5. Quand l'aéronef n'a pas la nationalité de l'Etat survolé, celui des deux Etats compétents qui tient en son pouvoir le prévenu a la priorité de compétence.
> [Later articles deal with extradition to either of these States by a third State.]
> (9me *Congrès International de Législation Aérienne du Comité Juridique International de l'Aviation*, 1931, p. 233.)

It is true that a considerable body of opinion would not support the unqualified inclusion of aircraft in the present article. While all agree, in general, that the State over which an aircraft is in flight is competent with respect to crimes in the territorial air, especially if such crimes have some effect on the subjacent territory, there is not the same approach to unanimity with respect to the State or States which should have concurrent jurisdiction. There are those who would prefer, on the basis of what are assumed to be practical considerations, to substitute for the jurisdiction of the flag State the jurisdiction of the State in which the aircraft lands after the crime is committed. See Lortsch, *"Du statut juridique du passenger d'aéronef,"* 13 *Droit Aérien* (1929), 7; Morpurgo, *"Quelques considérations sur les conflits internationaux de juridiction en matière pénale aéronautique,"* 12 *Rev. Jur. Int. de la Locom. Aérienne* (1928), 398; Pholien, *"Des crimes et délits commis à bord d'aéronefs en vol,"* 13 *Droit Aérien* (1929), 289. See also Hirschberg, *"Die Regelung der Zuständigkeit im internationalen Luftstrafrecht nach der Beschlüssen des comité juridique international de l'aviation von 8 Oktober 1930,"* 2 *Archiv für Luftrecht* (1931), 159; Meyer, *"Luftfahrt und Strafrecht,"* 2 *ibid.* (1932), 150. Such a substitution appears to be supported neither by analogy nor by practice. If sufficient evidence of the assumed practical considerations can be presented, it might become an appropriate subject for international legislation in the form of a general convention regulating aviation.

It is of course true that most aircraft are much less self-contained than seagoing vessels at the present time. See McNair, *Law of the Air* (1932), p. 90. It seems, however, that in their legal relations to their own State and to foreign States they have many points of resemblance and that they may

well be regarded, for present purposes, in substantially the same way. The case of an airplane which has landed on foreign territory is certainly the most extreme case to which the present article can be applied; but it seems impracticable to attempt any certain distinctions between the principles which should govern airplanes on the ground, on the one hand, and vessels tied up at dock or airships tied to a mooring mast, on the other hand. It has seemed better to state a general principle applying to all aircraft than to attempt distinctions which would be conditioned upon the size or type of aircraft or the means of contact with the ground when not in flight.

While some national legislation refers only to "crimes committed on national vessels," it is believed that the State's jurisdiction with respect to vessels and aircraft is as comprehensive as that which is stated in Article 3, preceding, with respect to territory. It includes crimes committed in whole or in part upon national ships or aircraft, participation in crime committed upon such ships or aircraft, and attempts to commit crime upon such ships or aircraft. The decision of the Permanent Court of International Justice in the case of the *S.S. Lotus* tends to support this conclusion. One of the principal grounds for that decision, with respect to which Judge Moore concurred with the majority, was that the negligence of the officer of the French vessel took effect upon the Turkish vessel which was thus sunk in consequence of collision on the high seas. Many of the writers insist that crime on shipboard should be regarded in the same way as crime on the territory; and an assimilation to territory is made expressly in some of the national codes. The following may be noted:

> Spain, Penal Code (1928), Art. 19.—There shall also be considered as Spanish territory, by extension, for those purposes:
> 1. Spanish vessels and aircraft, on the high sea, or in the free zone of the air, or anchored in a foreign port or in a foreign aerodrome.

See also Brazil, Penal Code (1890), Art. 4; Ecuador, Penal Code (1906), Art. 10; Hungary, Law XVI (1879); Italy, Penal Code (1930), Art. 4, par. 2; Norway, Penal Code (1902), sec. 12, No. 1, quoted *supra*. A still more explicit provision is found in the new Polish Penal Code of 1932, as follows:

> Art. 3, sec. 2.—L'infraction est considérée comme commise sur le territoire de l'Etat Polonais, sur un navire ou un aéronef polonais, si l'auteur y a accompli l'action ou l'omission délictueuses ou lorsque l'effet délictueux s'y est produit ou devait s'y produire suivant l'intention de l'auteur.

It is not within the province of this Convention to prescribe detailed rules for determining every possible question with respect to the water or airborne craft which are to be regarded as ships or aircraft within the meaning of the present article. In general, it is believed that the term "ships" is broad enough to include various kinds of small watercraft, as well as the larger seagoing vessels, and that it should also include the small boats and life-rafts dependent upon or coming from larger vessels. See *United States*

v. *Holmes* (1842), Fed. Cas. 15383; *Reg.* v. *Dudley* (1884), 15 Cox C. C. 624. *Cf. Reg.* v. *Waina* and *Swatoa* (1874), 2 N.S.W.R. (Australia), 403 (*contra*, as to a ship's longboat). On the other hand, it would not include logs, planks, or spars which had been carried on or which had formed part of a ship. Gliders might well be regarded as "aircraft", while parachutes, on the other hand, would seem to belong in the category of aircraft equipment. The present article prescribes a general principle. The rules to be deduced for borderline cases will be developed, as experience may require, by national and international agencies in conformity with the general international principle.

The present article does not make special provision for the case of collision between ships on the high seas or between aircraft in the "free" air. A few jurists have urged that special provision should be made for penal jurisdiction in such cases. Thus the Bustamante Code (1928), Art. 309 provides:

> In cases of wrongful collision on the high sea or in the air, between ships or aircraft carrying different colors, the penal law of the victim shall be applied.

See also the Antwerp Conference of 1930, reported in *Comité Maritime International, Bulletin* 91 (1931); the Oslo Conference of 1933, reported in *International Maritime Committee, Bulletin* 96 (1934); and the literature provoked by the *Lotus* case. None of the special solutions suggested have seemed adequate; and the present article, in recognizing a competence coextensive with that defined in Article 3 with respect to territory, establishes a concurrent jurisdiction in the several States to which the ships or aircraft involved in collision belong. Such a concurrent jurisdiction is supported, in the case of ships, by the decision of the Permanent Court of International Justice in the case of the *S.S. Lotus*. It is believed that the principles herein defined, together with the safeguards formulated in later articles of this Convention, provide an adequate solution for the problem of collision which is in substantial conformity with national law and international practice.

It is to be noted, finally, that the jurisdiction of the State as defined in this article extends only to ships and aircraft which have its "national character." The Convention on the Regulation of Aerial Navigation, October 13, 1919, Hudson, *International Legislation* (1931), I, 359, 364, provides:

> Art. 6. Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I (c) of Annex A.
>
> Art. 7. No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.
>
> No incorporated company can be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of the said State.

Art. 8. An aircraft cannot be validly registered in more than one State.

See also the Convention of Habana on Commercial Aviation, February 20, 1928, Art. 7, Hudson, *op. cit.*, IV, 2354, 2358. Apart from treaty, international law does not determine the national character of ships or aircraft. The basis upon which a State may confer its national character remains indefinite. The practice indicates that it may be conferred because of the flag, the registry, or the ownership. National legislation and jurisprudence refer to the ships or aircraft of the State as "flying its flag", "registered under its laws", or "owned by the State or its nationals." If it should be found desirable to have a more precise determination of the requisites of national character, with respect either to ships or aircraft, the matter could be dealt with most appropriately in a separate international convention on that subject.

ARTICLE 5. JURISDICTION OVER NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or

(b) By a corporation or other juristic person which had the national character of that State when the crime was committed.

COMMENT

Natural Persons

The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded. Such jurisdiction is based upon the allegiance which the person charged with crime owes to the State of which he is a national. The underlying principle is variously described as the principle of nationality, *Nationalitätsprinzip*, *principe de la personnalité active*, etc. By virtue of such jurisdiction the State is enabled to prosecute its nationals while they are abroad and to execute judgments against them upon property within the State or upon them personally when they return, or the State may prosecute its nationals after they return for acts done abroad. Under existing international practice, a State is assumed to have practically unlimited legal control over its nationals. This competence is justified on the ground that a State's treatment of its nationals is not ordinarily a matter of concern to other States or to international law.

Jurists have advanced an interesting variety of reasons for the State's control over its nationals. It has been said (1) that since the State is composed of nationals, who are its members, the State's law should apply to them wherever they may be; (2) that the State is primarily interested in and affected by the conduct of its nationals; (3) that penal laws are of a personal

character, like those governing civil status, and that, while only reasons *d'ordre public* justify their application to aliens within the territory, they apply normally to nationals of the State everywhere; (4) that the protection of nationals abroad gives rise to a reciprocal duty of obedience; (5) that any offence committed by a national abroad causes a disturbance of the social and moral order in the State of his allegiance; (6) that the national knows best his own State's penal law, that he is more likely to be fairly and effectively tried under his own State's law and by his own State's courts, and that the most appropriate jurisdiction from the point of view of the accused should be considered rather than a jurisdiction determined by reference to the offence; (7) that without the exercise of such jurisdiction many crimes would go unpunished, especially where States refuse to extradite their nationals. For discussion of the reasons advanced, with additional references, see Alcorta, *Principios de Derecho Penal Internacional* (1931), I, pp. 115–119, 121–124; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 56–58, 63–64, 77–80; Schwarze, in Holtzendorff, *Handbuch des Deutschen Strafrechts* (1871), II, pp. 33–38; Travers, *Le Droit Pénal International* (1920), I, sec. 72.

While the exercise of such jurisdiction is perhaps the exception rather than the rule in countries deriving their jurisprudence from the English common law, the existence of such jurisdiction is fully conceded in countries belonging to this group. The following passages from judicial opinions and the writings of jurists may be noted by way of example:

> The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no 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*, 1922, 260 U. S. 94, 102.)

> With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. (*Blackmer* v. *United States*, 1932, 284 U. S. 421, 437.)

> The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed; its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state; but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction. (Hall, *International Law*, 8th ed. 1924, p. 56.)

> It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own nationals for such acts and in such manner as it may deem proper. For the exercise of this right, each state is

responsible to itself alone, no other state being competent to intervene. (Moore, *Report on Extraterritorial Crime and the Cutting Case*, 1887, p. 35.)

The jurisdiction, which a state chooses to exercise over its own nationals in relation to acts performed at home or abroad, can never be the concern of any other state and is therefore quite outside the sphere of international law. (Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," *British Year Book of International Law*, 1925, pp. 44, 45.)

See also Borchard, *Diplomatic Protection of Citizens Abroad* (1915), sec. 13; Hyde, *International Law* (1922), I, sec. 240; Oppenheim, *International Law* (4th ed. 1928), I, sec. 145; and the British and American legislation, cited *infra*.

The jurisdiction to prosecute and punish nationals for crimes committed anywhere has been consistently recognized in the resolutions and draft codes approved by various international bodies. The following may be noted, by way of example:

Institute of International Law, Resolutions adopted at Munich, 1883, Art. 7.—Chaque Etat conserve le droit d'étendre sa loi pénale nationale à des faits commis par ses nationaux à l'étranger.

Institute of International Law, Resolutions adopted at Cambridge, 1931, Art. 3.—Chaque Etat a le droit d'étendre sa loi pénale à toute infraction ou à tout acte de participation délictueuse commis par ses nationaux à l'étranger.

International Conference for the Unification of Penal Law, Warsaw, 1927.—Art. 2. Les lois pénales de l'Etat . . . (x) s'appliquent à tout national qui participe comme auteur, instigateur, ou auxiliaire à une infraction commise à l'étranger, si celle-ci est aussi prévue par la loi du lieu de l'infraction.

S'il y a une différence entre les deux lois, le juge tiendra compte de cette différence en faveur du prévenu dans l'application de la loi nationale.

Sauf les exceptions prévues à l'article . . . , la poursuite est subordonnée contre le national, pour les infractions par lui commises à l'étranger, à son retour ou séjour volontaires, ou à son extradition.

Sous la même réserve, aucune poursuite n'aura lieu si le national prouve qu'il a été acquitté ou condamné définitivement à l'étranger, et, en cas de condamnation, qu'il a exécuté sa peine ou a bénéficié d'une mesure d'exemption.

Art. 3. Si le condamné se soustrait à l'exécution intégrale de sa condamnation, la durée de la peine subie à l'étranger sera déduite de la peine prononcée contre lui.

Aucune poursuite ne pourra être exercée pour l'infraction commise à l'étranger qui, d'après la loi du lieu du délit, est subordonnée à une plainte, si cette plainte n'a pas été portée ou a été légalement retirée.

See also Treaty of Lima, 1878, Art. 34; Field, *Outlines of an International Code* (2d ed. 1876), Art. 641.

An examination of the legislation adopted in various countries reveals

that practically all States exercise some penal jurisdiction on the principle of nationality. The States which derive their jurisprudence from the civil law assert a competence which is substantially more comprehensive than that exercised by States influenced by the English common law, but all make some use of the principle. Differences are revealed with respect to the circumstances in which the jurisdiction will be asserted rather than with respect to recognition of the principle itself. The following provisions are sufficiently typical of the legislation found in civil law countries:

Belgium, *Code d'Instruction Criminelle* (1878).—Art. 7. Toute Belge qui, hors du territoire du royaume, se sera rendu coupable d'un crime ou d'un délit contre un Belge, pourra être poursuivi en Belgique.

Art. 8. Lorsqu'un Belge aura commis, hors du territoire du royaume, contre un étranger, soit un crime ou un délit prévu par la loi d'extradition, soit un des délits prévus par les articles 426, al. 1 ^{er}, 427, 428, 429 et 430 du Code Pénal, il pourra être poursuivi en Belgique, sur la plainte de l'étranger offensé ou de sa famille, ou sur un avis officiel donné à l'autorité belge par l'autorité du pays où l'infraction a été commise.

Art. 9. Tout Belge qui se sera rendu coupable d'une infraction en matière forestière, rurale, de pêche ou de chasse sur le territoire d'un Etat limitrophe, pourra, si cet Etat admet la réciprocité, être poursuivi en Belgique, sur la plainte de la partie lésée ou sur un avis officiel donné à l'autorité belge par l'autorité du pays où l'infraction a été commise.

France, *Code d'Instruction Criminelle* (1808).—Art. 5 (1910). Tout Français qui, hors du territoire de la France, s'est rendu coupable d'un crime puni par la loi française, peut être poursuivi et jugé en France.

Tout Français qui, hors du territoire de la France, s'est rendu coupable d'un fait qualifié délit par la loi française, peut être poursuivi et jugé en France, si le fait est puni par la législation du pays où il a été commis.

Il en sera de même si l'inculpé n'a acquis la nationalité française qu'après l'accomplissement du crime ou du délit.

Toutefois, qu'il s'agisse d'un crime ou d'un délit, aucune poursuite n'a lieu si l'inculpé justifie qu'il a été jugé définitivement à l'étranger, et, en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce.

En cas de délit commis contre un particulier français ou étranger, la poursuite ne peut être intentée qu'a la requête du ministère public; elle doit être précédé d'une plainte de la partie offensée ou d'une dénonciation officielle à l'autorité française par l'autorité du pays où le délit a été commis.

Aucune poursuite n'a lieu avant le retour de l'inculpé en France, si ce n'est pour les crimes énoncés en l'article 7 ci-après.

Italy, Penal Code (1930). Art. 9. A national who, apart from the cases specified in the two preceding Articles, commits in foreign territory a crime for which Italian law prescribes the penalty of death or penal servitude for life or for a minimum period of not less than three years, shall be punished under that law, provided he is in the territory of the State.

In the case of a crime for which a punishment restrictive of personal liberty for a lesser period is prescribed, the guilty party shall be pun-

ished on the demand of the Minister of Justice, or on the petition or denunciation of the injured party.

In the cases contemplated in the preceding provisions, when the crime has been committed to the prejudice of a foreign State or of an alien, the guilty person shall be punished on the demand of the Minister of Justice, provided that his extradition has not been granted or has not been agreed to by the Government of the State in which he committed the crime.

In order to facilitate a review of legislation which asserts jurisdiction over extraterritorial crime on the nationality principle, such legislation may be classified for convenience, according to the offences made punishable, as follows: (1) all offences; (2) all offences which are also punishable by the *lex loci delicti;* (3) all offences of a certain degree; (4) offences against co-nationals; and (5) certain enumerated offences only.

National legislation providing for the punishment of all or most offences committed by nationals abroad, without regard to incrimination by the *lex loci delicti*, the degree of the offence, the nationality of the person injured, or the nature of the offence committed is unusual indeed. Of the few examples available, perhaps sections from the Austrian Penal Code of 1852 are most significant:

Austria, Penal Code (1852), sec. 36.—A subject of the Austrian Empire is never to be extradited upon entering the country for crimes committed abroad, but is to be dealt with in accordance with this Penal Law, regardless of the laws of the country in which the crime has been committed. . . .

Sec. 235. A national is never to be extradited upon entering the country for misdemeanors and infringements (*Vergehen und Übertretungen*) committed abroad, but is to be dealt with in accordance with this Penal Law, regardless of the laws of the country in which they have been committed, provided that they have not been punished or condoned abroad. . . .

See also Congo, Penal Code (1896), Art. 85; Costa Rica, Penal Code (1924), Art. 219, secs. 9 & 10, and Art. 220, sec. 1; Greece, Code of Criminal Procedure (1834), Art. 3, applied by the Areopagus in Case 36 of 1897, Clunet (1898), 962, and Case 95 of 1899, Clunet (1900), 824; see also Case 125 of 1922, Clunet (1924), 1120; Yugoslavia, Penal Code (1929), Art. 6. Under the codes just noted, it appears that the exercise of jurisdiction over nationals for offences committed abroad is conditioned solely upon the presence of the offender on national territory. In the Sudan, Penal Code (1924), Art. 4, sec. 2, provision is made for general jurisdiction over all offences committed by Sudanese abroad, but it is required that the offenders be domiciled in the Sudan.

Russian penal legislation of 1926 likewise provides for a very broad jurisdiction over nationals:

R.S.F.S.R., Penal Code (1926), Art. 2. The application of the present code is extended to all citizens of the R.S.F.S.R. who have committed

> socially-dangerous acts within the R.S.F.S.R. as well as outside of the U.S.S.R., provided that they are apprehended on the territory of the R.S.F.S.R.

A "socially-dangerous" act within the meaning of this article is coëxtensive with the Russian qualification of criminal offence; see the same Code, Art. 6, Trainin, *Ugolovnoie Pravo* (1929), p. 299 ff; and jurisdiction is therefore extended to all criminal offences committed by citizens of the R.S.F.S.R. outside of the Union of Socialist Soviet Republics. The only limitation concerns offences committed by citizens on the territory of other member states of the Soviet Union. Exclusive jurisdiction over such offences is given the particular Soviet state within whose territory the offence has been committed. See R.S.F.S.R., Penal Code (1926), Art. 3.

Finland, Penal Code (1889), Art. 1, provides for a fairly comprehensive jurisdiction over offences committed by nationals abroad, excepting only certain rather unimportant specified classes of offences.

National legislation providing for the punishment of all (or most) offences committed by nationals abroad, if punishable also by the *lex loci delicti* (in some instances punishing certain crimes of nationals without regard for the *lex loci delicti*), is exemplified in the following code provisions:

> Germany, Project of Penal Code (1927), Art. 7.—The penal laws of the Reich apply to other acts committed abroad if the act is punishable by the laws of the place of the act and if the actor
>
> 1. was a German national at the time of the act or became a national after the act . . .
>
> If the place of the act is not subject to the authority of any state, it is sufficient that the act is punishable by the laws of the Reich.

> Netherlands, Penal Code (1881), Art. 5.—La loi pénale néerlandaise s'applique au Néerlandais qui, hors du royaume en Europe, se rend coupable: . . .
>
> 2. De tout acte consideré par la loi pénale néerlandaise comme délit, et auquel la loi de pays où il a été commis attache une peine.
>
> La poursuite peut avoir lieu au cas où le prévenu n'est devenu Néerlandais qu'après avoir commis le fait.

See also Albania, Penal Code (1927), Art. 5; Bulgaria, Penal Code (1896), Art. 5; Czechoslovakia, Project of Penal Code (1926), Art. 6; Denmark, Penal Code (1930), Art. 7, sec. 2; Dominican Republic, Code of Criminal Procedure (as modified by Law of June 28, 1911), Art. 5; Egypt, Native Penal Code (1904), Art. 3; France, *Code d'Instruction Criminelle* (as amended 1866), Art. 5, as to *délits* (*crimes* are punishable regardless of *lex loci delicti*); see cases of *Bazot* (Trib. Corr. Seine, Dec. 18, 1901) Clunet (1902) 324, *Detrez* (Cass. Crim., March 13, 1913) Clunet (1913) 926, *Mion* (Cass. Crim., Sept. 5, 1914) Clunet (1916) 906, *Lafitte* (Cass. Crim., March 8, 1918) Clunet (1918) 1176, *Quemper* (Cass. Crim., April 9, 1925) Clunet (1926) 631, *Vandervilt et Obricks* c. *Mas et Moranne* (Cour d'Appel de Paris, June 4, 1905) 1 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1905), 888; the same principle is

upheld, but for various reasons the defendant was not punished, in *Madjoub Hadj* (Cour d'Appel d'Alger, Sept. 14, 1895) Clunet (1896) 1031, *Vigoroux* (Cass. Crim., May 8, 1925) Clunet (1926) 73, *Communal* (Cass. Crim., July 2, 1927) Clunet (1930) 964; France, Project of Penal Code (1932), Art. 13; Germany, Penal Code (1871), Art. 4; see cases reported in Clunet (1889), 118, and (1907), 447; Greece, Project of Penal Code (1924), Art. 3; Hungary, Penal Code (1878), Arts. 8 & 11; see decision of Hungarian Supreme Court, Feb. 1, 1931, Clunet (1931), 1257; Lebanon, Law of May 29, 1929 (as to *délits*); Luxembourg, Law of Jan. 18, 1879, Art. 5 (if the offence is not political); Mexico, Federal Penal Code (1931), Art. 4; under earlier laws, see case of *Alvarez* (1923), 20 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1925), 430; Monaco, Code of Penal Procedure (1904), Art. 6; Norway, Penal Code (1902), Art. 12, sec. 3-C; Poland, Penal Code (1932), Art. 4; Portugal, Penal Code (1886), Art. 53, sec. 5; Rumania, Penal Code (1865), Art. 4; see case of *Lazarescu* (1923), 21 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1926), 282; Rumania, Project of Penal Code (1926), Art. 4; Russia, Penal Code (1903), Art. 9 (adopted in Estonia, Penal Code, 1931, Art. 7, Latvia, Penal Code, 1918 & 1920, Art. 9, and Lithuania, Penal Code, 1930, Art. 9); Siam, Penal Code (1908), Art. 10, sec. 4; Turkey, Penal Code (1926), Art. 5; Uruguay, Penal Code (1889), Art. 6; Uruguay, Project of Penal Code (1932), Art. 10, sec. 5.

A third type of national legislation provides for the punishment of offences of a certain degree which may be committed by nationals abroad. In some codes the degree of the offence is determined by reference to a minimum penalty, while in others punishment is provided for the offences for which extradition is allowed under the extradition laws. Examples of this type of legislation are the following:

> China, Penal Code (1928), Art. 7.—Le présent Code s'applique à toutes infractions, autres que celles prévues aux deux articles précédents, commise par un citoyen de la République, hors du territoire de la République, lorsque sont réunies les conditions ci-après énoncées:
>
> 1. La peine minima encourue pour ces infractions est l'emprisonnement à temps ou une peine supérieure;
>
> 2. L'acte constitue une infraction d'après la loi du lieu où il a été commis;
>
> 3. Le délinquant n'a pas été acquitté par un jugement définitif rendu à l'étranger, ou, bien qu'il ait été condamné par un jugement définitif, sa peine n'a pas été complètement subie ou n'a pas été remise.

> Peru, Penal Code (1924), Art. 5.—Offences committed outside the territory of the republic will be prosecuted in the following cases: . . .
>
> 2. The offences not included in the above section, committed by a national, for which extradition is allowed according to Peruvian law; provided that they were also punishable in the state in which they were committed, and that the guilty party enters the Republic in some way.

Provisions for the punishment of crimes of a certain degree committed by nationals abroad are also found in Honduras, Law of Organization of Courts

(1906), Art. 177; Mexico, Federal Penal Code (1929), Art. 6; Paraguay, Penal Code (1914), Art. 9, sec. 2; Spain, Organic Law of the Judicial Power (1870), Art. 340; Spain, Penal Code (1928), Art. 13. The above also require incrimination by the *lex loci delicti*. Such incrimination is not required in Dominican Republic, Code of Criminal Procedure (as modified by Law of June 28, 1911), Art. 5; France, *Code d'Instruction Criminelle* (as amended by Law 26 Feb. 1910), Art. 5 (quoted *supra*, as to *crimes*, as distinguished from *délits*); this jurisdiction was the basis of convictions in the cases of *Yon* (Cass. Crim., June 22, 1882), Sirey (1884) I, 456; *Moisdon* (Cass. Crim., Oct. 17, 1889), Clunet (1893), 143; *Moires* (Cass. Crim., Feb. 19, 1904), Clunet (1907), 721; *Soufi Abdel Kader Taleb* (Cass. Crim., Jan. 6, 1916), Clunet (1916), 1227; *Giraud-Jordan et al.* (Cass. Crim., May 24, 1917 & April 2 & 11, 1918), 15 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1919), 68; *Claude* (Cass. Crim., April 11, 1918), Clunet (1918), 1186; *Bonnet Rouge* (Conseil de Guerre de Paris, May 15, 1918), Clunet (1919), 267, same case (Cass. Crim., July 11, 1918), Clunet (1919), 270; *Bounous* (Cass. Crim., Dec. 14, 1928), Clunet (1931), 370;—the jurisdiction was affirmed, though the requirements of the law were not fully met, in the cases of *Cacatte Vachali Narayanin* c. *Cacatte Connatedatil Narayanin* (Cour d'Appel de Pondichery, Feb. 20, 1913), Clunet (1914), 165; and *Tripodi* (Trib. Dep. des Alpes-Maritimes, Dec. 7, 1929), 26 *Rev. de Dr. Int. Privé* (1931), 309, with doctrinal note by R. Hubert, *ibid.* 310–319; Italy, Penal Code (1930), Art. 9 (quoted *supra*); jurisdiction was taken on this principle under the earlier Italian Code in decisions of the Court of Cassation of Rome, Sept. 25, 1907, Clunet (1908), 906, July 2, 1907, Clunet (1908), 1266, July 17, 1908, Clunet (1909), 562; of the Tribunal of Venice, Dec. 22, 1908, Clunet (1909), 1202; of the Court of Cassation of Rome, Aug. 4, 1909, Clunet (1910), 1321, Dec. 30, 1909, Clunet (1911), 336, Jan. 20, 1912, Clunet (1913), 246; of the Court of Cassation, July 1, 1927, Clunet (1928), 212; the jurisdiction was recognized, though held inapplicable, in decisions of the Court of Cassation of Rome, March 10, 1905, 3 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1907), 279, June 1, 1908, Clunet (1909), 271, and Dec. 29, 1914, *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1914), 650; Lebanon, Law of May 29, 1929 (as to *crimes*); Luxembourg, Law of Jan. 18, 1879, Art. 5; Monaco, Code of Penal Procedure (1904), Art. 5; Rumania, Penal Code (1865), Art. 4; Transjordan, Code of Criminal Procedure (as amended by Act of 1924), Art. 7. Provisions for punishing extraditable crimes, when committed by nationals abroad, are found also in Belgium, *Code d'Instruction Criminelle* (1878), Art. 8 (quoted *supra*); see cases of *Gaston* (Cour Cass., July 10, 1905) Clunet (1907) 471, *Anon.* (Cour d'Appel de Liège, Nov. 25, 1910) Clunet (1912) 270, *Koerver* (Cour Cass., April 29, 1912) *Pasicrisie belge* (1912) I. 231, *Uytdenhouwen* (Cour Cass., April 27, 1914) *Pasicrisie belge* (1914) I. 205, and lower court's decision in *ibid.* II, 126, *de Keuk* (Military Court of Belgium, Aug. 24, 1918) Clunet (1919), 804; Brazil, Project of Penal Code (1927), Art. 7; Guatemala, Penal

Code (1889), Art. 6, sec. 5; Switzerland, Extradition Law of 1892, and some cantonal legislation (see Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 60–62); Switzerland, Project of Penal Code (1918), Art. 6.

A fourth type of national legislation provides for the punishment of offences committed by nationals abroad against other nationals. Some of the legislation cited under this head also punishes crimes committed abroad by nationals against aliens, but on different conditions. Except where noted, incrimination by the *lex loci delicti* is not required. The following is an example of legislation of this type:

> Chile, Code of Penal Procedure (1906), Art. 2.—Of the crimes and simple delicts committed outside the territory of the Republic, there are subject to Chilean jurisdiction: . . .
>
> 6. Those committed by Chileans against Chileans, if the guilty party returns to Chile without having been tried by the authorities of the country where he committed the crime.

Similar provisions are found in Albania, Penal Code (1927), Art. 5; Belgium, *Code d'Instruction Criminelle* (1878), Art. 7 (quoted *supra*); see cases of *Oppenheim* (Cour d'Appel de Bruxelles, Jan. 22, 1901) Clunet (1905), 699, and *De Bruyn* (Cour Cass., Feb. 27, 1922) *Pasicrisie belge* (1922), I, 182; Bolivia, Law of Nov. 29, 1902, Art. 8; Brazil, Extradition Law 2416 (1911), Art. 14 (limited to certain crimes); Colombia, Penal Code (Law of 1890), Art. 20, sec. 3; Haiti, *Code d'Instruction Criminelle* (1835), Art. 7; Honduras, Law of Organization of the Courts (1906), Art. 176; under the older Italian law, see the decision of the Court of Cassation of Torino, June 10, 1885, Clunet (1886), 620; Palestine, Code of Criminal Procedure (1924), Art. 7; Salvador, Penal Code (1904), Art. 20; San Marino, Penal Code (1865), Art. 3, sec. 3; Spain, Law of Organization of the Judicial Power (1870), Art. 339; see case of *Antonio Miró Bastida* (Supreme Court, Nov. 15, 1899), 63 *Jurisprudencia Criminal*, 317; Spain, Penal Code (1928), Art. 12 (incrimination by *lex loci* required); Sweden, Penal Code (1864), Art. 1; Turkey, Penal Code (1926), Art. 5; Venezuela, Penal Code (1926), Art. 4, sec. 1. See also Finland, Penal Code (1889), Art. 1.

A similar jurisdiction was at one time exercised by Virginia over its citizens in case of felonies committed abroad against other citizens. See Collection of Acts in Force in 1792, chap. 136, secs. 5 and 7, applied in *Commonwealth* v. *Gaines* (1819), 2 Va. Cas. (4 Va.) 172. The act was repealed in the compilation of 1819.

Finally, a great many States provide for the punishment of certain enumerated offences if committed by nationals abroad. The enumerations vary from State to State and in many States accompany other legislative provisions of the types noted above. The following is an example:

> Netherlands, Penal Code (1881), Art. 5.—La loi pénale néerlandaise s'applique au Néerlandaise qui, hors du royaume en Europe, se rend coupable:

1. D'un des délits specifiés dans les titres I et II du livre II, et dans les articles 206, 237, 388, et 389.

The crimes thus enumerated in the Netherlands Code include offences against the security of the State or the Royal Dignity, intentionally making one's self or another unfit for military service, bigamy, and taking letters of marque or engaging in privateering without authorization from the Government. A similar type of provision (the enumeration varies, of course, in different countries) is found in Afghanistan, Penal Code (1924), Arts. 40–41 (military crimes against the State); Belgium, *Code d'Instruction Criminelle* (1878), Art. 8 (quoted *supra*); Belgium, Law of July 3, 1892 (slave trade), Law of May 26, 1914 (white slave traffic), Law of June 20, 1923 (dissemination of abortionist and contraceptive propaganda); Bolivia, Penal Code (1834), Art. 7 (for certain crimes, if the law so specifies); Bulgaria, Penal Code (1896), Art. 7, note (sodomy and paederasty); Cuba, Spanish Penal Code (1879), Art. 134 ff (treason); Czechoslovakia, Project of Penal Code (1926), Art. 6 (machinations against foreign States, counterfeiting foreign money, slave trade, white slave traffic, and other crimes of like kind which the State is bound by international law to punish); Ecuador, Penal Code (1906), Art. 10 (crimes against the State and its credit, crimes against international law, piracy, treason, and other crimes which may be included); Guatemala, Penal Code (1889), Art. 6, sec. 5 (arson, murder, robbery, or extraditable crimes); Iraq, Bagdad Penal Code Amendment Law (1924), A. 1 (bearing arms against the State); Japan, Penal Code (1907), Art. 3 (long list of enumerated crimes of ordinary type); (the same plan was followed in China, Provisional Penal Code of 1912, Art. 4); Mexico, Federal Penal Code (1931), Art. 123 (treason), and Art. 236 (falsification of foreign money); Norway, Penal Code (1902), Art. 12, sec. 3 (long list of enumerated crimes); Rumania, Penal Code (1865), Art. 4; Russia, Penal Code (1903), Art. 11 (chiefly crimes against the State, including the furnishing of improper war materials, bombing conspiracies, etc.) (copied with certain omissions in Estonia, Penal Code, 1931, Art. 9; Latvia, Penal Code, 1920, Art. 11; and Lithuania, Penal Code, 1930, Art. 11); Salvador, Code of Penal Procedure (1904), Art. 18 (crimes against the State); Siam, Penal Code (1908), Art. 109 (carrying arms against the State); Spain, Penal Code (1870), Art. 136 ff (treason and military crimes against the State); Spain, Penal Code (1928), Art. 11 (crimes violating laws governing the civil status of Spaniards); Venezuela, Penal Code (1926), Art. 4 (treason, slave trade, and crimes violating laws governing civil status of Venezuelans).

The legislation found in the United States and Great Britain providing for the punishment of crimes committed by nationals abroad belongs in this category. The treason statutes of the states of the United States are made applicable to treason abroad as well as within the state. See, for example, the following:

Vermont, General Laws (1917), sec. 6786.—A person who, owing al-

> legiance to this state, levies war or conspires to levy war against the same, or adheres to the enemies thereof, giving them aid and comfort, within the state or elsewhere, shall be guilty of treason against this state and shall suffer the punishment of death.

Similar legislation punishing extraterritorial treason is found in Illinois, Criminal Code (Cahill's Rev. Stat., 1927, ch. 38), par. 585; Montana, Rev. Code (1921), secs. 11714 & 10735; New Hampshire, Pub. Laws (1926), c. 393, secs. 1 & 2; New Jersey, Comp. Stat. (1910), "Crimes," secs. 1 & 3, "Criminal Procedure," sec. 157; North Dakota, Comp. Stat. (1913), sec. 10510 (see also secs. 9447–9448); Pennsylvania, Stat. (1920), sec. 8123. United States legislation providing for the punishment of treason is likewise applicable to treason committed abroad as well as within the United States.

> United States, 35 U. S. Stat. L. 1088, sec. 1.—Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

For other federal legislation in the United States incorporating the same principle, see United States Criminal Code (35 U. S. Stat. L. 1088), sec. 5 (correspondence with foreign governments); secs. 308–309 (supplying liquor or opium to Pacific Island natives); secs. 303–304 (aiding hostilities against the United States); and possibly other sections (see *United States* v. *Bowman*, 1922, 260 U. S. 94, 98–99). The United States statutes providing punishment for those who engage in the slave trade outside the United States, if taken literally, may be applicable to aliens, but in any case they are applicable to nationals (see United States Criminal Code, secs. 246–247). See also *State* v. *Main* (1863), 16 Wis. 398, 421 (violation abroad of penal clause in absentee voting statute); *United States* v. *Craig* (1886), 28 Fed. 795, 801 (assisting immigration of alien contract laborer). See also *Blackmer* v. *United States* (1932), 284 U. S. 421 (punishing nationals abroad for failure to return and testify when summoned); *Jones* v. *United States* (1890), 137 U. S. 202 (jurisdiction over murder committed by a national on a guano island); *Cook* v. *Tait* (1924), 265 U. S. 47 (sustaining an income tax on foreign income of a national domiciled abroad); Marshall's speech on Livingston's Resolution, United States House of Representatives, in 5 Wh. (U. S.) app.; *Henfield's Case* (1793), Fed. Cas. 6360.

In Great Britain there is an even greater variety of statutes under which British nationals may be punished for certain crimes committed abroad. The following enumeration presents an impressive record. (1) Treason: 25 Edw. III, stat. 5, c. 2; 35 Hen. VIII, c. 2; see *Story's Case* (1571), 1 St. Tr. 1087, s.c. Dyer 298b; *Plunket's Case* (1681), 8 St. Tr. 447; *Trial of Thos. Vaughan* (1696), 13 St. Tr. 485, s.c. 2 Salk. 634; *Rex* v. *Cundell* (1812), 4 Newgate Cal. 62 (see also [1917] 1 K.B. 119, 128, 137); *Rex* v. *Lynch* [1903] 1 K.B. 444; *Rex* v. *Casement* [1917] 1 K.B. 98. See also *Lord Wentworth's*

Case (1550), 4 St. Tr. 314, *Sir John de Gomeney's Case*, and *Duke of Wharton's Case* (all three cited in [1917] 1 K.B. 116, 119). See also Treason Felony Act, 11 & 12 Vict. c. 12; and *Mulcahy* v. *Reg.* (1868), 3 H.L. 306. South Africa has invoked this jurisdiction in *Rex* v. *Bester* (1900), 21 N.L.R. 237, and in *Rex* v. *Du Plessis* and *Rex* v. *Truter* (Special Criminal Court, 1915), noted in Gardiner and Lansdowne, *South African Criminal Law and Procedure* (2d ed. 1924), I, 28–29. Queensland has a similar provision in Criminal Code Act (1899), sec. 80. (2) Murder or manslaughter: 24 & 25 Vict. c. 100, sec. 9; see *Trial of Joseph Wall* (1802), 28 St. Tr. 51; *Rex* v. *Sawyer* (1815), 2 C. & K. 101; *Reg.* v. *Azzopardi* (1843), 1 C. & K. 203 (victim an alien). See also *Chamber's Case* (1709), cited in 8 Mod. 144, 2 C. & K. 106. *Cf. Rex* v. *Helsham* (1830), 4 C. & P. 394. (3) Bigamy: 24 & 25 Vict. c. 100, sec. 57; see *Trial of Earl Russell* [1901] A.C. 446; and see also *In re Bigamy Sections* (Can. Sup. Ct., 1897), 1 Can. Cr. C. 172; *King* v. *Brinkley* (Ontario, 1907), 12 *ibid.* 454. That colonial courts lack this jurisdiction, see *McLeod* v. *Attorney-General for New South Wales* [1891] A.C. 455; and *Rex* v. *Lander* [1919] N.Z.L.R. 305. But see Statute of Westminister, 1931, 22 Geo. V, c. 5. (4) Violation of Foreign Enlistment Act: 33 & 34 Vict. c. 90; see also *Reg.* v. *Jameson* [1896] 2 Q.B. 425. (5) Offences against Unlawful Oaths Act: 37 Geo. III, c. 123, sec. 6; 52 Geo. III, c. 104, sec. 7. (6) Offences against Official Secrets Act: 1 & 2 Geo. V, c. 28. (7) Offences against Incitement to Mutiny Act: 37 Geo. III, c. 70. (8) Offences against Explosive Substances Act: 46 & 47 Vict., c. 3, sec. 7. (9) Offences against Dockyards Protection Act: 12 Geo. III, c. 24, sec. 2. (10) Offences against Post Office Act: 8 Edw. VII, c. 48, sec. 72. (11) Offences against Perjury Act: 1 & 2 Geo. V, c. 6. (12) Offences by nationals on British ships or on foreign ships to which they do not belong: Merchant Shipping Act (1894), 57 & 58 Vict., c. 60, sec. 686. See also Bahamas, Penal Code (1924), sec. 9. (13) White Slave Traffic: Criminal Law Amendment Act, 48 & 49 Vict., c. 69. (14) Slave Trade: 6 & 7 Vict., c. 98. (15) Kidnapping of Pacific Islanders: 35 & 36 Vict., c. 19; see *Reg.* v. *Vos* (Brisbane, 1895), Queensland Crim. Rep., 1860–1907, p. 288. (16) Destruction or interference with submarine cables: 48 & 49 Vict., c. 49. (17) Statutes giving special jurisdiction to Australian courts over British subjects in Pacific Islands not a part of any State, 9 Geo. IV, c. 83, sec. 4, and to Cape of Good Hope courts over British subjects in parts of Southern Africa not claimed by any State, 6 & 7 Wm. IV, c. 57. See also Foreign Jurisdiction Act (1890), 53 & 54 Vict., c. 37. And see general statements as to jurisdiction over nationals in *The Sussex Peerage Case* (1844), 11 Clark & F. 85, 146, and *The Zollverein* (1856), Swabey Adm. 96, 98.

The following States apparently confine the exercise of jurisdiction on the nationality principle to cases in which the nationals are public functionaries: Argentina, Penal Code (1921), Art. 1, sec. 2; Cuba (see the laws cited in Bustamante, *Derecho Internacional Privado* (1931), III, pp. 43–44); Cuba,

Project of Penal Code (Ortiz, 1926), Art. 36, secs. 6 and 7 (although jurisdiction over nationals is also included under the principle of universality); Panama, Penal Code (1922), Art. 8.

It will be observed that the exercise of jurisdiction to punish nationals for crimes committed abroad is commonly circumscribed by conditions or safeguards which vary from State to State. Certain more or less typical limitations have been noted in connection with the legislation just reviewed. There are many others which it is not so easy to classify. It may be stipulated, for example, that the accused must be found on the territory of the State or have been extradited to the State; that there must be a complaint by the victim of the crime or by the government of the State in whose territory it was committed; that prosecution shall only take place upon the request of some administrative officer of the State; that there shall be no prosecution for a political crime; that the action must not have been barred by lapse of time either by the law of the prosecuting State or by the law of the State on whose territory the crime was committed; and that the accused shall not have been previously prosecuted or punished in the courts of the State where the crime was committed (*cf.* comment on Art. 13, *infra*). There is much to be said, no doubt, for such limitations upon the exercise of jurisdiction based upon the nationality principle.

The widespread inclusion of such limitations in national legislation tends to confirm the opinion that jurisdiction based upon nationality is properly regarded as subsidiary to the territorial jurisdiction of the State where the crime was committed. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 66–77, 80. It is believed, however, that these are matters which each State is free to determine for itself. Both the crimes abroad for which it will punish its nationals and the circumstances under which it will exercise jurisdiction are matters which international law leaves each State free to decide according to local needs and conditions. Consequently, while such limitations find a place very properly in national legislation, or in a draft for uniform national legislation, such as the Resolutions of Warsaw, quoted *supra*, they do not seem to belong in a draft convention which, like the present, seeks to define the sphere within which each State may exercise jurisdiction to prosecute and punish for crime. While it may be hoped, and indeed expected, that all States will circumscribe the exercise of jurisdiction over their nationals with desirable conditions or safeguards, the present Convention leaves each State free to confine or expand the exercise of such jurisdiction as its own internal policy may dictate.

Under the present article, a State has jurisdiction over natural persons who were nationals at the time the crime was committed or who are nationals when prosecuted. A national becomes liable to prosecution by the State of his allegiance at the time of the wrongful act or omission, and this liability is not terminated by subsequent expatriation or naturalization abroad. See Tobar y Borgoño, *Du Conflit International au Sujet des Com-*

pétences Pénales (1910), p. 154 ff; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 62; and the Draft Convention on Nationality, Art. 13, Research in International Law (1929), p. 44. Were the rule otherwise, a criminal might escape prosecution by change of nationality after committing the crime.

Although possibly a little difficult to justify theoretically, the jurisdiction of a State to prosecute or punish those who have become its nationals after committing a crime seems adequately supported by the practically complete control over its nationals which international law allows the State. If the accused is a national at the time of prosecution or punishment, whatever the State may do falls within its general competence under international law; and it is immaterial that the accused may not have been a national when he committed the offence charged. There is no principle of international law which forbids the exercise of such a jurisdiction over nationals. Indeed, if a contrary rule were followed, impunity might result from naturalization in a State which refuses extradition of its nationals; see the French case of *Serloute*, Clunet (1898), p. 1058, which led to the present French law.

The principle that jurisdiction may be founded either upon nationality at the time of the offence or upon nationality at the time of prosecution appears to be supported by such legislation as has dealt specifically with the question. See, for example, France, *Code d'Instruction Criminelle* (as amended by the Law of Feb. 26, 1910), Art. 5, quoted *supra;* Germany, Project of Penal Code (1927), Art. 7, quoted *supra;* Netherlands, Penal Code (1881), Art. 5, quoted *supra*. See also Brazil, Project of Penal Code (1927), Art. 4; Finland, Penal Code (1889), Art. 2; France, Project of Penal Code (1932), Art. 13; Germany, Penal Code (1871), Art. 4; see Clunet (1889), 118; Greece, Project of Penal Code (1924), Art. 3; Lebanon, Law of May 29, 1929; Poland, Penal Code (1932), Art. 4; Spain, Penal Code (1928), Art. 24. And note the following resolution of the *Conférence Internationale d'Unification du Droit Pénal*, Warsaw, 1927:

> Art. 8. La loi . . . (x) s'appliquera également à l'étranger qui, au moment de la perpétration de l'acte, était ressortissant de . . . (x); elle s'appliquera également à celui qui a obtenu la nationalité . . . (x) après le perpétration de l'acte.

While nationality either at the time of the crime or at the time of prosecution or punishment provides a basis for jurisdiction under this article, nationality at some other time is clearly insufficient. Thus jurisdiction cannot be founded upon the fact that the accused was once a national if he had become an alien before committing the crime and had not recovered his original nationality at the time of prosecution. Neither is there jurisdiction if the accused was not a national at the time of the crime, became a national after committing the crime, and ceased to be a national before the prosecution.

In case of double or multiple nationality, any State of which the accused is

a national is competent under this article. It is to be recalled that a national of a State, as the term is used in this Convention, is "a natural person upon whom that State has conferred its nationality . . . in conformity with international law." Art. 1(e) *supra*. Whether, in case of double or multiple nationality, an accused is a national of the State which is attempting to prosecute and punish is a question to be determined by reference to such principles of international law as govern nationality. If international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State. See Travers, *Le Droit Pénal International* (1920), I, sec. 476. It is possible that the denial of certain safeguards, similar to those provided in Articles 12, 13, 14, and 15, *infra*, would be ground for an international claim on the part of another State of which the accused was also a national; but it is believed that this is a matter which should be considered elsewhere, if it is to be considered at all, rather than in a convention dealing with the jurisdiction to prosecute and punish for crime.

Domiciled or resident aliens are not assimilated to the position of nationals under the present article. A few States attempt the assimilation and assert jurisdiction to prosecute domiciled aliens for crimes committed abroad. See Denmark, Penal Code (1930), Art. 7; Liberia, Constitution (1847), Art. 1, sec. 4; and Norway, Penal Code (1902), Art. 12. See also Act of 1926, 44 U. S. Stat. L. 835; 25 *Am. Jour. Int. L.* (1931), 723; 26 *ibid.* (1932), 351. Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 66–68, indicates that certain Swiss cantons do the same and points out that historically domicile rather than nationality provided the basis for the early theory of jurisdiction based on the principle of active personality. A few States assert a competence with respect to domiciled aliens which is similar to that asserted over nationals but much more limited. See Rumania, Penal Code (1865), Art. 5, and Project of Penal Code (1926), Art. 6. The latter position is taken in the Resolutions of Warsaw in which, after the two articles on nationality jurisdiction quoted *supra*, the following provision is incorporated:

> Art. 4. Les dispositions des deux articles précédents sont applicables aux étrangers domiciliés en . . . (x), s'ils ne sont pas citoyens d'un pays avec lequel l'Etat . . . (x) a signé un traité d'extradition ou si leur extradition n'a pas été demandée par leur pays. Elles sont également applicables aux apolytes domiciliés en . . . (x).

A great majority of the States, however, assert no such jurisdiction; and it seems clear in principle that domicile alone does not afford an adequate basis for the unrestricted competence which this article recognizes. In view of the jurisdiction over crime committed by aliens abroad which is recognized in other articles of this Convention, it seems wholly undesirable to attempt an assimilation of domiciled aliens to the position of nationals. The one case in which such an assimilation would be most plausible is the case of per-

sons who are "stateless" (*apatrides, apolytes, Staatslosen*). The Resolutions of Warsaw, quoted above, make the assimilation in this case, and the Italian Penal Code (1930), provides:

> Art. 4. For the purposes of penal law . . . stateless persons residing in the territory of the state are deemed to be Italian nationals.

However, such provisions are not supported by general practice; the case is not one likely to arise often; and when the case does arise a jurisdiction on some other principle will ordinarily be found under other articles of this Convention. Extradition may of course be granted to the State where the crime was committed.

Since the present article founds jurisdiction solely upon the nationality of the accused, it includes the case of nationals participating abroad in crime committed by aliens abroad and excludes the case of aliens participating abroad in crime committed by nationals abroad. In the former case, participation may be included by the State of allegiance as a "crime committed outside its territory" over which it has jurisdiction. The basis of jurisdiction is the nationality of the person whom the State is seeking to prosecute and punish, not that of the principal offender. Inasmuch as nationality is lacking in the case of alien participants abroad in crime committed by nationals abroad, the State does not have jurisdiction over such participants under this article, although of course they may be within its jurisdiction under other articles. The Belgian and French practice is otherwise, for in these two States, at least, the nationality of the principal offender determines jurisdiction over participants. Thus the Belgian *Code d'Instruction Criminelle* (1878), provides as follows:

> Art. 11. L'étranger coauteur ou complice d'un crime commis hors du territoire du royaume, par un Belge, pourra être poursuivi en Belgique, conjointement avec le Belge inculpé, ou après la condamnation de celui-ci.

While a French national cannot be tried in France for participation abroad in a crime committed by an alien abroad, an alien may be tried for participation abroad in a crime committed by a French national abroad. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 84–85, 386; Travers, *Le Droit Pénal International* (1921), II, sec. 996 ff, especially 1016, 1017, 1019. But see Garraud, *Droit Pénal Français* (3rd ed. 1916), I, p. 369, denying this jurisdiction under French law. Notwithstanding Belgian and French practice, it is believed that the present Convention is correct in not subjecting aliens to the jurisdiction of the State, in case of participation in a crime committed outside the State, solely on the ground that the principal offender is a national of that State. It is believed that contemporary international practice warrants no such assertion of competence, that participation in crimes committed by nationals

abroad does not provide an adequate basis for jurisdiction over aliens, and that sufficient competence with respect to alien participants is recognized in other articles of this Convention.

The basis for the present article, therefore, is the practically unlimited control over nationals everywhere which contemporary international practice allows the State of allegiance. This control is assumed in the national legislation and jurisprudence reviewed above and is acknowledged in the unanimous testimony of jurists. Variations in contemporary national practice indicate that some States prefer to confine more closely than others the exercise of an admitted competence. The competence seems clearly established in conformity with the broad general principle formulated in paragraph (a) of the present article.

JURISTIC PERSONS

Paragraph (b) of the present article deals with juristic persons having the national character of the State. In general, it assimilates competence with respect to such juristic persons to the State's jurisdiction over its nationals. While it must be admitted that such an assimilation goes beyond anything which is clearly established in the practice of States, it is indisputable that States do exercise a criminal jurisdiction over their juristic persons and that they consider their juristic persons as having a national character for important purposes. It is indisputable, also, that nothing in international law precludes a State from prosecuting and punishing one of its juristic persons for a crime committed outside its territory. Paragraph (b) of the present article affirms the competence of the State with respect to any crime committed outside its territory "by a corporation or other juristic person which had the national character of that State when the crime was committed."

In the British Empire and the United States it is well established that corporations can commit crimes and be punished for crimes. For authorities, see Thompson, *Corporations* (3d ed. 1927), VII, secs. 5606–5646. See also Bishop, *Criminal Law* (9th ed. 1923), I, secs. 417–424; and Wharton, *Criminal Law* (12th ed. 1932), I, secs. 116–123. Examples may be found in the following cases: *Queen* v. *Great North of England Ry. Co.* (1846), 2 Cox C. C. 70 (damage to highway); *Union Colliery Co.* v. *Queen* (Canada, 1900), 31 S.Ct. 81 (breach of statutory duty to avoid danger to human life); *Pearks, Gunston & Tee, Ltd.* v. *Ward* [1902] 2 K.B. 1 (sale of adulterated butter in violation of statute); *United States* v. *Union Supply Co.* (1909), 215 U.S. 50 (corporation a "person" punishable for violation of statute regulating sale of oleomargarine); *United States* v. *John Kelso Co.* (1898), 86 Fed. 304 (violation of act limiting working day on public works to eight hours); *United States* v. *Sin Wan Pao Co.* (United States Court for China, 1920), 1 Lobingier, *Extraterritorial Cases* 983 (newspaper company convicted for publishing advertisement of lewd books); *Commonwealth* v. *Proprietors of New Bedford Bridge* (1854), 2 Gray (Mass.), 339 (nuisance by building bridge

so as to obstruct navigation); *State* v. *Lehigh Valley Ry. Co.* (1920), 90 N.J.L. 372 (negligent manslaughter; decision based, not on a statutory liability, but on common law as modified by *State* v. *Morris & Essex Ry. Co.* (1852), 23 N.J.L. 360) (see 19 *Mich. L. Rev.* 205); *People* v. *N.Y.C. & H.R.R. Co.* (1878), 29 N.Y. 302 (failure to maintain proper railroad crossing); *People* v. *J. H. Woodbury Dermatological Institute* (1908), 192 N.Y. 454 (corporation convicted for practicing medicine when not a registered physician); *State* v. *Salisbury Ice Co.* (1914), 166 N.C. 366 (obtaining under false pretenses by knowingly selling false weight of coal). See also Gardner and Lansdown, *South African Criminal Law and Procedure* (2d ed. 1924), I, pp. 59–61, showing that South Africa also recognizes that corporations may be punished for crime.

While of course a juristic person cannot be jailed, in case of conviction, it may be fined or its charter may be suspended or terminated. See, for example, the provisions of the New York statute governing punishment of corporations convicted of felony:

> In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars. (Cahill's Cons. Laws, 1930, sec. 1932.)

Among the states of the United States whose laws provide a particular procedure to be used in prosecutions against corporations, see California, Penal Code (1872, as amended to 1931), secs. 1390–1397; Illinois, Cahill's Stat. (1929), ch. 38, Criminal Code, sec. 690; Ohio, Throckmorton's Ann. Code (1930), sec. 13437; Virginia, Code (as amended to 1930), sec. 4892; Washington, Rem. Comp. Stat. (1922), sec. 2011.

The assimilation of competence over corporations to the State's jurisdiction over its nationals finds support in the tendency of legislation in some States to include juristic persons in the term "person" when used in penal legislation. See the following:

> Great Britain, Interpretation Act (1889), 52 & 53 Vict., c. 63, sec. 2.—(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.
>
> Michigan, Penal Code, sec. 10, par. 3 (Mich. Pub. Acts, 1931, no. 328).—The words "person", "accused", and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations.

Of similar effect, see California, Penal Code (1872, as amended to 1931), sec. 7; Ohio, Throckmorton's Ann. Code (1930), sec. 12371; Washington, Rem. Comp. Stat. (1922), sec. 2303 (14); India, Penal Code (1860), sec. 11;

New South Wales, Act 40 of 1900, sec. 4; New Zealand, Cons. Stat. (1908), 1, No. 32, "Crimes", sec. 2; Sudan, Penal Code (1899), Art. 9. Under such legislation, laws asserting jurisdiction over nationals for crimes committed abroad should also be applicable to juristic persons having the State's national character. The decision in *American Banana Co.* v. *United Fruit Co.* (1909), 213 U.S. 347 is not inconsistent with such a principle, since that decision was based upon the conclusion that the statute in question was not intended to have extraterritorial effect. In delivering the opinion of the court, Mr. Justice Holmes indicated that United States penal laws might be made applicable to United States corporations for acts or omissions to act committed abroad. He said:

> It is true that domestic corporations remain always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men. (213 U. S. 347, 357.)

The conviction of a Delaware corporation in *United States* v. *Sin Wan Pao Co.* (1920), 1 Lobingier, *Extraterritorial Cases*, 983, in the United States Court for China, would seem to indicate that United States corporations may be assimilated to United States nationals for the purposes of criminal jurisdiction under the "extraterritorial régime" in China.

Prosecution and punishment of juristic persons for crime is also provided in India, Penal Code (1860), sec. 11; Liberia, Criminal Code (1914), sec. 28; Palestine, Companies Ordinance (1921), Art. 84; Sudan, Penal Code (1899), Art. 9. The provisions of Mexico, Federal Penal Code (1931), Art. 11, come to very much the same thing; similar provisions appear also in Cuba, Project of Penal Code (Ortiz, 1926), Art. 15; and France, Project of Penal Code (1932), Art. 115, par. 2. See also Spain, Penal Code (1928), Art. 44. See Lilienthal, "*Die Strafbarkeit juristischer Personen*," *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), Allg. Teil, V, 87–101. The penal responsibility of juristic persons was one of the topics considered at the second *Congrès Internationale de Droit Pénal* at Bucharest in 1929. Reports on the subject are published in the proceedings of the Congress, pp. 23–183 (also in 6 *Rev. Int. de Dr. Pénal*, 219 ff). See also Cuello Calón, *Derecho Penal* (1928), pp. 203–209, and Vidal, *Cours de Droit Criminel* (7th ed. 1928), sec. 65 ff, indicating the extent to which penal responsibility of juristic persons is recognized at present, especially in France. Saleilles, *De la Personnalité Juridique* (1910), p. 638 ff, Mestre, *Les Personnes Morales et le Problème de leur Responsabilité Pénale* (1899), and Mestre, "*Responsabilité Pénale des Personnes Morales*," *Revue Pénitentiaire* (1920), 239, urge that with respect to penal responsibility juristic persons should be treated substantially as natural persons are treated.

On the general subject of the penal responsibility and punishment of juristic persons, see also Canfield, "Corporate Responsibility for Crime," 14 *Columbia L. Rev.* (1914), 469; Collier, "Impolicy of Making Corporations

Indictable," 71 *Central L. Jour.* (1910), 421; Edgerton, "Corporate Criminal Responsibility," 36 *Yale L. Jour.* (1927), 827; Francis, "Criminal Responsibility of the Corporation," 18 *Ill. L. Rev.* (1924), 305; Hacker, "The Penal Ability and Responsibility of the Corporate Bodies," 14 *Jour. Crim. L. and Criminology* (1923), 91 (also discussing European practice and ideas on the subject); Hitchler, "The Criminal Responsibility of Corporations," 27 *Dickinson L. Rev.* (1923), 89, 119; Trainin, *Ugolovnoi Pravo* (1929), pp. 244–248.

The phrase "corporation or other juristic person" is used in the present article, in preference to formulae commonly used in certain national legal systems, because of the various kinds of juristic persons which are recognized under different systems of national law. The "corporation" is probably the type of juristic person best known in common law countries. The present article must be formulated in terms sufficiently broad, however, to include any entity which is recognized as a juristic person under the laws of the State whose "national character" it possesses. For discussion of different kinds of juristic persons, see Gray, Nature and Sources of the Law (2d ed. 1921), pp. 27–61; Salmond, *Jurisprudence* (7th ed. 1924), sec. 113; Brissaud, *History of French Private Law* (Howell's transl. 1912), secs. 588–590; Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1925), I, pp. 69–100; Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, (9th ed. 1925), I, pp. 154–335.

The phrase "national character" is used herein to describe a relationship to the State which is like the relationship described by the term "national" in paragraph (a) preceding. There is a difference of opinion as to whether a corporation should be regarded as having the nationality of the State under whose laws it is organized, apparently the Anglo-American view for most purposes, or of the State where its seat or chief office (*siège social*) is located, the view generally accepted elsewhere, or even of some other State, such as that where the chief activity is to take place. It would seem that this question is one to be resolved as part of another subject and not in a convention on jurisdiction with respect to crime. See the report of the League of Nations Committee of Experts for the Progressive Codification of International Law, Nationality of Corporations and Their Diplomatic Protection, *Publications of the League of Nations*, 1927. V. 12; also in 22 *Am. Jour. Int. L.* (1928), Supp. 171–214; Bustamante Code (1928), Arts. 16–20; Cuq, *La Nationalité des Sociétés* (1921); Leven, *De la Nationalité des Sociétés* (1899); Pepy, *La Nationalité des Sociétés* (1920); Schwandt, "*Die Staatsangehörigkeit der Handelsgesellschaften*," 6 *Zeitschrift für ausländisches und internationales Privatrecht*, bes. Heft 197 (1932); Streit, "*La nationalité des sociétés commerciales*," 55 *Rev. de Dr. Int. et de Lég. Comp.* (1928), 494–521; Travers, "*La Nationalité des Sociétés Commerciales*," in *Académie de Dr. Int., Recueil des Cours* (1930), III, 1–114; Yofre, *Nacionalidad de las personas juridicas* (1927). See also Hyde, *International Law* (1922), I, 486; Central Executive

Council of the Inter-American High Commission, *The Juridical Status of Foreign Corporations in the American Republics* (1927), especially pp. 94–102.

Of course a State cannot have unlimited competence to ascribe its national character to corporations and then to prosecute and punish them under the present article for crimes committed abroad. The opinion may perhaps be ventured that either the *siège social* must be in the State or the corporation must have been formed under its laws. Such questions, however, as well as questions of multiple national character, fall within a different field of international law from that with which the present Convention deals. It seems clear, as a general principle of penal jurisdiction, that the State should have the same kind of competence with respect to crimes committed abroad by its juristic persons as is attributed to it in paragraph (a), preceding, with respect to crimes committed abroad by those natural persons who are its nationals.

ARTICLE 6. PERSONS ASSIMILATED TO NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By an alien in connection with the discharge of a public function which he was engaged to perform for that State; or

(b) By an alien while engaged as one of the personnel of a ship or aircraft having the national character of that State.

COMMENT

Under paragraph (a) of this article, a State may prosecute and punish its public official (*fonctionnaire, Beamter*) of alien nationality, or of no nationality, for crimes committed abroad in connection with the discharge of his functions. In case of a functionary who is a national, of course, the State would have jurisdiction under Article 5, *supra*. Paragraph (a) of the present article provides that an alien functionary may be treated like a national with respect to crimes connected with the office. It has nothing to do with crimes which he may commit in his individual or private capacity. The term "functionary" may include diplomatic and consular officers, officers of military and naval forces, customs officials, public health officers, officials of government-operated transportation systems, etc. While such positions are usually held by nationals, aliens may be engaged; and it is to such aliens that the present article applies.

The jurisdiction defined in this article is based upon the relationship existing between the functionary and the State which he serves. The alien official is part of the State's governmental organization even though he may be serving outside its territorial limits. The State served is obviously the State chiefly concerned in the faithful discharge of the functionary's duties. While the State where the functionary's offences are committed is competent to prosecute and punish such offences as committed within its territory, it will not ordinarily have the same interest in prosecution and punishment that

it would have if its own governmental interests were affected. Such offences may be directed chiefly or solely against the State served. If the latter were without jurisdiction, many such offences would be likely to go unpunished. The situation presented is in some respects like that for which provision is made in Article 7, *infra*, dealing with the competence of the State to prosecute and punish crimes committed abroad against its security or integrity. Here, as there, the State must be competent to protect its own peculiar interests since the protection afforded by the State where the offence is committed has been shown by experience to be insufficient.

The relationship between the State and its functionaries is for each State to determine. If the functionary commits an act or omission in relation to his public functions, the consequences should be settled between him and the State served. In this respect the present article may be said to rest upon the principle that each State has an unrestricted capacity to organize and control its own governmental agencies.

Jurisdiction over crimes committed by functionaries abroad in relation to their public functions is asserted in the penal legislation of many States. The following selections are sufficiently typical:

> Argentina, Penal Code (1921), Art. 1.—This code shall be applied: . . . 2. In case of crime committed abroad by agents or employees of Argentine authorities in the performance of their duties.
>
> Chile, Code of Criminal Procedure (1906), Art. 2.—Of the crimes and simple delicts committed outside the territory of the Republic, there are subject to the Chilean jurisdiction:
> 1. Those committed by a diplomatic or consular officer of the Republic, in the exercise of his functions.
> 2. Maladministration of public funds, frauds and illegal exactions, unfaithfulness in keeping documents, violation of secrets, and bribery, committed by Chilean public functionaries or by aliens in the service of the Republic.
>
> China, Penal Code (1928), Art. 6.—Le présent Code s'applique à toutes infractions ci-après énoncées, commises par un fonctionnaire public de la République, hors du territoire de la République:
> 1. Infractions de corruption dans les fonctions publiques, art. 128, 131, 135, 139, et 140;
> 2. Infractions d'évasion de prisonniers, art. 172;
> 3. Infractions de fabrication de faux documents, art. 230.
>
> Italy, Penal Code (1930), Art. 7.—A national or foreigner who commits any one of the following offences in foreign territory shall be punished under Italian laws: . . . (4) Crimes committed by public officials in the service of the State, with abuse of their powers or in violation of the duties inherent in their functions.

Provisions of similar effect are found in Albania, Penal Code (1927), Art. 4; for Belgium, see case of *Masui et al.* (Trib. Corr. Bruxelles, April 6, 1920), Clunet (1920), 714; Brazil, Project of Penal Code (1927), Art. 4; Bulgaria, Penal Code (1896), Art. 4; Chile, Project of Penal Code (1929), Art. 3, Nos. 1 & 2; Colombia, Penal Code (1890), Art. 20, sec. 4; Cuba, Project of

Penal Code (Ortiz, 1926), Art. 36, sec. 6; Danzig, *Strafprozessordnung* (1927), sec. 11; Finland, Penal Code (1889), Art. 3; Germany, Penal Code (1871), Art. 4; Germany, Project of Penal Code (1927), sec. 6; Greece, Project of Penal Code (1924), Art. 4; Honduras, Law of Organization of the Courts (1906), Art. 173; India, Penal Code (1860), sec. 4; Japan, Penal Code (1907), Art. 4 (as to specified offences); Mexico, Penal Code (1929), Art. 7; Netherlands, Penal Code (1881), Art. 6; Panama, Penal Code (1922), Art. 8; Peru, Penal Code (1924), Art. 5, sec. 4; Poland, Penal Code (1932), Art. 7; Russia, Penal Code (1903), Art. 11 (adopted in Estonia, Penal Code, 1931, Art. 9, Latvia, Penal Code, 1918 and 1920, and Lithuania, Penal Code, 1930, Art. 11); Spain, Law of Organization of Judicial Power (1870), Art. 336; Spain, Penal Code (1928), Art. 11, sec. 3; Turkey, Penal Code (1926), Art. 4, par. 4; Uruguay, Project of Penal Code (1932), Art. 10, sec. 4. See Venezuela, Penal Code (1926), Art. 4, Nos. 6, 7, 13. See also, though perhaps confined to functionaries who are nationals, such legislation as is found in Bolivia, Penal Code (1834), Art. 169 (entering foreign territory under arms), and Military Penal Code, Art. 5; Costa Rica, Penal Code (1924), Art. 219, sec. 8; Cuba, in Bustamante, *Derecho Internacional Privado* (1931), III, 43–44 (jurisdiction over crimes by diplomats, consuls, and military forces abroad); Ecuador, Penal Code (1906), Art. 10; Great Britain, 11 & 12 Wm. III, c. 12, and 42 Geo. III, c. 85 (as to certain offences) (see *Rex* v. *Stevens* and *Agnew* (1804), 5 East 244; *King* v. *Jones* (1806), 8 East 30; *Case of Picton* (1804–12), 30 How. St. Tr. 225; *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote*, L.R. [1894] A. C. 670).

The present article applies only to a crime committed "in connection with the discharge of a public function." If a State asserts jurisdiction over its alien functionary for other crimes, its competence must be based upon some other article of this Convention. Crimes in relation to public functions cannot be enumerated or defined in this Convention. They depend primarily upon the nature of the office filled by the functionary. Examples of such crimes are misappropriation of funds or property, disclosure of official secrets, bribery, various types of falsification, and failure to perform the duties of the office as required by the State served.

While the present article provides for jurisdiction with respect only to such crimes, it does provide for jurisdiction with respect to them whether the alien is still a functionary, or has left the service of the State after committing the crime but before he is prosecuted and punished, or has left the service of the State before committing the crime. For illustration, if a national of State X serving as an official of State Y should, after the termination of his service, illegally disclose military secrets which came into his possession as an official of State Y, the latter State would have jurisdiction under this article wherever the illegal disclosure might be made. The basis of the jurisdiction would be the service as an official of State Y. The jurisdiction extends only to crimes in relation to that service; but it extends to such crimes whether or not the accused is still an official.

Under paragraph (b) of the present article, a State may prosecute and punish an alien who is one of the personnel of a ship or aircraft having its national character for any offence committed outside its territory while so engaged. The assimilation to the position of nationals is thus more comprehensive than that accomplished with respect to functionaries under paragraph (a). As to offences committed in whole or in part upon a ship or aircraft having its national character, the State has jurisdiction by virtue of the place of the offence. See Article 4, *supra*. As to offences committed elsewhere by the alien seaman of a national vessel, the State has jurisdiction by virtue of the assimilation which paragraph (b) of the present article effects. The assimilation is not common in national legislation or international practice, though there have been a few instances.

Referring to the position of alien seamen on American vessels where a question of extraterritorial jurisdiction was concerned, Secretary Blaine stated the position of the United States as follows:

> When a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation, in the exercise of an unquestioned authority, governs its vessels and seamen. (Secretary Blaine to Sir Edward Thornton, June 3, 1881, Moore, *Digest of International Law*, 1906, II, 607.)

See also *in re Ross* (1891), 140 U. S. 453.

Alien seamen have received the diplomatic protection of the State on whose vessel they served and international claims on their behalf have been successfully prosecuted by the State of the vessel's flag. See Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 471, 475 ff; Hyde, *International Law* (1922), I, 684; Moore, *International Arbitrations* (1898), pp. 2536, 4672.

The British Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, sec. 687, provides:

> All offences in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England.

No record has been found of prosecutions under this section for offences committed by alien seamen elsewhere than on British vessels. On the effect of the section and of similar legislation of earlier date, see Gibb, *The International Law of Jurisdiction* (1926), p. 269; Lewis, *Foreign Jurisdiction and the Extradition of Criminals* (1859), p. 24.

ARTICLE 7. PROTECTION—SECURITY OF THE STATE

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.

COMMENT

With but few exceptions, national penal codes contain provisions which are based upon the conception that States are competent to legislate for the protection of their security and credit against injurious acts even though such acts are committed by aliens upon foreign territory. The basis of such jurisdiction is the nature of the interest injured rather than the place of the act or the nationality of the offender. With the exception of the jurisdiction universally recognized over nationals abroad and over pirates (see Arts. 5 and 9), legislation enacted in reliance upon the protective principle constitutes the most common extension of penal jurisdiction to offences committed abroad.

Protective legislation applicable to aliens for acts committed in foreign territory appears at an early date. In fact, such legislation antedates the establishment of modern national States and the formulation of the modern territorial theory of penal competence. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 86, and *Introduction à l'Etude du Droit Pénal International* (1922), p. 175, citing statutes of various Italian cities of the 15th and 16th centuries. In view of the early appearance of such protective legislation and of its widespread adoption by States at the present time, it would seem clear that the underlying protective principle must find a place in a Convention on penal competence. See Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," *British Yearbook of International Law* (1925), pp. 50–52, 56–57; Bourquin, "*Crimes et Délits contre la Sûreté des Etats Etrangers*," *Académie de Dr. Int., Recueil des Cours* (1927), I, pp. 174–176; Brierly, "Criminal Competence of States in Respect of Offences Committed outside their Territory," Committee of Experts for the Progressive Codification of International Law, *Publications of the League of Nations*, C. 50, M. 27. 1926. V. 7, p. 2.

States may be divided roughly into two groups according to the extent to which they exercise a competence to punish crimes committed abroad against their security, integrity or independence. The first group includes those States which generally confine the application of their protective laws to nationals, while occasionally asserting a claim to jurisdiction over aliens for specific offences against their security or against the functioning of their political institutions or agencies. The second group includes those States which apply their protective laws, with certain exceptions, to aliens as well as to nationals.

Great Britain and the United States belong to the first group, basing their penal competence almost exclusively upon the territorial and personal principles. See Hintrager, "*Die Behandlung der im Auslande begangenen Delikte nach dem Rechte Grossbrittaniens unter Berücksichtigung des Rechts der Vereinigten Staaten von Amerika*," 9 *Zeitschrift für Int. Recht* (1899), 88 ff. Legislation for the protection of the security of the State, such as the treason laws, is applicable only to nationals abroad, aliens being exempted from its operation (*cf.* Art. 5, and comment).

There are provisions in the law of the United States, however, which it is difficult to reconcile with an exclusively territorial or personal theory of penal competence and which appear to be based in some measure upon the principle that the United States is competent to prosecute offences which interfere with the functioning of its public agencies and instrumentalities, irrespective of the place of the offence or the nationality of the offender. See, for example, the Act of Congress of August 18, 1856, c. 27, sec. 24 (11 U.S. Stat. L. 61), which makes punishable acts of perjury before an American diplomatic or consular officer without limitation to United States territory or to nationals of the United States. See also provisions punishing perjury or fraud in applications for immigration, Immigration Act of 1924, sec. 22 (43 U.S. Stat. L. 153, 165). In *United States ex rel. Majka* v. *Palmer* (1933), 67 F. (2d) 147, deportation was ordered because of perjury before an American consul abroad, the perjury being regarded as a crime by United States law. *Cf.* decision of Supreme Court of Vienna, March 29, 1929, Clunet (1931), 190 (presenting a falsified passport to an Austrian frontier official on Czech territory held punishable in Austria); and French case of *Min. Pub.* c. *Glass* (Trib. Corr. de Boulogne sur Mer, Feb. 25, 1858), D.P. 1858. 3. 39 (taking jurisdiction over an alien who used a false name before a French consul abroad to gain admittance to France). See also the British Foreign Marriages Act, 55 & 56 Vict., c. 23, sec. 15, later repealed by the Perjury Act. The language used by Chief Justice Taft, in delivering the opinion of the Supreme Court in the case of *United States* v. *Bowman* (1922), 260 U.S. 94, *Annual Digest*, 1919–1922, Case No. 109, seems to imply that certain statutory provisions for the protection of United States agencies might be applied to aliens for acts committed abroad. In this case the court overruled a demurrer, filed in behalf of an American citizen, to an indictment under sec. 35 of the Criminal Code, as amended October 23, 1918, c. 194 (40 U.S. Stat. L. 1015), for conspiracy to defraud the United States Shipping Board Emergency Fleet Corporation. After referring to the principle that statutes punishing crimes which affect the good order and peace of the community are to be interpreted as applicable only within the territorial limits of the United States, in the absence of express evidence of a contrary intent on the part of Congress, Chief Justice Taft said:

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality

> for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated. . . . Some such offences can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute. . . . In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offence. (260 U.S. 94, 98.)

The court left open the question as to whether the statute was applicable to aliens as well as to nationals for acts committed abroad. Chief Justice Taft said:

> The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. . . . The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial. (260 U.S. 94, 102.)

The Texas Penal Code contains an interesting provision, in its chapter punishing the forgery of titles to land, which appears to be based upon the principle of protection:

> Texas, Penal Code (1925), Art. 1009.—Persons out of the State may commit and be liable to indictment and conviction for committing any of the offences enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to arrest and punish all persons offending against its provisions, whether within or without the State.

This statute (then Penal Code, Art. 454) was upheld in *Hanks* v. *The State* (1882), 13 Tex. App. 289, the Texas Court of Appeals affirming the conviction of the defendant for forging Texas land titles in Louisiana. Delivering the opinion of the court, Judge White said:

> We can see no valid reason why the Legislature of the State of Texas could not assert, as it has done in Article 454 *supra*, her jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation, within or without her territorial limits. Such acts are offenses against the State of Texas and her citizens only, and can properly be tried only in her courts. It may in fact be no crime against the State in which it is perpetrated; and if it is, under such circumstances as we are considering, that other State would have no interest in punishing it, and would rarely, if ever, do so. When this forgery was committed in Louisiana, *eo instanti* a crime was committed against, and injury done to, the State of Texas, because it affected title to lands within her sovereignty. (13 Tex. App. 289, 308–309.)

It is possible that certain legislation against making war on the state, like that of Maryland, may apply to persons other than citizens. At least the wording of such provisions is not clearly confined to persons owing allegiance to the state. See Maryland, Ann. Code (1924), Art. 24, secs. 516, 517, 520, of which the following may be quoted:

> Sec. 516. If any person shall levy war against this State, or shall adhere to the enemies thereof, whether foreign or domestic, giving them aid or comfort, within this State or elsewhere, and shall be thereof convicted, on confession in open court or on the testimony of two witnesses, both to the same overt act, he shall suffer death, or be sentenced to confinement in the penitentiary for not less than six nor more than twenty years, at the discretion of the court.

And see the legislation noted in the comment on Article 3, *supra*, by way of illustration of the more extreme applications of the territorial principle.

The fact that the United States and Great Britain have not chosen to extend their legislation generally to punish offences against their security and integrity committed by aliens abroad is not conclusive evidence that they deem the exercise of such a competence contrary to international law. It is not always possible to "infer from the practice adopted by a State the theory upon which it bases its assumption of jurisdiction, since we cannot safely argue from the fact that it assumes jurisdiction only in certain cases that it regards those cases as the only ones in which the assumption of jurisdiction would be legitimate." Brierly, "Criminal Competence of States in Respect of Offences Committed outside their Territory," Committee of Experts for the Progressive Codification of International Law, *Publications of the League of Nations*, 1926. V. 7, p. 2.

The States assuming penal competence upon the protective principle include practically all States other than the United States and Great Britain. Nearly all of these States apply laws for the protection of their security, integrity or independence to offences committed abroad either by nationals or aliens. A number make certain distinctions between nationals and aliens as to the application, for example, of the rule of *non bis in idem*, or as to the particular offences which are made punishable. It is unnecessary, however, to take account of these distinctions and differences at this point.

The provisions of national codes providing for the punishment of crimes against security or integrity vary somewhat in the formula which they employ to describe the acts incriminated. Thus the French *Code d'Instruction Criminelle*, Art. 7, speaks of

> un crime attentatoire à la sûreté de l'Etat, ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, de papiers nationaux, de billets de banque autorisés par la loi.

The Polish Penal Code (1932), Art. 8, is made applicable to persons who have committed abroad

a) infractions contre la sûreté intérieure ou extérieure de l'Etat Polonais; *b*) infractions contre les offices publics ou les fonctionnaires de l'Etat Polonais; *c*) fausse déposition faite devant un office public de l'Etat Polonais.

The Guatemalan Penal Code (1890), Art. 4 denounces:

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

The German Penal Code (1871), Art. 4 applies to

> Acts of high treason (*Hochverräterische Handlung*) against the Reich or a Federal State, or a coinage crime (*Münzverbrechen*).

The following articles from national penal codes will suffice to illustrate the principal types of penal provision based upon the principle of protection and applying both to nationals and aliens for crimes abroad:

> Colombia, Penal Code (1890), Art. 20.—There shall be punished according to this Code, and ignorance of what it prescribes shall not exculpate them: . . .
> (2) Nationals and aliens who outside of the national territory commit acts or are guilty of omissions punished by law, provided that the said acts or omissions compromise the peace and external or internal security of the Republic, or affect its Constitution, or lead to the falsification of seals of public offices, or of documents of public credit, or of banknotes that circulate in the country, or of sealed paper or stamps of whatever sort, or of documents which are to have their effects in the country. There shall also be punished the acts and omissions which have in view the introduction of the said falsified things, or to cause any other damage to the interests of the country; but in no case shall they be tried in the Republic who have already been tried in the place where they did wrong, for the same acts or omissions.

> Germany, Project of Penal Code (1927), sec. 6.—The penal laws of the Reich apply to the following acts committed abroad, irrespective of the law of the place of the act:
> 1. high treason or treason against the Reich or one of the German States (*Länder*), and offences (*Vergehen*) against the defence force or the national force (*die Wehrmacht oder die Volkskraft*);
> 2. punishable acts which anyone commits as holder of a German office, or which anyone commits against the holder of a German office, during the exercise of his office or in relation to his office;
> 3. perjury in a proceeding pending before a German authority;
> 4. crimes of counterfeiting;
> 5. crimes of traffic in women and children.

Italy, Penal Code (1930).—Art. 7. A national or foreigner who commits any one of the following offences in foreign territory shall be punished under Italian law:

(1) Crimes against the personality of the State.

(2) The crimes of counterfeiting the seal of the State and of using such counterfeited seal.

(3) The crimes of counterfeiting coins which have legal currency in the territory of the State, or revenue stamps or Italian public credit securities.

(4) Crimes committed by public officials in the service of the State with abuse of their powers or in violation of the duties inherent in their functions.

(5) Any other offence in respect of which special provisions of law or international conventions prescribe the applicability of Italian penal law.

Art. 8. A national or foreigner who commits in foreign territory a political crime other than those specified in (1) of the preceding Article shall be punished under Italian law, on the demand of the Minister of Justice.

If the crime is one which is punishable on the denunciation of the injured party, such denunciation is required in addition to the above demand.

For the purposes of penal law, any crime which injures a political interest of the State, or a political right of a national, is a political crime. An ordinary crime, determined wholly or in part by political motives, is likewise considered to be a political crime.

Rumania, Project of Penal Code (1926), Art. 7.—Quiconque commettra, hors du territoire roumain, soit comme auteur, soit comme complice, un crime contre la sûreté de l'Etat, un délit de contrefaçon des monnaies ayant cours légal en Roumanie, du sceau de l'Etat, de ceux des autorités roumaines, ou bien falsifiera des effets public: timbres nationaux, timbres-poste, billets de banque autorisés par loi en Roumanie, passeports roumains, papiers de crédit, ou encore se rendre coupable d'infractions quelconque d'autre nature envers un citoyen roumain, pourra être poursuivi en Roumanie, jugé et condamné même par défaut.

Si le coupable a été appréhendé sur le territoire roumain, et si son extradition peut être obtenue, il devra purger la peine prononcée par les tribunaux roumains, même si pour les faits énumérés dans l'alinéa précédent, il avait été jugé à l'étranger, d'une sentence irrévocable.

En case d'une condamnation prononcée à l'étranger pour la même infraction, la peine déjà subie sera déduite de celle prononcée par les tribunaux roumains.

Venezuela, Penal Code (1926), Art. 4.—There are subject to prosecution in Venezuela and shall be punished according to the Venezuelan penal law: . . .

(2) The foreign subjects or citizens who in a foreign country commit any crime against the security of the Republic or against any of its nationals.

In the preceding two cases it is requisite that the accused has come to the territory of the Republic and that action has been brought by the injured party, or by the Public Minister in cases of treason or crime against the security of Venezuela.

It is also necessary that the accused has not been tried by foreign

courts, unless he has been tried and has avoided the sentence decreed.

. . .

(11) The Venezuelans, or aliens who have come to the territory of the Republic, who in another country falsify, or take part in the falsification of, money legally current in Venezuela, or seals of public office, stamps, or documents of credit of the nation, banknotes to the bearer or shares of capital and income whose issue has been authorized by national law.

(12) The Venezuelans or aliens who in any way have favored the introduction into the Republic of the [falsified] valuables specified in the preceding paragraph.

As may be seen from the examples above quoted, the general articles in national codes providing for jurisdiction over offences against the security and credit of the State vary as to the formulas which they employ to describe the types of offences made punishable. In order to ascertain what particular offences are included under the broad terms of the general articles, it is necessary to refer to special parts of the codes. There appears to be a high degree of uniformity in the particular crimes made punishable in reliance upon the protective principle. For offences designated in the French *Code d'Instruction Criminelle*, Art. 7, as crimes "*attentatoire à la sûreté de l'Etat*", see the Penal Code (1810), Bk. III, ch. I, "*Crimes et délits contre la sûreté de l'Etat,*" Sec. I."*Des crimes et délits contre la sûreté extérieure de l'Etat,*" Sec. II."*Des crimes contre la sûreté intérieure de l'Etat,*" Sec. III. "*De la révélation et de la non-révélation des crimes qui compromettent la sûreté intérieure ou extérieure de l'Etat.*" And see the following cases in which protective jurisdiction has been asserted successfully: *Oès* (Conseil de révision de Lyon, Feb. 5, 1917), Clunet (1917), 1027; *Wechsler* (Conseil de Guerre de Paris, July 20, 1917), Clunet (1917), 1745, 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 551; *Sedano y Leguizano* (Cass. Crim., Aug. 23, 1917), Clunet (1917), 1748; *Rachkoff* (Cass. Crim., May 10, 1919), 123 *Bull. Crim.* (1918), 189; *Urios* (Cass. Crim., Jan. 15, 1920), Clunet (1920), 195, *Annual Digest*, 1919–1922, Case No. 70; *Bayot* (Cass. Crim., Feb. 22, 1923), D.P. 1924. 1. 136, 128 *Bull. Crim.* 140, *Annual Digest*, 1923–1924, Case No. 54. For Germany, see Preuss, "International Law and German Legislation on Political Crime," in *Transactions of Grotius Society* (1934); see also Project of Penal Code (1927), *Begründung*, p. 8, note 1, citing other laws providing for protective jurisdiction over offences committed by aliens abroad; and see decision of June 30, 1911, in *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1911), 402. For the particular crimes punishable under the protective principle in Italy, see Penal Code (1930), Bk. II, chs. 1–5, Arts. 241–313.

In addition to the provisions above quoted, the following codes, laws, and projects provide for protective legislation with extraterritorial application to aliens: Albania, Penal Code (1927), Arts. 4 and 6; Belgium, Code of Criminal Instruction (1878), Art. 6 (Law of Aug. 4, 1914), and Art. 10;

Bolivia, Law of Nov. 29, 1902, Arts. 6 and 7; Brazil, Law of June 28, 1914, Art. 13, and Project of Penal Code (1927), Art. 3; Bulgaria, Penal Code (1896), Art. 4; China, Penal Code (1928), Art. 5; Costa Rica, Penal Code (1924), Art. 219, Nos. 5 and 6; Cuba, Project of Penal Code (1926), Art. 36; Czechoslovakia, Law for the Protection of the Republic, Mar. 11, 1923, secs. 1–7, 17, 38, and Project of Penal Code (1926), sec. 5; Denmark, Penal Code (1930), sec. 8; Dominican Republic, Law of June 28, 1911, Art. 7; Ecuador, Penal Code (1906), Art. 10; Finland, Penal Code (1889), secs. 1 and 3; Finland, Project of Penal Code (Serlachius, 1920), ch. 1, Art. 4 (according to Pella, *Académie de Dr. Int., Recueil des Cours*, 1930, III, 671, 774); France, Project of Penal Code (1932), Art. 14; Germany, Law for the Protection of the Republic, Mar. 25, 1930, secs. 1–5, 7; Greece, Code of Criminal Procedure (1834), Art. 2, applied in Decision 541 of the Areopagus, Clunet (1929), 1183, and Project of Penal Code (1924), Art. 4; Guatemala, Penal Code (1889), Art. 6; Haiti, Code of Criminal Procedure (1835), Art. 5, and Extradition Law (1912), Art. 4; Honduras, Law of Organization of the Courts (1906), Art. 173; Hungary, Penal Code (1878), Art. 7; Japan, Penal Code (1907), Art. 2; Lithuania, Penal Code (1930), Art. 9; Luxembourg, Code of Criminal Procedure (1808, replaced in Law of Jan. 18, 1879), Arts. 5 and 7; Monaco, Code of Criminal Procedure (1904), Art. 7; Netherlands, Penal Code (1881), Art. 4; Nicaragua, Penal Code (1891), Art. 13; Norway, Penal Code (1902), sec. 13, par. 3; Palestine, Code of Criminal Procedure (1924), Arts. 5 and 6; Panama, Penal Code (1922), Art. 6, and Project of Penal Code (1930), Art. 7; Paraguay, Penal Code (1914), Art. 9; Peru, Penal Code (1924), Art. 5; Poland, Penal Code (1932), Art. 8; Portugal, Penal Code (1886), Arts. 3 and 4; Rumania, Penal Code (1865), Art. 5 and Project of Penal Code (1926), Art. 5; Rumania, Project of Penal Code (revised, 1928), Arts. 9 and 19 (see Pella, *Académie de Dr. Int., Recueil des Cours*, 1930, III, 671, 774, 779); Salvador, Code of Criminal Procedure (1904), Art. 18; Siam, Penal Code (1908), Art. 10; Spain, Law of Organization of the Judicial Power (1870), Art. 336 and Penal Code (1928), Art. 11; Sudan, Penal Code (1924), Art. 4; Sweden, Penal Code (1864), Arts. 1 and 2, and Project of Penal Code (1923), ch. 1, sec. 5; Switzerland, Federal Penal Law (1853), Art. 1, and Project of Penal Code (1918), Art. 4; also the following Swiss Cantonal Codes, Aargau, Penal Code (1857), sec. 2c; Appenzell A. Rh., Penal Code (1878), Art. 1b; Baselland, Penal Code (1873), sec. 2, No. 2; Bern, Law of July 5, 1914, Art. 3; Fribourg, Penal Code (1924), Art. 3; Geneva, Code of Crim. Proc. (1891), Art. 9; Glarus, Penal Code (1867), Art. 2b; Graubünden, Penal Code (1851), sec. 3; Luzern, Crim. Code (1861), Art. 2c; Neuchâtel, Penal Code (1891), Art. 6, No. 1; Obwalden, Crim. Code (1864), Art. 2b; St. Gall, Penal Code (1857, rev. 1886), Art. 4b; Schauffhausen, Penal Code (1859), sec. 3c; Schwyz, Crim. Code (1881), sec. 3; Soluthurn, Penal Code (1874), sec. 4b; Thurgau, Penal Code (1841, modified 1868), sec. 2c; Ticino, Penal Code (1873, modified 1885), Art. 3, sec. 1;

Valais, Penal Code (1859), sec. 10; Vaud, Penal Code (1931), Arts. 5(c) and 246–293; Zug, Penal Code (1882), sec. 2d; Zurich, Crim. Code (1897), sec. 3c; Uruguay, Penal Code (1889), Art. 5, and Project (1932), Art. 10; Yugoslavia, Penal Code (1929), Art. 4.

In addition to the evidence of almost universal approval of the protective principle revealed in the national code provisions above cited, this principle has also been supported by various resolutions of international organizations, by conferences on penal law, and to a limited extent in treaties. The following may be noted:

Institute of International Law, Resolutions of 1883, Art. 8.—Tout Etat a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'Etat en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.

Institute of International Law, Resolutions of 1931, Art. 4.—Tout Etat a le droit de punir des actes commis en dehors de son territoire, même par des étrangers, lorsque ces actes constituent:

a) Un attentat contre sa sécurité;

b) Une falsification de sa monnaie, de ses timbres, sceaux ou marques officiels.

Cette règle est applicable lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis.

International Prison Congress, August 10, 1900.—Art. 1. Chaque Etat peut punir, conformément à ses lois, les crimes et les délits commis hors de son territoire, par des nationaux ou par des étrangers, soit comme auteurs, soit comme complices, contre la sûreté, la fortune ou le crédit publics de cet Etat.

La poursuite n'est pas subordonnée à la présence de l'inculpé sur le territoire de l'Etat lésé.

International Conference for the Unification of Penal Law, Warsaw, 1927.—Art. 5. Sera punissable, même par défaut, quiconque aura participé à l'étranger à un crime ou délit: 1° contre la sûreté de l'Etat; 2° de contrefaçon ou falsification de sceau, poinçons, cachets ou timbres de l'Etat.

Bustamante Code (Convention on Private International Law, signed at the Sixth International Conference of American States, February 20, 1928).—Art. 305. Those committing an offense against the internal or external security of a contracting State or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting State.

International Congress of Comparative Law, The Hague, 1932.—Art. 3. Tout Etat a le droit de punir les actes commis en dehors de son territoire, même par des étrangers lorsque les actes constituent

a) Un attentat contre sa sécurité;

b) Un délit de contrefaçon du sceau de cet Etat ou d'usage du sceau contrefait;

c) Un délit de falsification de monnaie ou de valeur du timbre ou d'effet de crédit public de cet Etat.

Cette règle est applicable, lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis.

There is justification for the enactment of penal legislation based upon the protective principle in the inadequacy of most national legislation punishing offences committed within the territory against the security, integrity and independence of foreign States. So long as the State within whose territory such offences are committed fails to take adequate measures, competence must be conceded to the State whose fundamental interests are threatened. At the present time the international obligation to protect foreign States against such offences is ill-defined and national legislation to that end is varied. Some States, such as Great Britain and the United States, while recognizing an obligation to afford a minimum of protection, tend to adhere to the principle of "political neutrality" and to make a relatively fragmentary and incomplete provision for protecting the interests of foreign States. Other States, such as France, Penal Code (1810), Arts. 84 and 85, and States which have based their legislation upon the French model, provide for the punishment of anyone who, by unauthorized hostile acts, exposes the State to a declaration of war or its citizens to reprisals. Such legislation is enacted primarily for the security of the legislating State and affords only an incidental protection to foreign States. Another group of States, including Austria, Germany, and Switzerland, grant a more extended protection, assimilating crimes against the security, integrity, and independence of foreign States to treason against the legislating State. See Bourquin, "*Crimes et Délits contre la Sûreté des Etats Etrangers*," *Académie de Dr. Int., Recueil des Cours* (1927), I, 121, *passim;* Hegler, "*Actes d'hostilité envers des états amis*," *Actes du Congrès Pénal et Pénitentiaire de Prague* (1930), II, pp. 207–213; Gerland, "*Feindliche Handlungen gegen befreundete Staaten*," *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1906), Bes. Teil. I Bd., *passim.*

Various factors have contributed to make the legislation enacted an insufficient assurance of protection for foreign States. The traditional political liberalism of certain States has made them reluctant to lend any support to the protection or maintenance of régimes based upon principles different from their own. Other States have guaranteed a more extended protection only to secure reciprocal treatment, or because their international position has rendered it essential to their own security that they repress all acts upon their territory which might be of a nature to compromise their relations with foreign States. See Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States," 22 *Am. Jour. Int. Law* (1928), 108; Preuss, "*La répression des crimes et délits contre la sécurité des états étrangers*," 40 *Rev. Gén. de Dr. Int. Pub.* (1933), 606. Not only is the existing national legislation inadequate, but it is, in addition, indifferently enforced. In short, it

appears that such legislation cannot be relied upon by States which are the object of political offences emanating from abroad. In the present condition of the international community, it is doubtful whether substantial advance in this field through conventional agreement is to be anticipated. Protective penal legislation applicable to offences committed outside the territory by aliens must remain, therefore, the principal defense of the security, independence and integrity of States. Legislation enacted for this purpose assumes that the legislation of the State where the crime is committed will be inadequate. This is demonstrated by the fact that protective provisions in no case provide that the act must be incriminated by the *lex loci delicti* as well as by the law of the injured State, although the requirement of double incrimination is common in the case of ordinary offences committed abroad by aliens. See Getz, *Actes du Congrès Pénal International de Bruxelles* (1900), II, p. 204; *Annuaire Inst. de Dr. Int.*, Session de Munich (1883), pt. 2, p. 204; *ibid.*, Session de Bruxelles (1879), pt. 1, pp. 279–281; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 110–137.

At the present time, it appears that the tendency in national legislation is toward an extension of the exercise of competence to punish crimes by aliens against the security and integrity of the State. Modern means of communication have increased the opportunities for such crimes and States have naturally reacted to the growing danger to their security in extending the application of their penal laws. New penal legislation has been introduced and older provisions have been made applicable in times of peace as well as in war. The overthrow of liberal régimes in many countries and the establishment of dictatorships of party or class have led to an increase in the subversive activities of dissenting groups which are frequently conducted from the shelter of foreign territory. In postwar penal legislation there has been a marked departure from the general attitude of relative indifference with which political crimes were regarded during the nineteenth century. See Plassard, *Evolution de la nature juridique des attentats à la sûreté extérieure de l'Etat* (1924), p. 38 ff; Pella, "*La répression des crimes contre la personnalité de l'état*," *Académie de Dr. Int., Recueil des Cours* (1930), III, p. 699 ff; Bourquin, "*Crimes et Délits contre la Sûreté des Etats Etrangers*," *ibid.*, (1927), I, pp. 128–134. The extension of the application of penal law to certain political crimes committed abroad has become all but universal, the severity of penalties has been increased, and the emphasis upon the right of the State to protect its security and integrity has led in numerous instances to legislation containing serious derogations from those safeguards which have been deemed essential in the past to prevent injustice to individuals. These features of recent legislation are mentioned here only to suggest that much of the present controversy with respect to the propriety of protective legislation is due, not to a disposition to question the principle upon which it is based, but to a fear that its practical application may lead to inadmissible results. See Brierly, "Criminal Competence of States in Respect of Offences

Committed outside their Territory," Committee of Experts for the Progressive Codification of International Law, *Publications of the League of Nations*, C. 50. M. 27. 1926. V. 7, pp. 255–256.

The Marseilles assassinations of 1934 have focused attention upon the inadequacy of existing national legislation for the suppression of political offences against foreign States and have indicated a need for more effective international coöperation. The resolution of the Council of the League of Nations of Dec. 10, 1934, recalls

> That it is the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose;
>
> That every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to governments which request it. (*New York Times*, Dec. 11, 1934, p. 1.)

After referring more particularly to the duties of League members, and to the controversy which had arisen with respect to alleged subversive activities on Hungarian territory, the resolution continues:

> Considering that the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international coöperation in this matter;
>
> Decides to set up a Committee of experts to study this question with a view to drawing up a preliminary draft of an international convention to assure the repression of conspiracies or crimes committed with a political and terrorist purpose. (*Publications of the League of Nations*, C. L. 219. 1934. V.)

The international validity of penal jurisdiction asserted upon the protective principle has been defended upon various grounds. In countries which have enacted such legislation, doctrine tends naturally to affirm the existence of international competence. See Drost, "*Völkerrechtliche Grenzen für den Geltungsbereich staatlicher Strafrechtsnormen*," 43 *Zeitschrift für Int. Recht* (1930–31), 111 ff. While apparently conceding that the competence to prosecute and punish for crime is not absolutely unlimited, a number of writers attempt to derive this particular competence from the theory of sovereignty. Thus Binding says:

> The scope of its penal law is determined by every sovereign state as sovereign. Under no conditions would the existence of its pretensions with respect to punishment be conditioned upon the consent of a foreign sovereign. (*Handbuch des Strafrechts* (1885), I Bd., p. 374.)

Traub states:

> "The proper field of the penal competence of the state, and also the proper domain of its rules and penal statutes, results from the scope of its legal interests, which it alone is entitled to determine." (*Strafrechtliche Abhandlungen* (1913), Heft 167, p. 23.)

See also Mendelssohn Bartholdy, "*Das Räumliche Herrschaftsgebiet des Strafgesetzes*," *Vergleichende Darstellung des deutschen und ausländischen*

Strafrechts (1908), Allg. Teil, VI Bd., p. 106; Travers, *Le Droit Pénal International* (1920), I, p. 11; and the views of other writers analyzed in Van Praag, *Juridiction et Droit International Public* (1915), pp. 134–138. Such an analysis, without more, advances but little the justification of the protective principle and hardly provides an acceptable theory for a draft convention which seeks to define jurisdiction.

Other writers, while stressing sovereignty, go on to emphasize the considerations of convenience or necessity which have actually led to the widespread adoption of protective legislation. Thus Mercier has said in *consultation:*

> Le principe fondamental qui domine toute la matière est celui de la souveraineté des Etats. Cette souveraineté comporte le droit de légiférer, chaque Etat appréciant lui-même les éléments, conditions et modalités de son ordre social, dont il a la responsabilité, et édictant librement les dispositions législatives, d'ordre civil, administratif, pénal ou autre, qu'il estime nécessaires à la protection de ses intérêts et de son ordre public au sens le plus large du mot . . . Mais le droit de libre législation des Etats peut subir des restrictions en raison des conventions internationales, générales ou spéciales, telles que celles qui fixent des règles destinées soit à éviter les conflits, positifs ou négatifs, pouvant résulter de lois divergentes des Etats, soit à établir les facteurs de solution de ces conflits. On pourrait aussi admettre, exceptionnellement, qu'une restriction soit apportée au droit de libre législation des Etats par une coutûme générale et constante, dûment attestée par une pratique continue, bien établie et universelle. Ou encore pourrait-on invoquer comme règle coutumière entre certains Etats des normes identiques ou similaires que consacreraient leurs législations respectives ou qui seraient suivies de façon générale et constante par la jurisprudence de leurs tribunaux. (*Publications P.C.I.J.*, Series C, No. 13, II, pp. 400–401.)

Referring specifically to legislation for the protection of the security of the State against offences committed abroad, Mercier says:

> En principe, tout Etat souverain, qui a la responsabilité de son bon ordre social, doit avoir le droit de réprimer les actes de nature à troubler celui-ci, quel que soit leur lieu de commission et quelle que soit la nationalité de leur auteur. Aucun Etat ne saurait d'avance renoncer à l'action répressive qui peut être nécessaire au maintien de son ordre public, à la protection des intérêts dont il a la garde. Assurément, dans chaque cas particulier, l'Etat peut voir si et dans quelle mesure il doit exercer son droit d'action, si et dans quelle mesure il peut y renoncer, en s'inspirant aussi des considérations de justice et d'équité, qui sont des éléments de l'ordre social. Mais aucun Etat ne peut dire d'une façon générale que, quelle que soient les circonstances, il n'exercera jamais d'action répressive en raison d'un acte commis à l'étranger par un étranger et dirigé contre ses droits ou intérêts. Le principe, au contraire, doit être que tout acte qui lèse les droits ou intérêts d'un Etat crée un lien juridique entre l'auteur de cet acte et cet Etat. Et ce lien juridique est manifesté par un droit d'action de cet Etat contre l'auteur de cet acte. (58 *Rev. de Dr. Int. et de Lég. Comparée*, 1931, 464.)

The *exposé des motifs* of the project for a new Czechoslovakian penal code (1926), states:

> Il est certain que l'Etat doit défendre ses intérêts, même si c'est en dehors des frontières de son territoire qu'on y a porté atteinte. Ce sont spécialement ses propres ressortissants qui ont comme devoir de respecter partout et toujours ses intérêts. Mais l'Etat doit aussi se défendre contre les étrangers qui menacent ses intérêts à l'étranger, car la protection qui est fournie par l'Etat étranger est le plus souvent très insuffisante. (p. 13.)

In the *Bayot* case, February 22, 1923, the French Court of Cassation stated:

> Attendu que, si le droit de punir, qui émane du droit de souveraineté, ne s'étend pas, en principle, au délà des limites du territoire, il en est autrement au cas prévu par l'art. 7, C. instru. crim., dont la disposition, fondée sur le droit de légitime défense, attribue compétence à la juridiction française pour connaître des crimes attentatoires à la sûreté de l'Etat commis hors du territoire de la France par un étranger dont l'arrestation a eu lieu en France. (Sirey, 1923, I, 330.)

The divergence of opinion among those who doubt or deny the international validity of particular legislation based on the protective principle, on the one hand, and those who hold on the other that such legislation is within the competence of States, seems to be based less upon a conflict as to jurisdiction than upon differences with respect to its exercise. In view of the fact that an overwhelming majority of States have enacted such legislation, it is hardly possible to conclude that such legislation is necessarily in excess of competence as recognized by contemporary international law. The contention advanced by certain Anglo-American writers that jurisdiction over aliens is restricted to those within the territory and to pirates appears to be the result of a tendency to equate the exercise of jurisdiction undertaken in a particular State with competence as determined by international law. In commenting upon this tendency, Professor Fedozzi has said in *consultation:*

> Il n'est pas facile à comprendre que, nonobstant le manque évident d'une coutume internationale dans le sens susindiqué, les Etats qui s'abstiennent d'exercer leur juridiction pénale pour les délits commis par des étrangers à l'étranger puissent soutenir que les dispositions contraires contenues en plusieurs législations sont en contradiction avec le droit des gens. Il y a là surtout un phénomène de psychologie bien connu de qui a considéré attentivement la pratique des controverses internationales. Chaque Etat est naturellement porté à considérer les règles édictées par son propre droit public extérieur non seulement comme conformes aux principes de droit international, mais aussi comme les seules conformes à ces principes. Cette opinion se transforme avec facilité en la prétention que les Etats qui adoptent des règles différentes soient obligés à les changer pour se conformer aux prétendus principes du droit international. (*Publications P.C.I.J.*, Series C, No. 13, II, p. 372.)

It is believed that most of the objections to the protective principle may be overcome by agreement on certain limitations with respect to the acts of aliens which may be denounced as criminal and by the general acceptance of certain safeguards.

The present article accepts the principle upon which penal jurisdiction for the protection of the security and integrity of the State is founded. As drafted, however, it contains an important limitation upon this competence. While the limitation proposed has some basis in national legislation, it is incorporated in the present draft, not as a restatement of existing practice, but as a means of attaining a reasonable compromise between those States which now claim the most extensive jurisdiction on the protective principle and States which have tended to adhere more closely to a territorial theory. The differences between these two groups of States are by no means so great as has been sometimes assumed. As regards jurisdiction over crime committed by aliens abroad against the security of the State, the gap between the two groups is partially bridged at least by the so-called objective application of the territorial principle. See Bourquin, "*Crimes et délits contre la sûreté des états étrangers*," *Academié de Dr. Int., Recueil des Cours* (1930), III, pp. 756–758. It would appear feasible to bridge the gap entirely if reasonable safeguards are established for the protection of nationals of the latter group of States against possible abuse of the competence. In drafting the present article, a limitation has accordingly been incorporated which leaves an ample competence to enact protective legislation, while rejecting such extreme claims as are likely to be unjust in their effect upon the nationals of other States or inconsistent with generally accepted principles of law.

The limitation incorporated in the present Article excludes from prosecution or punishment on the protective principle every act or omission which is "committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed." This limitation affords a reasonable compromise between those States which have perhaps been oversensitive about their prestige or security, on the one hand, and other States which have probably been lax in providing the necessary minimum of protection for the interests of foreign States, on the other hand. To require that the act or omission be denounced as an offence by the *lex loci* would obviously defeat the legitimate purpose of protective jurisdiction. To permit the act or omission to be prosecuted and punished, notwithstanding the guarantee of the *lex loci*, would victimize the individual for something for which the State where the act was done should be responsible if responsibility is to be imposed. Thus, under the present article, it will be no defense to an assertion of protective jurisdiction that the act was not denounced by the *lex loci*. On the other hand, it will be a complete defense that the *lex loci*, in an organic law, legislation in force, or authoritative judicial opinion, has guaranteed the liberty to do or refrain from doing such acts or omissions as those with respect to which jurisdiction is asserted. Conspicuous among the acts thus safeguarded in many States against an assumption of protective jurisdiction by other States are acts done in the exercise of liberties of free speech, freedom of the press, or free assembly.

By way of illustration of the operation of this limitation, it may be noted

that it would restrict or even prohibit the application to certain acts committed in Great Britain or the United States, where a maximum of liberty is guaranteed the individual, of such legislation as the Polish Penal Code (1932), Art. 104, or the Italian Penal Code (1930), Art. 265. The Italian Code, Art. 265, provides:

> Whoever, in time of war, spreads or communicates false, exaggerated, or misleading reports or news, which may arouse public alarm or depress the public spirit, or otherwise lessen the resistance of the nation to the enemy, or in any way acts so as to cause injury to the national interests, shall be punished with penal servitude for not less than 5 years.

It would likewise require a more closely guarded application of the French Penal Code (1810), Art. 78 than has been made by the French courts in recent cases. This article provides for the punishment of anyone guilty of correspondence with the subjects of an enemy State if such correspondence has the effect of furnishing the enemy with information harmful to the political or military situation of France or her allies. The very extreme applications which French tribunals made of this article during and after the World War are illustrated in the following cases. In the case of Captain Urios, a Spanish national and captain in the Spanish merchant marine, the Court of Cassation affirmed (Jan. 15, 1920), Clunet (1920), 195, *Annual Digest*, 1919–1922, Case No. 70, a decision of the Permanent Council of War of the Military Division of Oran (Nov. 7, 1919), condemning Captain Urios to twenty years imprisonment for correspondence in Spain with the subjects of an enemy Power. The prosecution was instituted under *Code d'Instruction Criminelle*, Art. 7, and the Penal Code (1810), Art. 78. Of Article 78 the court said:

> par la généralité même de ses termes, cet article exclut distinction; qu'il est applicable aux étrangers comme aux Français, les faits eûssent-ils été commis hors du territoire de la France. (Sirey, 1923, I, 238.)

See 16 *Rev. de Dr. Int. Privé* (1920); Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 95. In the case of *B.*, a Belgian national arrested in France on a charge of correspondence with the enemy in Belgium, in the form of aid in obtaining various military supplies, the Court of Cassation held (Feb. 22, 1923), Sirey (1923), I, 331, that the French courts had jurisdiction. The aid given, it was concluded, exceeded the normal operations of commerce. See also the case of *Raçhkoff* (May 10, 1919), 123 *Bull. Crim.* (1918), 189. It is believed that such assertions of competence are inadmissible in principle and in excess of anything which international law permits. The fundamental objection is well stated by Garçon, the French commentator, as follows:

> Le droit des gens est obligatoire pour les tribunaux criminels français. C'est ainsi, par exemple, que le droit pénal français a toujours reconnu l'immunité diplomatique. Or, lorsqu'il s'agit précisément de crimes

commis par un étranger en temps de guerre, contre l'Etat français, il paraît impossible de ne pas tenir compte des règles et des coutumes du droit des gens. Si on accepte ce principe, on pourra en déduire que le sujet d'une puissance en guerre avec la France ne commet aucun crime contre la sûreté de l'Etat français en servant son pays, pourvu qu'il se conforme aux coutumes du droit des gens; qu'un neutre ne se rend non plus coupable d'aucun crime en usant des droit qui lui appartiennent comme sujet de son propre pays, s'il respecte, dans ses relations avec les belligérants, les règles du droit international public. (*Code pénal annoté*, Art. 76, No. 3.)

Other limitations serving to confine the scope of protective jurisdiction, as well as other types of jurisdiction, are incorporated in later articles (Art. 12 to 16 inclusive) dealing with the general subject of safeguards. Notable among these other limitations on the State is the provision of Article 12, *infra*, forbidding the prosecution of an alien who has not been "taken into custody by its authorities." There are provisions to the contrary in a number of national codes in which prosecution and conviction for acts committed abroad against the security, integrity or independence of the State is permitted in the absence of the accused (*par défaut, par contumace*). See, for example, Albania, Penal Code (1927), Art. 4; Belgium, *Code d'Instruction Criminelle* (1878), Art. 12; Italy, Penal Code (1930), Arts. 7 and 10; Paraguay, Penal Code (1914), Art. 9; Poland, Penal Code (1932), Art. 10; Uruguay, Penal Code (1889), Art. 5. While it is recognized that the limitation herein imposed would restrict the scope of such legislation, it is believed that it incorporates a reasonable compromise which would tend strongly to remove the objections entertained in some quarters to all legislation based upon the protective principle. There are more States which restrict prosecution in the absence of the accused to nationals and which require, in the case of aliens, that the accused shall be apprehended within the territory. See, for example, Bolivia, Law of Nov. 29, 1902, Art. 6; Brazil, Law of June 28, 1911, Art. 13; Finland, Penal Code (1889), secs. 1 and 3; France, *Code d'Instruction Criminelle*, Arts. 5 and 7, and Project of Penal Code (1932), Art. 14; Spain, Law of Organization of the Judicial Power (1870), Art. 336, and Penal Code (1928), Art. 11. Abandonment of the claim to prosecute absent aliens would certainly remove one of the principal objections to protective legislation commonly advanced in Great Britain and the United States. Since the difficulties in securing witnesses and adequate evidence, more or less acute in all prosecutions for offences committed abroad, are especially serious in prosecutions for offences in this category, it is believed that the concession asked of those States which now prosecute in the accused's absence is not one which will work any substantial impairment of the protective principle. On the other hand, it will safeguard nationals of other States against a type of prosecution which is too likely to be arbitrary and unfair.

Notable also among the limitations imposed upon protective jurisdiction by later articles devoted to safeguards is the principle of *non bis in idem*,

incorporated in Article 13, *infra*, forbidding the prosecution and punishment of an alien who has been previously prosecuted in another State for substantially the same offence. Here again the limitation imposed establishes a jurisdiction somewhat more restricted than is now asserted by a few States. The Italian Penal Code (1930), Art. 11, for example, provides that in all cases of crime abroad punishable under Italian law the accused shall be tried again in Italy upon demand of the Minister of Justice. No effect is given the action previously taken by foreign courts or authorities. Of similar effect, see Albania, Penal Code (1927), Art. 4; Yugoslavia, Penal Code (1929), Art. 8. A larger number of national codes, while not incorporating the principle of *non bis in idem*, provide that the penalty undergone abroad shall either be deducted from the penalty imposed locally or shall at least be taken into account. Thus the German Penal Code (1871), Art. 7 provides:

> Any punishment already undergone in a foreign country is to be taken into account in assessing the punishment to be inflicted if a sentence in respect of the same offence is again imposed within the territory of the German Reich.

See also Austria, Penal Code (1852), secs. 36 and 38; Bulgaria, Penal Code (1896), Art. 4; Brazil, Law of June 28, 1911, Art. 14; China, Penal Code (1928), Art. 8; Cuba, Project of Penal Code (1926), Art. 43; Czechoslovakia, Project of Penal Code (1926), sec. 66; Hungary, Penal Code (1878), Art. 7; Japan, Penal Code (1907), Art. 7; Paraguay, Penal Code (1914), Art. 10; Poland, Penal Code (1932), Art. 11. In a third group of States, the principle of *non bis in idem* is applied in prosecutions for offences committed abroad against the security, integrity or independence of the State, thus barring prosecution and punishment in case of acquittal, pardon, or prescription in a foreign State, or where the penalty has been undergone in full. If the penalty has been only partially undergone, as much as has been incurred is imputed in determining the local sentence or is at least taken into account. The Belgian *Code d'Instruction Criminelle* (1878), Art. 13 provides:

> Les dispositions précédentes ne seront pas applicable lorsque l'inculpé jugé en pays étranger du chef de la même infraction, aura été acquitté.
>
> Il en sera de même lorsque, après y avoir été condamné, il aura subi ou prescrit sa peine, ou qu'il aura été gracié.
>
> Toute détention subie à l'étranger, par suite de l'infraction qui donne lieu à la condamnation en Belgique, sera imputée sur la durée des peines emportant privation de la liberté.

See also Costa Rica, Penal Code (1924), Art. 220; Netherlands, Penal Code (1881), Art. 68; Panama, Penal Code (1922), Art. 7. It is believed that recognition of the principle of *non bis in idem* will work no real hardship upon those States which have asserted the most extreme competence under the protective principle, that it is essential if States are to be encouraged to develop an adequate protection for the interests of foreign States in their

penal laws of territorial application, that it is an essential safeguard of individual rights, and that it will contribute much to make the protective principle acceptable among those who have hitherto regarded it with disfavor.

Of similar effect are the other safeguards with which Article 12, *infra*, circumscribes the prosecution and punishment of aliens under this Convention. Thus the establishment of special tribunals with special procedure for trying offences against the security of the State has provoked vigorous criticism. *Cf.* the Italian Decree No. 2062 of Dec. 12, 1926 (*Leggi e Decreti*, 1926, IV, p. 4701). Certain of the tribunals and procedures established would seem to provide but meager assurance of a fair and impartial trial. Article 12, *infra*, requires further that no State shall "prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination."

The present article embodies a principle which finds emphatic expression in the national legislation and jurisprudence of most States. It embodies a principle which appears to be indispensable unless and until States recognize much more clearly than they do now their obligation to provide a well-defined minimum of protection for the interests of foreign States and take appropriate measures to translate such a recognition of obligation into effective action. At the same time, the present article and other articles in this Convention circumscribe the principle with such limitations as appear necessary to satisfy well-founded criticism and to safeguard against abuse. It is believed that the gap between the most expansive and the most restricted assertions of jurisdiction based upon the protective principle may thus be bridged without sacrificing any essential interest. The advantages which would accrue to all States from a common understanding require no emphasis.

ARTICLE 8. PROTECTION—COUNTERFEITING

A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority.

COMMENT

Most States punish the falsification or counterfeiting of their seals, currency, instruments of credit, stamps, passports, or public documents, and also the use of uttering of such falsified copies or counterfeits, wheresoever or by whomsoever committed. Provisions to this end are commonly included

in legislation for the protection of the security, integrity, independence and credit of the State of the type reviewed in the comment on Article 7, *supra*. The competence of the State to punish such offences has been recognized consistently in the resolutions and draft conventions prepared by various international organizations and conferences. See the resolutions of the Institute of International Law, the Conference of Warsaw for the Unification of Penal Law, and the International Congress of Comparative Law at The Hague, quoted *supra*. The present article makes a separate and more specific provision for this jurisdiction. A separate provision appears to be required by the very special nature of the problem presented.

In the first place, while the competence defined in this article rests fundamentally upon the same protective principle as Article 7, *supra*, and while it is impossible to distinguish sharply between many of the offences which fall within the scope of Article 7, *supra*, and at least some of the offences which may fall within the scope of the present article, it remains true nevertheless that most offences falling within the scope of the present article are regarded everywhere as highly reprehensible and are not classed among political offences. This is conspicuously true of offences of falsifying or counterfeiting the seals, currency, instruments of credit, stamps or passports of a State for a private purpose. Such offences are generally classed among the common crimes.

In addition to the national legislation and international resolutions or draft conventions already noted, there have been two significant developments which tend to confirm an almost universal approval of the application of the protective principle which is made in this article. On the one hand, national penal legislation of territorial effect, even in States which have been traditionally most reluctant to punish political offences against foreign States, has made a notable progress in providing for the punishment of the counterfeiting of the seals, currency, instruments of credit, stamps or passports of foreign States. See *Emperor of Austria* v. *Day and Kossuth* (1861), 2 Giff. 628; *United States* v. *Arjona* (1887), 120 U. S. 479; United States, Criminal Code (1909), secs. 156–163, 165, 167, 170–173, 218, 220 (35 U. S. Stat. L. 1088, 1117, 1118, 1131, 1132); 18 U. S. Code Ann., secs. 270–277, 279, 281, 284–288, 347, 349. The R.S.F.S.R., ordinarily somewhat indifferent to offences against nonproletarian States, forbids the counterfeiting of foreign currencies, prescribing death as the maximum penalty. See Criminal Code (1926), Art. 59, sec. 8. In short, it is generally considered to be to the advantage of each State that crimes of falsification or counterfeiting of the seals, currencies, etc. of any State should be everywhere suppressed.

On the other hand, an even more significant development is the denunciation of counterfeiting in recent multipartite international instruments of legislative effect. See the Convention on the Suppression of Counterfeiting Currency, Geneva, April 20, 1929, League of Nations Document, C.153. M.59.1929.II., Hudson, *International Legislation* (1931), IV, 2692, which provides:

> Art. 9. Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.
>
> The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

See also Dupriez, "*Répression internationale du faux monnayage*," 10 *Rev. de Dr. Int. et de Lég. Comp.* (1929), 387; Pella, "*La coopération des Etats dans la lutte contre le faux monnayage*," 34 *Rev. Gén. de Dr. Int. Pub.* (1927), 673; 24 *Am. Jour. Int. L.* (1930), 135.

In the second place, it is clear that the limitation with which Article 7, *supra*, circumscribes the competence to prosecute and punish an alien under the protective principle for offences against the security, independence or integrity of the State has no proper application to crimes of falsification or counterfeiting. In view of the widespread practice of suppressing such offences through appropriate penal legislation of territorial effect, and in view of the progress made in the coöperative effort to suppress such offences through multipartite international instruments of legislative effect, it is hardly conceivable that the acts involved could be guaranteed by the law of any State. Crimes of counterfeiting now belong clearly to the category of offences which are coming more and more to be regarded as of the nature of *delicta juris gentium*. See the comment on Art. 2, *supra*, and Art. 9, *infra*.

For the reasons thus briefly indicated, the present article states a general principle of jurisdiction in conformity with contemporary national legislation and international practice and without the special safeguard which appeared essential in the article preceding. The jurisdiction is of course circumscribed by the general safeguards with respect to the prosecution and punishment of aliens prescribed in later articles of this Convention. See Articles 12–16, *infra*. Here, as elsewhere, the alien accused must have been taken into custody, must have a fair and impartial trial, may not suffer twice for the same offence, may not be prosecuted for something which was required by the law of the place where it was done, may not be prosecuted while voluntarily present to testify or assist in the administration of justice, and may not be prosecuted if brought within the State in violation of international convention or international law.

ARTICLE 9. UNIVERSALITY—PIRACY

A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.

COMMENT

The jurisdiction of the State to prosecute and punish for piracy *juris gentium* though committed outside the territory is everywhere recognized.

Most of the principal maritime States have enacted legislation making piracy a special ground of jurisdiction, while in other States it is included in a more comprehensive competence which the State asserts over various offences committed by aliens abroad. The principle is one of universality. The piratical act need not have been committed within the territorial jurisdiction of the State. The pirate need not be a national or one assimilated thereto. If the crime is one "which constitutes piracy by international law" the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence. Jurists who have written on the jurisdiction of crime are practically unanimous in affirming the competence. The whole subject has been carefully studied in the preparation of the Draft Convention on Piracy, Research in International Law (1932), pp. 739–885; and most of the relevant legislation has been collected in the accompanying Collection of Piracy Laws (*ibid.*, pp. 887–1013).

The jurisdiction to prosecute and punish for piracy, even when committed abroad by aliens, appears to be expressly recognized in the legislation of the following States: Argentina, Code of Penal Procedure (1888), Art. 23, No. 1; Brazil, Penal Code (1890), Art. 5; Canada, Criminal Code, 1 Can. Rev. Stat., 1927, c. 36, sec. 137; Chile, Code of Criminal Procedure (1906), Art. 2, and Project of Penal Code (1929), Art. 3, No. 6; China, Penal Code (1928), Art. 5; Colombia, Penal Code (1890), Art. 20, No. 5; Costa Rica, Penal Code (1924), Art. 219, No. 11; Cuba, Spanish Penal Code (1879), Arts. 153–154; see Bustamante, *Derecho International Privado* (1931), III, p. 63; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, No. 1; Ecuador, Code of Criminal Procedure (1906), Art. 2, No. 6; France, Law of April 10, 1825; France, Project of Penal Code (1932), Art. 15; Great Britain, see *Dawson's Trial* (1696), 13 How. St. Tr. 451, 455, *Quelch's Trial* (1704), 14 *ibid.* 1067, *The Magellan Pirates* (1853), 1 Spinks Ecc. & Adm. 81, *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1873), 5 P.C. 179, *In re Piracy Jure Gentium* [1934] A.C. 586; see also *The Serhassan* (1845), 2 W. Rob. 354, and see Stephen, *Digest of the Law of Criminal Procedure* (1883), Art. 4, Hawkins, *Pleas of the Crown* (1716), I, ch. 37; Greece, Piracy Law (March 30, 1845); Greece, Maritime Penal Code (1923), Art. 13; Mexico, Federal Penal Code (1931), Art. 146 (see also Federal Penal Code (1929), Art. 409); Netherlands, Penal Code (1881), Art. 4, sec. 4; Netherlands Indies, Penal Code (1915), Art. 4, sec. 4; Panama, Penal Code (1922), Art. 8; Peru, Penal Code (1924), Art. 5, No. 1; Poland, Penal Code (1932), Art. 9; Siam, Penal Code (1908), Art. 10, No. 3; Spain, Penal Code (1928), Arts. 245–246; United States, Criminal Code (1909), sec. 290 (35 U.S. Stat. L. 1088, 1145); on the earlier legislation, see *U.S. For. Rel.* (1887), 757, 794; 38 *Harv. L. Rev.* 334, 342; and see *United States* v. *Klintock* (1820), 5 Wh. (U.S.) 144, *United States* v. *Smith* (1820), 5 Wh. (U.S.) 153, *United States* v. *Pirates* (1820), 5 Wh. (U.S.) 184, *People* v. *Lol-lo and Saraw* (1922), 43 P.I. 19, *Annual Digest*, 1919–1922, Case No. 112; Uruguay, Penal Code (1889), Art. 142; Venezuela, Penal Code

(1926), Art. 4, sec. 9. See also Norway, Penal Code (1902), Art. 12, No. 4, and Arts. 267–269; Portugal, Penal Code (1886), Art. 162.

Likewise most of the resolutions and treaties proposed or adopted on the subject of penal competence provide for jurisdiction over piracy whatever the nationality of the offender. See the Treaty of Lima (1878), Art. 34, No. 3; Treaty of Montevideo on International Penal Law (1889), Art. 13; Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

Among jurists who affirm the competence are Bluntschli, *Le Droit International Codifié* (Lardy's transl. 1895), Art. 346; Fauchille, *Traité de Droit International Public* (1922), sec. 483; Field, *Outlines of an International Code* (2d ed. 1876), Art. 650; Fiore, *International Law Codified* (Borchard's transl. 1918), Art. 299; Hall, *International Law* (8th ed. 1924), sec. 81; Halleck, *International Law* (1861), I, ch. 7, sec. 24; Hyde, *International Law* (1922), I, sec. 231; Lewis, *Foreign Jurisdiction and the Extradition of Criminals* (1859), pp. 12–14; Oppenheim, *International Law* (4th ed. 1928), I, secs. 272–280; Ortolan, *Diplomatie de la Mer* (4th ed. 1864), I, p. 207; Pradier-Fodéré, *Traité de Droit International Public* (1891), sec. 2490 ff; Tobar y Borgoño, *Du Conflit International au Sujet des Compétences Pénales* (1910), p. 95; and Travers, *Le Droit Pénal International* (1920), I, p. 78. The opinions of a great number of jurists are collected in the comment on the Draft Convention on Piracy, Research in International Law (1932), pp. 739, 751–754, 757–765, 852 ff.

The Draft Convention on Piracy, Art. 14, Research in International Law (1932), pp. 739, 852, states the rule as follows:

> 1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
>
> 2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
>
> 3. The law of the state must, however, assure protection to accused aliens as follows:
>
> (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
>
> (b) The accused person must be given humane treatment during his confinement pending trial.
>
> (c) No cruel and unusual punishment may be inflicted.
>
> (d) No discrimination may be made against the nationals of any state.
>
> 4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

It is to be noted that the safeguards prescribed in paragraph 3 of the above, for the protection of accused aliens, are incorporated in Article 12, *infra*, of the present Convention.

Originating in a period when piratical depredations were a very real menace to all water-borne commerce and traffic, the competence to prosecute and punish for piracy was commonly explained by saying that the pirate who preyed upon all alike was the enemy of all alike. As expressed by Coke, C. J., in *King* v. *Marsh* (1615), 3 Bulstr. 27, 81 E.R. 23, "*pirata est hostis humani generis.*" The competence is perhaps better justified at the present time upon the ground that the punishable acts are committed upon the seas where all have an interest in the safety of commerce and where no State has territorial jurisdiction. Notwithstanding the more effective policing of the seas in modern times, the common interest and mutual convenience which gave rise to the principle have conserved its vitality as a means of preventing the recurrence of maritime depredations of a piratical character.

The present article defines the competence as including "any crime committed outside its territory by an alien which constitutes piracy by international law." If the offence is committed within the territory, there is jurisdiction under Article 3, *supra;* if by a national, there is jurisdiction under Article 5, *supra.* But if the offence is committed outside the territory, by an alien, it is necessary to define a special extraterritorial competence. Such a competence is recognized if the offence is one "which constitutes piracy by international law." It is essential that the competence should be so stated as to include only offences which constitute "piracy by international law," since many States denounce various offences as piracy by national law. Such national legislation is applicable, of course, only within the territory, upon national ships or aircraft, or in the prosecution of nationals.

The definition of piracy is not within the scope of the present Convention. The Draft Convention on Piracy, Art. 3, Research in International Law (1932), pp. 739, 768, defines it as follows:

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
>
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
>
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

The phrase "pirate ship," as used in the article quoted above, is defined in the Draft Convention on Piracy, Art. 4, Research in International Law (1932), pp. 739, 822, as follows:

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control.

Among other definitions of piracy *juris gentium*, the following may be noted:

> By piracy we understand any violent act committed on the high sea for the purpose of robbery or depredation, by a ship not provided with a license or letters of marque emanating from a recognized government, and when the offence is directed indiscriminately against the ships of any country. (Fiore, *International Law Codified*, 1918, Borchard's transl., sec. 300.)

> La piraterie est le fait de commettre, dans un esprit de lucre et pour son propre compte, des actes de violence contre les personnes et de depredation contre les biens, dans les lieux ne relevant de la souveraineté d'aucun Etat determiné et que compromet ainsi en ces lieux la sécurité de la circulation. (Pella, "*La Répression de la Piraterie*," *Académie de Dr. Int., Recueil des Cours*, 1926, V, pp. 145, 170.)

> Les pirates sont des hommes qui, sans commission ni papiers d'aucun Etat souverain, courent les mers avec des bâtiments armés, attaquent et pillent les navires qu'ils recontrent, à quelque nation qu'ils appartienent. (André Senly, *Le Piraterie*, 1902, p. 53.)

> Piracy occurs only on the high seas and consists in the commission for private ends of depredations upon property or acts of violence against persons.
>
> It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy. (Matsuda, *Draft Provisions for Suppression of Piracy*, Art. 1, *League of Nations Document*, C.196.M.70.1927.V., p. 119.)

For a thorough discussion of the offences which constitute piracy by international law, see the Draft Convention on Piracy, Art. 3, Comment, Research in International Law (1932), pp. 739, 769–822. See also Moore, *Digest* (1906), II, pp. 951–979.

In exercising jurisdiction under the present article, a State is subject to the general safeguards stipulated in Articles 12–16, *infra*. Of particular importance among these safeguards is the provision requiring apprehension by authorities of the State assuming jurisdiction in a way consistent with international law. See Article 12, *infra*. The Draft Convention on Piracy, Art. 14, quoted *supra*, permits prosecution by a State which has "lawful

custody." On the other hand, the same Draft Convention, Art. 9, Research in International Law (1932), pp. 739, 834, provides that

> If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Cf. Article 16, *infra*. See also Pella, "*La Répression de la Piraterie*," *Académie de Dr. Int., Recueil des Cours* (1926), V, pp. 145, 247. It is settled that international law permits apprehension outside the territorial jurisdiction of another State. Thus apprehension is permissible in the territory or territorial waters or air of the apprehending State, on the high seas or in the "free air," or on land which does not belong to any State. The Draft Convention on Piracy, Art. 6, Research in International Law (1932), pp. 739, 832, provides:

> In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

It is not so clearly established that international law permits apprehension, even in exceptional circumstances, within the territorial jurisdiction of another State. The Draft Convention on Piracy, Art. 7, Research in International Law (1932), pp. 739, 832, provides:

> 1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.
>
> 2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.
>
> 3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.

And see the comment on the above article, *loc. cit.* The question concerns the international law of piracy and is outside the scope of the present Convention.

If the Draft Convention on Piracy, Art. 7, quoted above, formulates correctly the governing principle of international law, the penal competence of the State is clear under the present article. If the Draft Convention on Piracy should be ratified, the penal competence as between States parties to that convention would likewise be clear under the present article. And there would also be penal jurisdiction between States parties to other con-

ventions which might be concluded to provide specially for the apprehension of pirates within their territorial waters. Thus if State X and State Y should conclude a convention permitting State X to seize pirates in the territorial waters of State Y, it would be permissible for State X to apprehend in the territorial waters of State Y pirates of any nationality. The nature of the offence would clearly exclude objection on the part of the State of the pirate's nationality; and the competence would be established as between State X and State Y by the provisions of such a special convention.

It is to be noted, finally, that the present article recognizes the penal competence of States with respect to an offence committed by an alien outside the territory only in case the offence is one "which constitutes piracy by international law." This excludes from the scope of the present article other offences which modern international conventions of legislative effect have tended to assimilate to piracy. Certain publicists and the resolutions of certain learned bodies have urged that jurisdiction over these various so-called *delicta juris gentium* should be assimilated to that over piracy. There are national codes and projects of codes which assert a jurisdiction to prosecute and punish such offences substantially as piracy is prosecuted and punished. By way of example, the following may be noted:

> Germany, Project of Penal Code (1927), sec. 6.—The penal laws of the Reich apply to the following acts committed abroad, irrespective of the law of the place of the act: . . .
> 4. Crimes of counterfeiting.
> 5. Crimes of traffic in women and children.
>
> Poland, Penal Code (1932), Art. 9.—Indépendamment des dispositions en vigueur au lieu de l'accomplissement de l'infraction, la loi pénale polonaise est applicable aux citoyens polonais et aux étrangers dont l'extradition n'a pas été accordée, lorsqu'ils ont commis à l'étranger les infractions suivantes:
> a) piraterie;
> b) contrefaçon des monnaies, des papiers publics de valeurs ou des billets de banque;
> c) traite des esclaves;
> d) traite des femmes et des enfants;
> e) emploi d'un moyen propre à provoquer un danger général, dans l'intention de le provoquer;
> f) trafic de stupéfiants;
> g) trafic de publications obscènes;
> h) toute autre infraction prévue dans les traités internationaux conclus par l'Etat Polonais.

However, there seems to be little or no basis for common agreement as to which offences should fall within the class of *delicta juris gentium* which are to be prosecuted and punished on the same basis as piracy. For example, see the provisions of the following national codes, laws, or projects with respect to the slave trade: Costa Rica, Penal Code (1924), Art. 219; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; Czechoslovakia, Project of Penal

Code (1926), Art. 7; France, Project of Penal Code (1932), Art. 15; Germany, Law of July 18, 1895; Greece, Project of Penal Code (1924), Art. 4; Panama, Penal Code (1916), Art. 1, sec. 6 (but not found in Penal Code of 1922); Poland, Penal Code (1932), Art. 9c; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4; and on the analogous coolie trade, see Tobar y Borgoño, *Du Conflit International au Sujet des Compétences Pénales* (1910), p. 108 ff.

With respect to the counterfeiting of foreign moneys or securities, see Belgium, Law of July 12, 1932, Art. 2; Czechoslovakia, Project of Penal Code (1926), Art. 7; France, Project of Penal Code (1932), Art. 15; Germany, Project of Penal Code (1927), secs. 6, 215–224; Mexico, Federal Penal Code (1931), Art. 236; Poland, Penal Code (1932), Art. 9b; Siam, Penal Code (1908), Art. 10, sec. 2; Switzerland, Project of Federal Penal Code (1918), Art. 206; see also Norway, Penal Code (1902), Art. 12, sec. 4A; Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to traffic in women and children for immoral purposes, see Chile, Project of Penal Code (1929), Art. 3, No. 6; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; Czechoslovakia, Project of Penal Code (1926), Art. 7; France, Project of Penal Code (1932), Art. 15; Germany, Project of Penal Code (1927), secs. 6, 308; Greece, Project of Penal Code (1924), Art. 4; Poland, Penal Code (1932), Art. 9d; Spain, Penal Code (1928), Art. 11, sec. 3; Switzerland, Project of Penal Code (1918), Art. 177; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to the use of explosives or poisons to cause a common danger, see Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 2; Poland, Penal Code (1932), Art. 9c; Switzerland, Project of Penal Code (1918), Art. 190; see also Germany, Law of June 9, 1884; Norway, Penal Code (1902), Art. 12, sec. 4A; Switzerland, *Sprengstoffsgesetz* (Apr. 12, 1894), Art. 6; Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6.

With respect to injury to submarine cables, see Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; see also Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to traffic in narcotics, see France, Project of Penal Code

(1932), Art. 15; Poland, Penal Code (1932), Art. 9f; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to the traffic in obscene publications, see France, Project of Penal Code (1932), Art. 15; Poland, Penal Code (1932), Art. 9g; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

The inclusion of other offences has been urged and among them the following: brigandage in neighboring States (Greece, Code of Crim. Proc., as modified by Law of Dec. 22, 1887, Art. 2; see decision of Areopagus, No. 6 of 1904, Clunet (1908), 245, and No. 13 of 1906, *ibid.*, 1262); crimes against the public health of the world by spread of contagious disease (see Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4; propaganda in favor of war or leading to a war of aggression (formerly in the Polish Project of a Penal Code, but deleted in the draft adopted; this has provoked an extensive literature); use of false radio signals, especially false signals of distress; crimes against the international protection of deep sea fisheries; abuse of the Red Cross; injury to international means of communication (notably interoceanic canals); crimes against internationally protected industrial or literary property; etc. A discussion will be found in the reports presented to the Third International Congress of Penal Law (Palermo, 1933); and on the question as to what crimes should be subject to universal jurisdiction see the same reports in *Rev. Int. de Dr. Pénal* (1931–2), Vols. 8 and 9. See also Saldaña, "*La Justice Pénale Internationale*," *Académie de Dr. Int., Recueil des Cours* (1925), V, pp. 223, 285 ff. Because of the difficulties of enumeration, some States assert the jurisdiction with respect to so-called "crimes against humanity"; see Costa Rica, Penal Code (1924), Art. 219, sec. 11; Venezuela, Penal Code (1926), Art. 4, sec. 9; or with respect to so-called "crimes against international law"; see Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; Panama, Penal Code (1916), Art. 1, sec. 1.

Finally, there are those who would assert a jurisdiction, comparable to that over piracy, with respect to all crimes which States have agreed by treaty to repress. See Article 2, comment, *supra*. In short, proponents of this view would adopt international coöperation for the repression of certain crimes as the test for determining whether there is to be a universal jurisdiction with respect to such crimes on the same basis as in case of piracy. If a list of such crimes is to be undertaken, this is perhaps the soundest basis for selection; but it can hardly be said that any such principle of international law has yet matured. Indeed, because of its implications and its inherent vagueness, it is probable that the inclusion of such a test in an international

convention on penal competence would tend to discourage further coöperation in the suppression of offences of general international concern. If States wish to agree upon a universal competence for the suppression of such crimes in conventions providing for coöperation, they are free to do so under Article 2, *supra*, of the present Convention.

In any case, competence such as is asserted in national legislation of the type noted above is excluded from the scope of the present article. There will be many cases in which jurisdiction over such "international crimes" may be successfully asserted on the ground that the offence was committed in part within the territory. And jurisdiction over aliens who commit such offences abroad, as well as those who commit other offences, may of course be taken under Article 10, *infra*, incorporating the general principle of universality when the conditions imposed are satisfied. There appears to be no good reason why the conditions imposed should not be required in case of so-called *delicta juris gentium*. Subject to those conditions, the articles incorporating the principle of universality provide an adequate competence. See Donnedieu de Vabres, "*Pour quels délits convient-il d'admettre la compétence universelle*," 9 *Rev. Int. de Dr. Pénal* (1932), 315, who says of the difficulty involved in setting up a classification of certain offences as *delicta juris gentium:*

> Parmi les délits de droit commun, il n'en est aucun, à notre connaissance, qui soit toujours, et nécessairement, un délit international; il n'en est aucun, en revanche, à qui doive être déniée la possibilité de le devenir. (*Op. cit.*, p. 318.)

Donnedieu de Vabres concludes that the proper course is as follows:

> En appliquant aux infractions de toute nature le compétence du *forum deprehensionis*, mais en lui assurant la place qui est normalement la sienne dans la hiérarchie des compétences, c'est-à-dire exactement la dernière. (*Op. cit.*, p. 329.)

Even the Third International Congress of Penal Law (Palermo, 1933), which adopted a resolution favorable in general to the idea of *delicta juris gentium* (see 10 *Rev. Int. de Dr. Pénal*, 144 ff), resolved that until further unification of national legislation with respect to such offences, and until the establishment of better coöperation in the matter of proceedings in a place other than where the offence was committed, extradition should be regarded as preferable to jurisdiction on the universality principle (*ibid.*, p. 157). There appears to be no sufficient reason for singling out any of the above-mentioned offences for the special treatment which is accorded piracy, since jurisdiction under appropriate safeguards is permitted under Article 10, *infra*. While international law undoubtedly requires such treatment in the case of piracy, it does not at the present time do so with respect to other so-called *delicta juris gentium*.

ARTICLE 10. UNIVERSALITY—OTHER CRIMES

A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6, 7, 8, and 9, as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

COMMENT

The present article provides for jurisdiction of crimes committed by aliens outside the territory on the principle of universality, that is to say, on the sole basis of the presence of the alien within the territory of the State assuming jurisdiction (*principe de l'universalité, Weltrechtsprinzip*). It so circumscribes and limits the competence, however, as to make it distinctly subsidiary and one which will be rarely invoked. Thus, on the one hand, the article states a principle which is not limited in its application to any particular offence or class of offences, as in Article 9, *supra*, applying the principle of universality to crimes of piracy; and, on the other hand, since it recognizes the applicability of the universality principle to "any crime committed outside its territory by an alien," a situation much more common than the above and a competence much more debatable, it so limits both the occasions when the jurisdiction may be invoked and the manner of its exercise as to remove all grounds for objection on the part of other States. It is a sub-

sidiary jurisdiction; but there will be occasions when either it must be invoked or the offender permitted to go unpunished. In view of the extent to which the principle is recognized in contemporary legislation and of its utility in occasional cases as a subsidiary principle, it seems clear that it should have a place in the present Convention.

CRIMES COMMITTED IN A PLACE SUBJECT TO THE AUTHORITY OF ANOTHER STATE

Paragraph (a) of the present article recognizes the jurisdiction of the State, on certain conditions, in cases in which the crime committed outside its territory, by an alien, is committed "in a place not subject to its authority but subject to the authority of another State." Paragraph (a) recognizes throughout the superior authority of the territorial principle and envisages surrender to the State where the crime was committed as the ordinary procedure whenever such surrender is possible. Consequently the application of the principle of universality is restricted to cases where such surrender has not been accepted. In such cases, universality is essential to prevent impunity. The competence of the State having custody is concisely justified by Donnedieu de Vabres as follows:

> Il intervient, à défaut de toute autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 135.)

The principle of universality has a long history extending back at least to its recognition in the *Corpus Juris Civilis* (C.3.15.1.). Applied in mediaeval times to certain crimes and recognized by various of the Glossators, d'Argentré, Voet, and other jurists of the Middle Ages and the Renaissance, it found expression in French practice and German legislation of the 16th to 18th centuries and has been more recently embodied in modern codes of the 19th and 20th centuries. For the history of the principle, see Donnedieu de Vabres, *Introduction à l'Etude du Droit Pénal International* (1922), pp. 106, 128 ff, 174 ff, 222, 290 ff, 312, 324 ff, 331, 337 ff, 345 ff, 359 ff, 459, and *passim;* Alcorta, *Principios de Derecho Penal Internacional* (1931), I, 136 ff; and sources cited in the above. The classical writers on international law approved the principle. Grotius treated it as an alternative to extradition and urged that it was not only a right but a duty of the State *aut dedere aut punire;* Grotius, *De Jure Belli ac Pacis* (1625), II, c. 21, sec. 4, Nos. 1, 3, 8. See also Vattel, *Le Droit des Gens* (1758), I, c. 19, par. 233.

The incorporation of the principle of universality in modern codes and projects of codes is exemplified in the following:

> Austria, Penal Code (1852), sec. 39.—Again, if a foreigner has committed abroad an offence other than those indicated in the preceding paragraph, he shall always be arrested upon entering the country; arrangement shall be made forthwith for his extradition to the state where the offence was committed.
>
> Sec. 40. Should the foreign state refuse to receive him, the foreign offender will generally be prosecuted in accordance with the provisions

of the present penal code. If, however, more lenient treatment is prescribed by the criminal law of the place where he committed the act, he shall be treated according to this more lenient law. Expulsion shall also be included in the penal sentence in addition to the infliction of the usual penalty.

Germany, Project of Penal Code (1927), sec. 7.—The penal laws of the Reich apply to other acts committed abroad, if the act is incriminated by the law of the place of the act and if the actor . . .

2. At the time of the act was an alien, has been arrested upon the territory, and has not been extradited, although extradition would be permissible according to the nature of the act.

Hungary, Penal Code (1878), Art. 9.—Sera aussi puni d'après les dispositions du présent Code l'étranger qui commet à l'étranger un crime ou un délit non mentionné au paragraphe 2 de l'article 7, dans le cas où son extradition n'est pas autorisée par les traités ou l'usage en vigueur, et si le Ministre de la Justice donne l'ordre de poursuivre.

Italy, Penal Code (1930), Art. 10.—A foreigner who, apart from the crimes specified in Articles 7 and 8, commits in foreign territory to the prejudice of the State or of a national a crime . . .

If the crime is committed to the prejudice of a foreign State or of an alien, the guilty party shall be punished under Italian law, at the demand of the Minister of Justice, always provided—

(1) That he is in the territory of the State.

(2) That the crime is one for which the penalty of death, penal servitude for life, or penal servitude for a minimum period of not less than 3 years is prescribed.

(3) That his extradition has not been granted or agreed to by the Government of the State in which he committed the crime, or by that of the State to which he belongs.

Poland, Penal Code (1932), Art. 10, sec. 1.—La loi pénale polonaise est applicable à un étranger qui a commis à l'étranger une infraction non énoncée aux articles 5, 8, et 9, si l'auteur de l'infraction se trouve sur le territoire de l'Etat Polonais et si son extradition n'a pas été accordée, les conditions des Articles 6 ou 7 étant remplies.

Sec. 2. La poursuite est exercée sur l'ordre du Ministre du Justice.

Rumania, Project of Penal Code (1928), Art. 8.—Tous autres crimes ou délits, en dehors de ceux prévus dans l'art. 7, commis par un étranger à l'étranger seront poursuivis et punis conformément aux dispositions de ce code, si l'étranger délinquant se trouve dans le pays, s'il n'a pas été puni, si son extradition n'a pas été démandée et si le Ministère de la Justice demande la poursuite. La poursuite ne pourra se faire qu'à la demande du Ministère de la Justice, en exceptant les infractions suivantes:

1) falsification de la monnaie étrangère métallique ou papier-monnaie;

2) le trafic international d'enfants et de femmes;

3) l'emploi intentionnel de n'importe quels moyens de produire un péril public;

4) le trafic des substances stupéfiantes;

5) le trafic de publications obscènes;

6) la piraterie . . . (Quoted by Buzea, "*Règle de Droit Pénal et ses Applications Extraterritoriales*," 8 *Rev. Int. de Dr. Pénal*, 1931, 125, 136–137).

Similar provisions are found in Albania, Penal Code (1927), Art. 6; Argentina, Extradition Law (April 25, 1885), Art. 5; Austria, Project of Penal Code (1909), Art. 87; Bulgaria, Penal Code (1896), Art. 6; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37; Czechoslovakia, Penal Code (Austrian Code of 1852), Arts. 39, 40, Project of Penal Code (1926), sec. 7; Italy, Penal Code (1889, superseded by Code of 1930, quoted *supra*), Art. 6, Project of Penal Code (Ferri, 1921, not adopted, Code of 1930 adopted), Art. 5; Sweden, Project of Penal Code (1923), ch. 1, sec. 9; Turkey, Penal Code (1926), Art. 6; Yugoslavia, Penal Code (1929), Art. 7. See also the variation of the principle, excluding the offer of surrender and made applicable to a long list of crimes, including most of the common crimes of any gravity, in the following:

> Norway, Penal Code (1902), sec. 12.—A moins de dispositions contraires, le Code pénal norwégien est applicable aux actes condamnables commis . . .
>
> (4) A l'étranger, par des étrangers, quand l'acte, ou bien
>
> (A) tombe sous le coup des articles 83, 88, 89, 90 (dernier alinéa), 93, 98 à 104, 110 à 132, 148, 152 (1, 2, 3 alinéas), 153, 154 (1 alinéa), 159, 160, 161, 169, 174 à 178, 182 à 185, 187, 189, 190, 191 à 195, 202, 217, 220, 221, 223 à 225, 231 à 235, 243, 244, 264, 267 à 269, 277, 292, 327, 328, 331, et 423 de la présente loi, ou bien . . .
>
> Sec. 13. Dans les cas de l'article 12 (no. 4), les poursuites pénales ne peuvent être commencées que sur l'ordre du roi.

While the incorporation of the principle in modern legislation dates back at least to the Austrian Penal Code of 1803, its continued vitality is attested by the approval of those engaged throughout the world in the preparation of official projects. Donnedieu de Vabres says:

> Parmi les codes pénaux en voie d'élaboration, il n'en est à peu près aucun, à notre connaissance, qui n'admette, à quelque mesure, la compétence du *judex deprehensionis*. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 156.)

The general principle of universality has also been affirmed with few qualifications in the resolutions or drafts of various international conferences or organizations. The Institute of International Law at its Munich Session of 1883 resolved as follows:

> Art. 10. Chaque Etat chrétien (ou reconnaissant les principes du droit des pays chrétiens), ayant sous sa main le coupable, pourra juger et punir ce dernier, lorsque, nonobstant des preuves certaines de prime abord d'un crime grave et de la culpabilité, le lieu de l'activité ne peut être constaté ou que l'extradition du coupable, même à sa justice nationale, n'est pas admise ou est réputée dangereuse.
>
> Dans ces cas, le tribunal jugera d'après la loi la plus favorable à l'accusé en égard à la probabilité du lieu du crime, à la nationalité du coupable et à la loi pénale du tribunal même.

At its Cambridge session of 1931, the Institute reaffirmed the same principle, but only for offences against general interests protected by international law, so-called *delicta juris gentium*, in the following terms:

> Tout Etat a le droit de punir des actes commis à l'étranger par un étranger découvert sur son territoire lorsque ces actes constituent une infraction contre des intérêts généraux protégés par le droit international (tels que la piraterie, la traite des noirs, la traite des blanches, la propagation de maladies contagieuses, l'atteinte à des moyens de communication internationaux, canaux, câbles sous-marins, la falsification des monnaies, instruments de crédit, etc.), à condition que l'extradition de l'inculpé ne soit pas démandée ou que l'offre en soit refusée par l'Etat sur le territoire duquel le délit a été commis ou dont l'inculpé est ressortissant.

The International Conference held at Warsaw in 1927 for the Unification of Penal Law, on the other hand, composed chiefly of members of various official codification commissions, resolved unanimously in favor of the universality principle for all offences:

> Art. 7. Tout autre crime ou délit commis à l'étranger par un étranger, pourra être puni dans le pays . . . (x) dans les conditions prévues aux articles précédents, si l'agent se trouve sur le territoire de l'Etat . . . (x) et si l'extradition n'a pas été demandée ou n'a pu être accordée et si le Ministre de la Justice requiert la poursuite.

See the Draft Code of International Law adopted by the Japanese Branch of the International Law Association, and Kokusaiho Gakkwai, "Rules Concerning the Jurisdiction of Offences Committed Abroad and Concerning Extradition," Art. 2, *International Law Association, Report of the 34th Conference*, 1926, pp. 378, 383–384; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4; and the Third International Congress of Penal Law (Palermo, 1933), which, after a discussion of so-called *delicta juris gentium*, resolved as follows:

> Que l'attribution de la compétence aux tribunaux du pays où le délinquant est arrêté est hautement désirable, même lorsqu'il s'agit d'infractions de droit commun et lorsque l'extradition du coupable n'a été demandée ni par l'Etat, sur le territoire duquel l'infraction a été commise, ou dont elle lèse directement les intérêts, ni par l'Etat dont le délinquant relève par sa nationalité. (10 *Rev. Int. de Dr. Pénal*, 1933, 144, 157.)

In addition to the national legislation and the resolutions noted above, it should be recalled that there is legislation in a number of States which asserts jurisdiction on the principle of universality over enumerated offences, in some States under limitations similar to those incorporated in this article, in others without such limitations. The legislation of this type is cited and discussed briefly under Article 9, comment, *supra*. And *cf.* Article 2, comment, *supra*. It will be apparent at once that par. (a) of the present article is both broader in scope and more restricted in effect than such legislation. It so states the principle of universality as to make it applicable to all offences which are also made crimes by the *lex loci delicti*, but so narrows the exercise of such jurisdiction as to leave it effective in only a limited class of cases. Following the more common practice, it avoids the difficulties inherent in any attempt to

prescribe a competence for specific offences by generalizing the competence and circumscribing its exercise so as to remove all valid objections.

The principle of universality as stated in the present article finds some support likewise in the legislation and practice of those States which assert jurisdiction over offences committed against their nationals abroad by whomsoever committed (passive personality, *personalité passive, Schutzprinzip*). An important group of States asserts such jurisdiction; others would contest it. Many writers favor it, while others oppose it. The following is sufficiently typical of legislation in force in those States which assert the jurisdiction:

> Japan, Penal Code (1907), Art. 3.—[after enumerating a long list of offences for which nationals will be punished if they commit them abroad] . . . This law also applies to foreigners who have committed offences mentioned in the preceding paragraph against Japanese subjects outside the Empire.
>
> Uruguay, Penal Code (1889), Art. 7.—Aside from the cases provided for in article 5, offences committed in foreign territory by an alien, to the injury of a citizen or to the injury of the state, and punishable both by the laws of the latter and by those of the state where they were committed, shall be tried and punished by the courts of the state, when the criminals enter the territory in any way, applying to them the milder law and taking into account what is provided in the second paragraph of the preceding article [requiring complaint of the injured party in case of the less serious offences].

See also Albania, Penal Code (1927), Art. 6; Brazil, Extradition Law No. 2416 (1911), Art. 3; Project of Penal Code (1927), Art. 6; China, Penal Code (1928), Art. 7; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37; Czechoslovakia, Project of Penal Code (1926), Art. 5; Estonia, Penal Code (1929), Art. 7; Finland, Penal Code (1889), Art. 2; Greece, Code of Crim. Proc. (1834), Art. 2; see Clunet (1898), 962, for judgment of the Areopagus applying this article; Greece, Project of Penal Code (1924), Art. 3; Guatemala, Penal Code (1889), Art. 6, No. 6; Italy, Penal Code (1930), Art. 10; Latvia, Penal Code (Russian Code of 1903), Art. 9, sec. 2; Lithuania, Penal Code (1930), Art. 9, sec. 2; Mexico, Federal Penal Code (1929), Art. 6, Federal Penal Code (1931), Art. 4; Monaco, Code of Crim. Proc. (1904), Art. 8; Peru, Penal Code (1924), Art. 5, No. 3; Poland, Penal Code (1932), Art. 5; Rumania, Project of Penal Code (1926), Art. 7; Russia, Penal Code (1903), Art. 9, par. 2; San Marino, Penal Code (1865), Art. 3; Sweden, Penal Code (1864), Art. 2; and Project of Penal Code (1923), ch. 1, sec. 5; Switzerland, Project of Penal Code (1918), Art. 5; Turkey, Penal Code (1926), Art. 6; Uruguay, Project of Penal Code (1932), Art. 10, No. 6; Venezuela, Penal Code (1926), Art. 4, No. 2; Yugoslavia, Penal Code (1929), Art. 5.

A few of the States which assert competence on the principle of passive personality qualify the asserted competence with restrictions comparable to those incorporated in the present article; but in most national legislation

based on this principle no such restrictions are incorporated. As an example of the more exceptional type of national code provision, see

> Peru, Penal Code (1924), Art. 5.—Offences committed outside the territory of the Republic shall be punished in the following cases: . . .
> 3. Offences not included in the first paragraph, committed by an alien against a national, for which extradition is allowed under Peruvian law, provided that they are also punishable in the state in which they are committed, and that the criminal enters the Republic in some way, and is not surrendered abroad.

Jurisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence. It has been vigorously opposed in Anglo-American countries. See the British objections to the proposed French Law of 1852, mentioned briefly in Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 107, 369, and the Cutting Incident between Mexico and the United States, *U. S. Foreign Relations* (1887), 751–867. *Cf.* Mendelssohn-Bartholdy, *Das räumliche Herschaftsgebiet des Strafgesetzes* (1908), pp. 135–143. See also the *S. S. Lotus*, *Publications P.C.I.J.*, Series A, Judgment No. 9. It has had distinguished opponents among Continental writers. See Donnedieu de Vabres, *op. cit.*, pp. 129–131, 362–364; Travers, *Le Droit Pénal International* (1920), I, sec. 71. Of all principles of jurisdiction having some substantial support in contemporary national legislation, it is the most difficult to justify in theory. Unless circumscribed by important safeguards and limitations, it is unlikely that it can be made acceptable to an important group of States. Since the essential safeguards and limitations are precisely those by which the principle of universality is circumscribed in the present article, and since universality thus circumscribed serves every legitimate purpose for which passive personality might be invoked in such circumstances, it seems clear that the recognition of the latter principle in the present Convention would only invite controversy without serving any useful objective. In consequence, the principle finds no place in the present Convention.

Failure to include the principle of passive personality in the present Convention makes it all the more essential that such desirable ends as it may serve in the States which assert it should be attainable under some one or more of the principles herein incorporated. It would appear that every desirable end may be attained under the principle of universality as formulated in the present article. Under the present article, indeed, no less than three groups of States will find practical realization of an asserted competence: first, States asserting a universal jurisdiction over so-called *delicta juris gentium* other than piracy; second, States asserting jurisdiction on the principle of passive personality; and third, States which assert jurisdiction on the principle of universality substantially as it is herein delimited. The list of States asserting competence on one or another of the above principles

would include: Albania, Argentina, Austria, Brazil, Bulgaria, China, Costa Rica, Cuba (project), Czechoslovakia, Estonia, Finland, France (project), Germany, Greece, Guatemala, Hungary, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, Norway, Panama, Peru, Poland, Rumania (project), San Marino, Siam, Sweden, Switzerland (including various cantonal codes), Turkey, Uruguay, Venezuela, and Yugoslavia. No record has been found of official objection on international principles to the type of jurisdiction which the present article delimits.

The reasons advanced in the literature for a much broader application of the principle of universality apply *a fortiori* in support of the subsidiary principle stated in paragraph (a) of the present article. If disturbance of the legal order within a State's territory is considered the most persuasive reason for penal jurisdiction, such disturbance may be found in the presence unpunished of an offender who has committed crime elsewhere. As Fusinato says:

> La présence du délinquant qui peut, après son crime, jouir avec impunité du profit qu'il en a tiré, constituerait la plus scandaleuse et intolérable offense à l'honnêteté publique, à la morale et au droit. C'est le spectacle des avantages que l'on peut tirer d'un délit, plus encore que le spectacle du délit lui-même, qui constitue le mauvais exemple le plus dangereux. (*"Des Délits Commis à l'Etranger,"* Clunet, 1892, 56, 59–60.)

See also Baty, *International Law* (1909), p. 231; Carrara, *Opuscoli di Diritto Criminale* (2d ed. 1870), II, 396; Schauberg, *"Das intercantonale Strafrecht der Schweiz,"* 16 *Z. f. Schw. R.* (1869), 107. The same idea seems to have inspired Chief Justice Taney's dictum that states of the United States

> may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. (*Holmes* v. *Jennison*, 1840, 14 Pet. (U. S.) 540, 568.)

If the legal order is generalized idealistically, and crime is regarded as menacing a universal interest, then the only criticism of the present article will be that it is not sufficiently comprehensive. It will be agreed, with de Boeck, that the principle of universality "est justifié par la solidarité des Etats dans la lutte contre la délinquant." *Annuaire de l'Inst. de Dr. Int.* (1931), I, 157, 159. See Germany, *Entwurf eines allgemeinen deutschen Strafgesetzbuchs, Begründung* (1927), pp. 9–10; Bernard, *"Etudes sur le nouvelle code pénal Sarde,"* 20 *Rev. Crit. de Lég. et de Jurisp.* (1862), 364, 368; Lévitt, "Jurisdiction over Crimes," 16 *Jour. Crim. L. and Criminology*, 316, 496, 505; Pinheiro-Ferreira, *Droit des Gens*, II, Art. 3, sec. 12, and *Cours de Droit Publique* (1850), II, 31; Saldaña, *La Défense Sociale Universelle* (1925), p. 21. The list of jurists who have supported a more comprehensive application of universality than is here approved is a long one and includes many

distinguished names. If to this list are added the names of those who would approve the more restricted competence delimited in the present article, the roster becomes impressive indeed.

Without further attention to the literature at this point, we may conclude with Mercier:

> Le principe lui-même . . . n'est plus guère contesté; sa consécration progressive par le droit positif et par les projets de codes pénaux atteste qu'il répond à une exigence de la justice pénale, bien que l'accord sur les motifs ne soit pas établi en doctrine.
>
> Entre la conception purement idéaliste d'un impératif de la justice et la conception purement réaliste d'un intérêt territorial à ne pas tolérer la présence d'un criminel impuni, il y a encore la conception, à la fois idéaliste et réaliste, d'une solidarité internationale pour la protection d'un patrimonie, matériel et moral, de l'humanité civilisée.
>
> Mais, malgré ces divergences doctrinales, les legislations font une place de plus en plus importante au principe de la répression universelle. Et si l'étendue de son application, limitée parfois à quelques infractions, varie encore d'un pays à l'autre, par contre les conditions d'application se retrouvent à peu près les mêmes partout. (*Rapport, Annuaire de l'Inst. de Dr. Int.*, 1931, I, 87, 136.)

In the words of Donnedieu de Vabres,

> Il est dès lors inutile de pénétrer dans le détail des spéculations philosophiques par lesquelles on a voulu l'étayer. Il suffit de constater qu'étant *utile*—internationalement, universellement utile—et *juste*, cette compétence répond aux *desiderata* dont s'inspire, pour organiser la répression, la doctrine neo-classique, fondement de presques toutes les législations positives. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 169.)
>
> L'attribution d'une compétence très subsidiaire au juge du lieu d'arrestation donne satisfaction à un besoin de sécurité, à un sentiment élémentaire de justice. (*Ibid.*, p. 445.)

See, in addition to Bernard, Carrara, de Boeck, Donnedieu de Vabres, Fusinato, Grotius, Lévitt, Mercier, Pinheiro-Ferreira, Saldaña, and Schauberg, cited above, Alcorta, *Principios de Derecho Penal Internacional* (1931), I, 135–146; Bar, in *Annuaire de l'Inst. de Dr. Int.* (1883–85), 127, 141; Getz, in *Actes du Congrès Pénitentiaire International* (Brussels, 1900), II, 199; Girardon, *De la Répression des Infractions à la Loi Pénale* (1876), p. 160 ff; Harburger, in 20 *Z. f. gesammte Strafrechtswissenschaft* (1882), 588; Heffter, *Das Europäische Völkerrecht* (8th ed. 1888), sec. 104; Manfredini, "*Estraterritorialità del Diritto Penale*," 10 *Archivio Giuridico* (1872), 153; von Martens, *Précis du Droit des Gens de l'Europe* (1788), sec. 100 (Cobbett's transl., 1795), Bk. III, ch. 3, sec. 22 ff); von Mohl, *Staatsrecht, Völkerrecht und Politik* (1860), I, pp. 711 ff, 750 ff; Poittevin, in *Actes du Congrès Pénitentiaire International* (Brussels, 1900), II, 403; Travers, *Le Droit Pénal International* (1920), I, sec. 73; Travers, "*Compétence criminelle*," in de Lapradelle et Niboyet, *Répertoire de Dr. Int.* (1930), IV, 377–381; Woulfert, in *Actes du*

Congrès Pénitentiaire International (Brussels, 1900). See also Ferri, *Principii di Diritto Criminale* (1928), p. 156 ff; and Ortolan, *Eléments de Droit Pénal* (4th ed. 1875), I, 382, 389.

Without extending further the comment upon the general principle of the present article, attention may be directed more particularly to the limitations and safeguards which paragraph (a) incorporates. The principle of the article may be invoked only if the alien is present in a place subject to the authority of the State assuming jurisdiction and if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed. The presence of the accused provides the basis for jurisdiction. The requirement of incrimination by the *lex loci delicti* is included to safeguard against the possibility, however remote, that an alien might be prosecuted in reliance upon the principle of universality for an act or omission which was not a crime where committed. This requirement will tend to limit prosecutions in reliance upon the principle of universality to the more serious offences and to offences generally made punishable throughout the world. It is believed that this would be a desirable tendency under present conditions. Not all States include the requirement in their penal codes. See Travers, *Le Droit Pénal International* (1920), I, sec. 73. Considerations of fairness and justice would seem to support its inclusion. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 161 ff; Mercier, 58 *Rev. de Dr. Int.* (1931), 439, 477–478. It is included in the legislation of Bulgaria, Czechoslovakia, Cuba, Germany, Hungary, and Poland, and in the Resolutions of the Conference for the Unification of the Penal Law (Warsaw, 1927). A similar requirement is included in the legislation of many States providing for the prosecution of nationals for crimes committed abroad. *A fortiori* it should be included here.

Following the requirement of incrimination by the *lex loci delicti*, the article stipulates that a "surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted." In other words, jurisdiction in reliance upon the principle of universality may be invoked under par. (a) only as an alternative to extradition, other conditions being satisfied. Hitherto opposition to the principle of universality has come chiefly from British and American writers and from Continental writers opposed to universality without an offer of extradition. See Fiore, *Droit Pénal International* (Antoine's transl., 1880), secs. 42–60, 83; Deloume, *Principes Généraux du Droit International en Matière Criminelle* (1882), pp. 98–99; Cybichowski, "*La compétence des tribunaux à raison d'infractions commises hors du territoire*," *Académie de Dr. Int., Recueil des Cours* (1926), II, 247, 283 ff, 377. Yet even Hall, a conspicuous opponent of jurisdiction over crimes committed abroad, concedes an important distinction between universality in its more comprehensive form and universality as limited in the present article. He says:

> As the refusal of an offer to surrender is the equivalent of consent to the trial of a prisoner by the state making the offer, the jurisdiction afterwards exercised does not take the form of a jurisdiction exercised as of right. (*International Law*, 8th ed., 1924, p. 262.)

And in colonial New England we find a quaint instance of universality asserted as an alternative to surrender for trial elsewhere:

> It is enacted by the Court that whosoever haveing comitted uncleanes in another Collonie and shall come hither and have not satisfyed the law where the fact was comitted they shalbe sent backe or heer punished according to the nature of the crime as if the acte had bine heer done. (*Charter and Laws of New Plymouth*, by William Brigham, printed 1836, p. 162.)

Recourse to the principle of universality is an alternative to extradition in all the modern codes and the projects of codes noted *supra*, excepting only the Penal Code of Norway. The texts vary but the essential idea is the same. Since the offence may have been committed in part in one State and in part in another, the text here adopted requires that an offer of surrender be made to "such other State or States," thus assuring precedence in all cases to the territorial jurisdiction. If the crime was committed in two or more States, the question whether offers should be made simultaneously or in a determined sequence is for the law governing extradition to decide. The text here adopted requires an actual offer of surrender; mere notice is not enough. It does not require that the offer be formally declined; it is enough if the State or States to which the offer is communicated either decline, fail to proceed for whatever reason, or do not reply.

It is to be noted that Italy, and under Italian influence, Albania and Turkey, as well as the Third International Congress of Penal Law (Palermo, 1933), require also an offer of surrender to the State of which the alleged offender is a national. While there is nothing in the present article to prevent such an offer, it is felt that it should not be required as a necessary condition to the exercise of jurisdiction on the principle of universality. Were the requirement incorporated, there would be imposed upon the competence of States an added restriction which appears to be unwarranted by anything in international law and unsupported by the existing practice of States. Of the many States providing for some jurisdiction on the universality principle, only the three noted require an offer of surrender to the State of allegiance.

The next condition requires that "prosecution is not barred by lapse of time under the law of the place where the crime was committed." Since recourse to the principle of universality is permissible under par. (a) only as an alternative to surrender for prosecution at the place where the offence was committed, it seems correct to affirm the superior authority of the territorial law with respect to limitation or prescription. If prosecution is barred at the place where the offence was committed, it is only just that it

should be barred everywhere. A similar requirement is found in the legislation of Bulgaria, Hungary, and perhaps Yugoslavia. Many States incorporate the requirement in legislation providing for the prosecution of nationals for crimes committed abroad. *A fortiori*, it would seem, the requirement should be incorporated here. See also Foelix, *Droit International Privé* (3d ed. 1856), II, sec. 602.

Finally, it is stipulated that "the penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed." Again the superior authority of the territorial law is affirmed and a safeguard is established against consequences which might appear unjust from the point of view of the State or States where the offence was committed. Similar provisions are found in the codes of Austria, Bulgaria, Hungary, and Poland, and in the Resolutions of the Conference for the Unification of the Penal Law (Warsaw, 1927), as well as in the legislation of some States providing punishment for crimes committed by nationals abroad. In view of the widely varying punishments provided in different States for the same type of offence, the stipulation seems essential if the offender is to be assured, in the State which invokes the principle of universality, substantially the same treatment as he would have received if he had been surrendered to a State in which he committed the offence.

In addition to the above conditions, national legislation frequently requires approval of the prosecution by a designated administrative or executive official or, in some classes of cases, a complaint on the part of the injured party. Since the present Convention is concerned only with the international competence of States, and since this type of requirement would appear to be matter of internal procedure rather than international competence, it has not seemed appropriate to include anything of the kind in the present article. There is probably much to be said for such requirements, particularly for certain classes of cases, but they are matters with respect to which each State remains free to make its own decision.

It thus appears that the principle herein defined and limited is in no respect the sort of jurisdictional cosmopolitanism which some have espoused and others have condemned. In no case does it recognize an original or primary competence based solely upon the presence of the accused. It is by no means a principle under which any State may prosecute and punish anyone for anything done anywhere. Rather it is a conservative statement of a subsidiary competence, available in case there can be no surrender to the State or States where the offence was committed, carefully circumscribed by limitations suggested by the best contemporary practice, and fully secured against possible abuse by the safeguards of Articles 12 to 16, *infra*. It will seldom be invoked in actual practice; but it has been emphatically affirmed, as has been noted, in the national legislation of a great number of States, it may serve a useful purpose on exceptional occasions, and it is clearly entitled to a place in

a convention which purports to embody a complete statement of international penal jurisdiction.

CRIMES COMMITTED IN A PLACE NOT SUBJECT TO THE AUTHORITY OF ANY STATE

Paragraph (b) of the present article formulates an application of the principle of universality with respect to crimes committed by an alien in a place which is not subject to the authority of any State. The principle thus formulated applies to offences which are neither committed within the territory of any State nor upon the ships or aircraft of any State. It may be assumed that there will be few occasions for the exercise of such jurisdiction; but the likelihood of cases arising seems sufficiently clear to require the formulation of a principle in a convention which aims to incorporate a comprehensive statement of State jurisdiction to prosecute and punish for crime.

It is not possible to exhaust, within the scope of this comment, the meaning of "a place not subject to the authority of any State." One hundred years ago considerable land areas would have fallen within this category; today States have asserted a territorial authority over most of the land areas of the world. Nevertheless certain areas may remain so imperfectly organized for the administration of criminal justice as to be in effect "not subject to the authority of any State"; and other areas now sufficiently organized may return, with changing circumstances, to such a condition. Parts of the Antarctic continent now claimed by certain States may conceivably be regarded by other States as *terra nullius* or *terra communis;* see Hall, *International Law* (8th ed.), p. 125, note; Reeves, in 28 *Am. Jour. Int. L.* (1934), 117; and much of the Antarctic area is admittedly *terra nullius* at the present time. Numerous expeditions have visited and explored the Antarctic area; its marine resources have attracted whaling, sealing and fishing; and at some future date its mineral resources may attract exploitation. See Greely, *Polar Regions in the Twentieth Century* (1928), pp. 229 ff, 250 ff. Spitzbergen was treated as *terra nullius* until 1920, although it had been known, visited and inhabited for various industrial and commercial purposes since the seventeenth century. Franz Josef Land, now claimed by Russia, was often visited before it was claimed as the territory of any State. As recently as 1931, Norway contended with some plausibility that East Greenland was *terra nullius,* though the Permanent Court of International Justice has recently held otherwise. *Publications P.C.I.J.,* Series A/B, No. 53. In the Pacific, perhaps even in the Caribbean, there may still be small islands, atolls, reefs and rocks which are part of no State's territory. It is possible that parts of Arabia, especially in the southeast, such as the "Empty Quarter" (apparently not included in the Arabian Saudian Kingdom, Yemen, Muscat, or parts under an effective British protectorate), may be regarded as "not subject to the authority of any State."

In addition to land areas of doubtful or unknown status, there are large ice areas, some attached to the land and others floating free. It is extremely

doubtful whether these ice-fields or ice-floes can be regarded as territory or subject to territorial authority, even on the so-called Arctic-Sector principle. Nevertheless people can live on them for long periods of time, as is evidenced by the Norwegian sealers and Icelandic fishermen who work regularly on drifting icepacks, the Eskimo, Russian and Siberian hunters who travel long distances on the ice, the polar expeditions which have remained for long periods on the ice, and the possibility, demonstrated by Wilkins, of using ice-fields as emergency landing-fields on the shortest air-routes between Europe and much of America or eastern Asia. Not only is it possible that crimes may be committed wherever men may go, but there are already on record such instances as a gambling house on the ice more than three miles from the Alaskan coast, 11 *Rev. Gén. de Dr. Int. Pub.* (1904), 340; Green's killing of an Eskimo on the Arctic ice during the MacMillan Expedition of 1914 (Greely, *Polar Regions in the Twentieth Century*, 1928, p. 91); the murder by Eskimos of a leader of the Peary expedition in 1909 (Greely, *op. cit.*, p. 205); and the crimes committed, rude trials held and sentences executed by hunters and traders on the ice north of Siberia (more or less reliably reported in Welzl, *Thirty Years in the Golden North*, 1932, p. 305 ff).

By no means beyond possibility, in addition to the above, are offences committed on the high seas on ships or floating objects having no national character. It has been questioned whether pirate ships retain a national character; likewise as to various types of small boats or rafts. See comment on Article 4, *supra*, and *Reg.* v. *Waina and Swatoa* (1874), 2 N.S.W.L.R. 403, holding that a British ship's long-boat was not a British ship for jurisdictional purposes. There is also the possibility of crimes committed on floating logs, spars, or timbers, *e.g.*, the classical example of one survivor of a shipwreck pushing another off a spar. Crimes committed on a floating iceberg, or by a person swimming or supported by a surfboard or similar object, would certainly be "in a place not subject to the authority of any State" if outside territorial waters.

The aggregate of possibilities and more or less remote probabilities seems clearly sufficient to require a statement of governing principle if the present Convention is to be complete. In the absence of anything of the nature of territorial authority, the problem presented is *sui generis*. After a careful study of the problem, Travers concludes:

> Il faut, selon nous, lorsque le crime ou le délit a eu lieu dans un Etat barbare ou sur un territoire sans maître, non seulement donner droit de juridiction aux Etats lésé par la nature même de l'infraction . . . mais aussi reconnaître le quadruple compétence 1. des lois de l'Etat dont le coupable est ressortissant ou protégé . . . 2. de celles du pays dont la victime est national ou protégé . . . 3. de celles de l'Etat de refuge . . . 4. de celles des pays dont la région non civilisée ou sans maître est limitrophe. (*Le Droit Pénal International*, 1920, I, sec. 369.)

See also Kauffmann, *Delikte auf staatenlosem Gebiet* (1913). The State of which the accused is a national has jurisdiction under Article 5, *supra*, and

the State of which the victim is a national under par. (c), following. The notion of jurisdiction based upon contiguity alone appears to have slight support in theory or practice. The other basis of jurisdiction suggested by Travers is covered adequately by par. (b) of the present article.

Application of the principle of universality to offences committed "in a place not subject to the authority of any State," thus permitting any State where the offender may be found to prosecute and punish, has the support of considerable opinion in addition to that of Travers. Pella says:

> Pour en revenir à la question de la compétence universelle à raison du lieu où l'infraction a été commise, nous remarquerons qu'en dehors de la haute mer il y a encore les territoires sans maître . . .
>
> Aussi longtemps qu'un Etat ne sera pas parvenu à imposer sa souveraineté exclusive sur ces territoires, tous les Etats y garderont, en vertu des principes ci-dessus indiqués, un droit virtuel de juridiction répressive. (*Académie de Dr. Int., Recueil des Cours*, 1926, V, 145, 223.)

Cybichowski, discussing "la compétence des tribunaux à raison d'infractions commises hors du territoire," says:

> Quant aux délits commis sur une terre nullius ou dans un Etat barbare on leur applique le principe de la juridiction pénal originaire, car il n'existe pas de juridiction criminel que l'on puisse remplacer par celle d'un autre Etat. (*Académie de Dr. Int., Recueil des Cours*, 1926, II, 251, 291.)

To the same effect, see Nachbaur, "*Droit Pénal International*," in de Lapradelle et Niboyet, *Répertoire de Dr. Int.* (1930), VII, 441, 474; Rolin, *International Prison Congress* (1900), II, 399; and Schoenborn, in *Académie de Dr. Int., Recueil des Cours* (1929), V, 81, 164 (as to floating ice, in particular).

From the United States, we find a New Jersey opinion suggesting that

> Where an act *malum in se* is done in solitudes, upon land where there has not yet been formally extended any supreme power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water. (*State* v. *Carter*, 1859, 3 Dutcher, N. J. L., 499, 502.)

See also Hepner, *Extraterritorial Criminal Jurisdiction and its Effects on American Citizens* (1890), p. 17. And see the official reply of the Rumanian Government to the questionnaire of the League of Nations' Committee of Experts for the Progressive Codification of International Law:

> Besides the high seas, there are also unowned territories, . . . and until some State acquires exclusive sovereignty over them, every State, in virtue of the principles described above, will naturally have a theoretical right of punitive jurisdiction over them. . . .
>
> The fact of the apprehension of the criminal transforms the theoretical right into an actual right. . . .

> Supposing, for example, that a band of brigands in some unowned territory attacks and plunders a convoy or caravan and escapes capture by its victims, what is the difference from the legal point of view between piracy on the high seas and pillage in unowned territory?
>
> Although certain publicists maintain that in such cases the right of suppression may only be exercised by the State to which the villain belongs, or by States bordering on the unowned territory, this theory is undeniably quite arbitrary and is not founded on any of the principles now underlying the application of criminal law.
>
> If the act was committed in unowned territory, it is universally punishable in virtue of the same principles as those which make piracy on the high seas universally punishable. (*League of Nations Document* C. 196, M. 70. 1927. V. I., pp. 190, 204.)

While but few States have dealt in their penal legislation with crimes committed in a place not subject to the authority of any State, unless to extend their laws to their own nationals in such places, the following may be noted:

> Germany, Project of Penal Code (1927), sec. 7. The penal laws of the Reich apply to other acts committed abroad, if the act is incriminated by the law of the place of the act and if the actor . . .
>
> 2. At the time of the act was an alien, has been arrested upon the territory, and has not been extradited, although extradition would be permissible in view of the nature of the act.
>
> If the place of the act is not subject to the authority of any state, it is sufficient that the act is punishable by the laws of the Reich.

The Polish penal code, in conjunction with Art. 10 providing for jurisdiction over aliens who commit crimes abroad, if extradition is not granted, stipulates as follows:

> Poland, Penal Code (1932), Art. 6, sec. 1. L'acte commis à l'étranger n'entraine la responsibilité pénale que sous la condition que le dit acte soit qualifié infraction par la loi en vigueur au lieu de son accomplissement.
>
> Art. 7. Les dispositions de l'article 6 ne sont pas applicables: . . .
>
> b) aux personnes qui ont commis une infraction dans un lieu qui n'est soumis à l'autorité d'aucun Etat.

The Criminal Code of the Swiss canton of Vaud (1931), provides in Art. 5:

> Les dispositions du present code sont applicables: . . .
>
> (f) aux délits commis hors du canton, dans un lieu qui n'est soumis à aucune souveraineté, lorsque l'inculpé peut être apprehendé dans le canton. . . . Dans les cas prévus sous litt . . . (f) ci-dessus, la poursuite pénale est subordonnée à l'autorisation du Conseil d'Etat.

See also the Bustamante Code (1928), Art. 308, providing as follows:

> Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offences of a similar nature against international law committed on the high seas, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter.

It would appear, in short, that the problem is of sufficient importance to require a solution in the present Convention and that the principle of universality incorporated in this article may provide an acceptable solution.

Paragraph (b) requires that "the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national." It prescribes, subject also to the safeguards formulated in Articles 12 to 16, *infra*, a set of conditions which are intended to establish definitely the superior authority of the law of the State of which the alien is a national. Thus it is required that an offer of surrender for prosecution be made to the State or States of which the alien is a national, that prosecution shall not be barred by lapse of time under the law of any such State, and that the penalty be no more severe than is provided for the same crime by the law of such a State. It is assumed that the State of the alien's allegiance has an interest in the prosecution which is superior to that of the State whose concern arises only from custody of the accused, in short, that jurisdiction on the universality principle is auxiliary and inferior to jurisdiction based upon the principle of nationality. Possible cases of double or multiple nationality have made necessary the phrasing "a State of which the alien is a national," "the State or States of which he is a national," and "a State of which the alien is a national." In such cases, par. (b) of the present article requires that at least one State of allegiance make the act or omission a crime, that surrender be offered to every State of allegiance and be accepted by none, that prosecution be barred by the law of no such State, and that the penalty be no more severe than that provided by the law of any such State. With the interest of the State or States of which the alien is a national thus safeguarded, it is difficult to conceive of any possible objection on the part of other States to an exercise of jurisdiction by the State which has lawful custody of the accused.

Paragraph (c) of the present article provides for the one case of an offence committed in a place not subject to the authority of any State, by an alien, with respect to which the State having lawful custody of the accused may properly claim an interest superior to that of the State of which the accused is a national, namely, the case of an offence to the injury of the State having custody, of one or more of its nationals, or of one or more corporations or juristic persons having its national character. The present Convention excludes the theory of passive personality (jurisdiction based upon the nationality of the injured party). Here, however, in the absence of any territorial authority, it would seem clear that the State which is injured directly or through its nationals has at least as vital an interest as the State of which the accused is a national, and that the former State, if it has lawful custody of the accused, should be competent to prosecute and punish on the principle of universality without limitation.

Application of the principle of universality in case of such offences committed in a place not subject to the authority of any State is supported, of

course, by the law and practice of those States, by no means inconsiderable in number and importance, which now affirm the principle of passive personality. See comment on par. (a), *supra*. Perhaps even more significant is the support of legislation and opinion rejecting the principle of passive personality in general. Thus Travers, in general a vigorous opponent of the theory of passive personality, makes an exception in favor of the theory for offences committed where there is no territorial jurisdiction.

> Le troisième cas, dans lequel nous croyons que la loi pénale de la victime est applicable à ce seul titre est celui où il n'existe pas de loi répressive du lieu de l'infraction. . . .
>
> En pareille occurrence, le devoir de protection de l'Etat dont la partie lésée est ressortissante, redevient absolu.
>
> Les intérêts généraux d'un Etat exigent que tout ressortissant, atteint par un fait assez grave pour revenir tous les éléments d'une infraction à la loi pénale, trouve une loi et des tribunaux pour le protéger. (Travers, *Le Droit Pénal International*, 1920, I, sec. 71.)

To the same effect, see Travers, "*Compétence Criminelle*", in de Lapradelle et Niboyet, *Répertoire de Dr. Int.* (1930), IV, 360, 369. And see Klüber, *Droit des Gens Moderne de l'Europe* (1819), sec. 61.

Of similar import is the statement of the American, Francis Wharton:

> If an American citizen is murdered or plundered abroad, it is the duty of his country to exact redress and retribution. . . . If the crime is committed in a barbarous or semi-barbarous land, where a demand for extradition is not recognized, and where justice is not inflicted in accordance with civilized jurisprudence, then we have the right to execute justice ourselves, by seizing the offenders and trying them according to our laws, in all cases in which these laws embody crimes against men, irrespective of local limitations. Ignorance of law would, indeed, avail as a defense as to offences not *mala in se*. But as to offences *mala in se*, wherever the rights of a citizen are assailed, then it is the prerogative of his state to require redress. (Wharton, "Extraterritorial Crime", *4 Southern Law Rev.*, N.S., 1879, 676, 701.)

For American action on this principle in Samoa, see Ryden, *Foreign Policy of the United States in Relation to Samoa* (1933), pp. 20–23.

Great Britain is among the States most strongly opposed to the principle of passive personality, yet in at least one instance, where the circumstances were such as to come within the present paragraph, British authorities took jurisdiction:

> A British subject having been murdered in 1877 by natives in the island of Tanna, H.M.S. "Beagle" proceeded thither; the murderer was tried by two naval officers, was found guilty, and executed by hanging at the forearm of the "Beagle", the commander being aware that Sir George Innes, Attorney-General for New South Wales, had already given an opinion, based on previous decisions, that there was no jurisdiction in the colonial courts to try such islanders, they not being

> British subjects, and the crime not being committed within British territory. The Admiralty deemed that the commander had adopted the most humane course, and approved thereof, . . . that the only real justification for so unusual a mode of punishment lay in the circumstance that the crime committed was not justiciable by any civilized tribunal, and was of such a nature as not to admit of any more merciful course being adopted. . . . The Attorney-General in the House of Commons supported the action of the naval officers. (Halleck, *International Law*, Baker's 4th ed., 1908, I, 220.)

Similarly the Danish Penal Code (1930), which does not admit a general jurisdiction based on the nationality of the party injured, provides in Art. 8:

> There fall within Danish jurisdiction, regardless of the perpetrator's nationality, acts committed abroad: . . .
> 3. If committed outside of what is recognized by international law as the territory of any state, if the act is committed to the injury of a Danish national or a person resident in Denmark, and is an act of such a sort as to be punishable by a penalty more severe than arrest (*Haefte*).

The Danish provision may be particularly significant in view of the large number of Danish nationals engaged in enterprises which take them into places not subject to the authority of any State.

And in France, another State rejecting the principle of passive personality in general, the Cour de Cassation has upheld the jurisdiction of a colonial court in a case involving the killing of a French national by natives in a part of Africa not then subject to any State. The Court observed:

> Pour la protection de ses nationaux, la France conserve toujours les droits qu'elle tient de la légitime défense . . . qu'elle peut se saisir des coupables et les livrer à la justice de ses tribunaux. (Case of *Suleman*, May 17, 1839, Dalloz, *Répertoire*, "*Compétence criminelle*," No. 111, pp. 336–337.)

Foelix, *Traité du Droit International Privé* (Demangeat 3d ed. 1856), II, 294, accepts this as a general rule for crimes against nationals in places not subject to the authority of any State. It has been held, however, that France has no jurisdiction on this principle over a crime by an alien against a native subject of a protected chief. Case of *Roland and Brown* (Cour d'assises du Sénégal), Clunet (1882), 281. For these and other French cases, see Travers, *Le Droit Pénal International* (1920), I, sec. 361 ff.

Paragraph (d) of the present article refers to the very unusual case of crime committed in a place not subject to the authority of any State by an alien who is not a national of any State. Such an alien, of no nationality, may be prosecuted and punished wherever found. There is neither an applicable territorial law, nor a national law, and the injured party may be an alien. Unless such offenders are to go completely unpunished, they must be subject to prosecution wherever apprehended. The case is unlikely to occur; but if it does occur, there appears to be no possible objection to jurisdiction on the

universality principle. The safeguards incorporated in Articles 12 to 16, *infra*, are entirely adequate.

ARTICLE 11. IMMUNITIES

In exercising jurisdiction under this Convention, a State shall respect such immunities as are accorded by international law or international convention to other States or to institutions created by international convention.

COMMENT

This article requires that States, in exercising jurisdiction under this Convention, shall respect such immunities from jurisdiction or the exercise of jurisdiction as international law or international agreement have accorded to other States, or to Institutions created by international convention, or to such States or Institutions for their officers, diplomatic representatives, consuls, armed forces, public or private ships, aircraft, or other agencies or instrumentalities. The general principle is universally acknowledged. Particular applications must be determined by reference to the law governing immunities. It is not within the scope of the present Convention or comment to consider particular applications.

The immunities of States are considered in the Draft Convention on the Competence of Courts in Regard to Foreign States, and comment thereon, Research in International Law [*Am. Jour. Int. L., Supp.*] (1932), pp. 451–738. The immunities of sovereigns and heads of States are considered in Adinolfi, *Diritto Internazionale Penale* (1913), pp. 176–180; Alcorta, *Principios de Derecho Penal Internacional* (1931), I, p. 268 ff; Tobar y Borgoño, *Du Conflit International du Sujet des Compétences Pénales* (1910), pp. 227–255; and Travers, *Le Droit Pénal International* (1921), II, secs. 876–879. The immunities of persons entitled to diplomatic privilege are considered in the Draft Convention on Diplomatic Privileges and Immunities, especially in Articles 18 and 19 and comment thereon, Research in International Law (1932), pp. 15–187, 97, 99; and in Adinolfi, *op. cit.*, pp. 180–187; Alcorta, *op. cit.*, I, 270 ff; Diaz, *Derecho Penal Internacional* (2d ed. 1911), pp. 88–104, 163–172; Tobar y Borgoño, *op. cit.*, p. 256 ff; and Travers, *op. cit.*, II, secs. 789–792, 837–875. Similar limitations with respect to jurisdiction over consuls, especially as regards offences committed in the performance of their duties, are considered in the Draft Convention on the Legal Position and Functions of Consuls, particularly in Articles 21, 27 and 28, and comment thereon, Research in International Law (1932), pp. 189–449, 338, 356, 358; and in Alcorta, *op. cit.*, I, p. 276; Tobar y Borgoño, *op. cit.*, p. 510 ff; and Travers, *op. cit.*, II, secs. 793–830. For a list of treaties dealing with consuls, see Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933), II, pp. 1419–1472. Materials on the immunities of foreign military forces are collected in Adinolfi, *op. cit.*, p. 193 ff; Alcorta, *op. cit.*, I, pp. 308–310;

Diaz, *op. cit.*, pp. 104–105; Tobar y Borgoño, *op. cit.*, p. 748 ff; and Travers, *op. cit.*, II, secs. 879, 956–974. With respect to the immunities of public and private ships, see the Draft Convention on the Law of Territorial Waters, especially Articles 15, 17, 18 and 19, Research in International Law (1929), pp. 241–380, 297, 299, 307, 328; and Alcorta, *op. cit.*, I, pp. 282–298, 300–301; Diaz, *op. cit.*, pp. 120 ff, 158 ff; Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), ch. 3; Tobar y Borgoño, *op. cit.*, pp. 597–703; Travers, *op. cit.*, II, secs. 883–943. Offences on foreign airships within or over the territory are considered in Alcorta, *op. cit.*, I, pp. 307–308; and Travers, *op. cit.*, II, secs. 944–953.

With regard to immunities accorded to international institutions for their members, agents, or premises, see Hill, "Diplomatic Privileges and Immunities in International Organizations," 20 *Georgetown L. Jour.* (1931), 44; Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 *Am. Jour. Int. L.* (1931), 694; and Rey, "*Les immunités des fonctionnaires internationaux*," 23 *Rev. de Dr. Int. Privé* (1928), 253, 432. On immunities, in general, see van Praag, *Juridiction et Droit International Public* (1915).

While the immunities mentioned above are those more often invoked and most fully discussed in the literature, the present article is not confined to any particular list or enumeration. Enumeration in comment is only by way of illustration. The exercise of jurisdiction under this Convention must be in conformity with the limitations established by any immunity accorded to States or to international Institutions by international law or by conventions in force.

It would appear, for example, that an immunity under international law may be claimed under certain circumstances where an act, otherwise punishable, has been authorized or adopted by a State as its public act. A classical instance is *M'Leod's Case*, arising out of the Fenian invasion of Canada in 1838. The case is summarized in Moore, W. H., *Act of State in English Law* (1906), p. 126 ff, as follows:

> In the course of the conflict between the Canadian and Fenian Forces at the boundary line of United States and Canadian territory, the Canadian forces crossed the line and attacked a vessel called the *Caroline*, forming part of the Fenian forces, which was lying at her mooring in American waters. The vessel was sunk, and some lives were lost. The British Government assumed responsibility for the act, and the United States demanded explanations, which were given and accepted. In 1841, M'Leod, who was a member of the colonial forces engaged in the *Caroline* incident, was in New York, and was there arrested and indicted for murder. Great Britain at once addressed herself to the Federal authorities and demanded M'Leod's surrender, on the ground that "the transaction on account of which M'Leod has been arrested, and is to be put on his trial, is a transaction of a public kind, planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps and do any acts which might be necessary

> for the defence of Her Majesty's territories, and for the protection of Her Majesty's subjects; and that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally answerable to the laws and tribunals of any foreign country" ("State Papers," 1840–1, vol. xxix, p. 1127). It was added that "the question is one especially of a political and international kind, which can be discussed and settled only between the two Governments, and which the Courts of Justice of the State of New York cannot by possibility have any means of judging, or any right of deciding." In this view, the Government of the United States entirely concurred, the Secretary of State (Mr. Daniel Webster) writing: "The Government of the United States entertains no doubt that after this avowal of the transaction as a public transaction authorised and undertaken by the British authorities, individuals concerned in it ought not by the principles of public law and the general usage of civilised States to be holden personally responsible in the ordinary tribunals of law for their participation in it." (*Ibid.*, p. 1131.)

See further Moore, *op. cit.;* Scott, *Cases on International Law* (1922), p. 398. In this case, M'Leod's act was done within the territory of the United States and the adoption of his act by Great Britain as its public act was thus pleaded to prevent an exercise of territorial jurisdiction otherwise unquestionable.

By way of further example, it would no doubt be contrary to international law for a State to treat all members of the armed forces of an enemy State, whether nationals of the enemy State or of a neutral State, as criminals. The common provision punishing the carrying of arms against the State or against an allied State is generally made applicable only to nationals. See Belgium, Penal Code (1878), Art. 113; France, Penal Code (1810), Art. 75; Germany, Penal Code (1871), Art. 88; Italy, Penal Code (1930), Art. 242. The German Project of 1927 contains a section (sec. 120) providing for the punishment of anyone who shall recruit German nationals for a foreign military service. This section is made applicable without respect to the nationality of the offender or the place of the offence (sec. 6). However, the enforcement of this section against a French officer recruiting German nationals in France for the Foreign Legion in Morocco, for illustration, would be without doubt a violation of international law. Apparently with such eventualities in view, sec. 23 of the Project provides that "a punishable act does not exist if the illegality of the act is excluded by public [including international] or civil law."

The principle of the present article has been recognized expressly in the national laws of a number of States. Some national codes include a general reference to principles of international law. Thus the Penal Code (1881) of the Netherlands provides:

> Art. 8. L'applicabilité des articles 2–7 est restreinte par les exceptions reconnues dans le droit des gens.

See also Denmark, Penal Code (1930), Art. 12; and Norway, Penal Code (1902), Art. 14. The Costa Rican Penal Code (1924), provides:

> Art. 223. The penal law of the Republic is binding on all the inhabitants, including aliens; but proceedings by virtue of it cannot be brought in the country against the persons who, by their diplomatic character or other reason, enjoy, according to international law or the dispositions of a public treaty, the privileges of immunity or extraterritoriality.

Similar provisions are found in Argentina, Code of Criminal Procedure (1888), Art. 25, No. 1; Brazil, Project of Penal Code (1927), Art. 11; Bulgaria, Penal Code (1896), Art. 3, No. 1; Chile, Code of Penal Procedure (1906), Art. 1; Colombia, Penal Code (1890), Art. 20, No. 1; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33; Estonia, Penal Code (1931), Art. 5; Finland, Penal Code (1889), Art. 7; Guatemala, Penal Code (1889), Art. 8, No. 1; Hungary, Penal Code (1878), Art. 5; Italy, Penal Code (1930), Art. 2; Latvia, Penal Code (Russian Code of 1903), Art. 5; Lithuania, Penal Code (1930), Art. 5; Nicaragua, Penal Code (1891), Art. 11; Panama, Penal Code (1922), Art. 5; Rumania, Project of Penal Code (1926), Art. 3; Russia, Penal Code (1903), Art. 5, sec. 4; R.S.F.S.R., Penal Code (1922), Art. 1; Sweden, Penal Code (1864), sec. 4; Uruguay, Project of Penal Code (1932), Art. 9.

Similar also is the provision in the Resolutions of the Conference for the Unification of the Penal Law (Warsaw, 1927):

> Art. 1, par. 3. Ne sont pas soumises aux lois pénales, les personnes qui, d'après le droit international ou d'après les conventions spéciales, sont soustraites à la juridiction pénale des tribunaux . . . (x).

See also Resolutions of the Institute of International Law (Cambridge, 1931), Art. 1; Treaty of Montevideo (1889), Art. 7. Article 5 of R.S.F.S.R. Penal Code (1926) provides for diplomatic settlement of such situations.

Provisions of the type noted above incorporate merely a reference to the general principle. They do not attempt an enumeration of the situations in which an immunity may be claimed but only refer to international law and treaties. The text of the present article follows this example.

There are other codes which do attempt something of the nature of an enumeration without, however, purporting to make the enumeration complete. One of the most restricted is the enumeration contained in the Spanish Penal Code (1928), no longer in force, as follows:

> Art. 25. The penal laws are applicable to all persons, whatever may be their condition, saving the inviolability of the King, with the following exceptions: . . .
>
> 2. As to the Kings, Presidents or Chiefs or Hereditary Princes of other states, Ambassadors, Ministers plenipotentiary, and Ministers resident, Chargés d'Affaires, and aliens employed in the Legations; who, when they transgress will be put at the disposition of their respective governments.
>
> 3. As to Consuls-General, Consuls, and Vice-Consuls, being subjects of the state which names them, in the measure that international treaties determine.

Legislation dealing in a particular way with certain immunities or limitations is found also in Cuba, see Bustamante, *Derecho Internacional Privado* (1931), III, 23–31, and Project of Penal Code (Ortiz, 1926), Art. 34; Denmark, Penal Code (1866), sec. 8; France, Project of Penal Code (1932), Art. 12; Honduras, Law of Organization of Courts (1906), Art. 171; Iraq, Bagdad Penal Code (1918), Art. 2; Liberia, Criminal Code (1914), sec. 19; Portugal, Penal Code (1886), Art. 53; Spain, Organic Law of Judicial Power (1870), Art. 334; Venezuela, Penal Code (1926), Art. 4, No. 5.

Perhaps the most nearly complete of any of the enumerations now in effect is that found in the Bustamante Code, in force between fifteen of the Latin-American republics. Among its rules on criminal jurisdiction, the Bustamante Code provides:

> Art. 297. The head of each of the contracting States is exempt from the penal laws of the others when he is in the territory of the latter.
>
> Art. 298. The diplomatic representatives of the contracting States in each of the others, together with their foreign personnel, and the members of the families of the former who are living in his company enjoy the same exemption.
>
> Art. 299. Nor are the penal laws of the State applicable to offenses committed within the field of military operations when it authorizes the passage of an army of another contracting State through its territory, except offenses not legally connected with said army.
>
> Art. 300. The same exemption is applied to offenses committed on board of foreign war vessels or aircraft while in territorial waters or in the national air.
>
> Art. 301. The same is the case in respect to offenses committed in territorial waters or in the national air, on foreign merchant vessels or aircraft, if they have no relation with the country and its inhabitants and do not disturb its tranquillity.

It is obvious, of course, that few or none of the national code provisions of this type are actually exhaustive. It may be that certain of the immunities stipulated in a particular code are not required by international law. On the other hand, international law may require others which are not stipulated. In a general convention on penal competence, it will be better to follow the more common practice of incorporating by general reference such immunities from the exercise of criminal jurisdiction "as are accorded by international law or international convention."

ARTICLE 12. ALIENS—PROSECUTION AND PUNISHMENT

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial

tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination.

COMMENT

This is the first of a series of four articles (Articles 12, 13, 14 and 15) formulating or restating certain essential safeguards which must in all cases limit the prosecution of aliens for crime. While the authority for much that is contained in these articles is ordinarily associated with the law and practice governing the protection of nationals abroad or the responsibility of States for injuries to aliens, it is believed that the underlying principles should have a place in the present Convention. They constitute, in a sense, an essential complement to the broad principles of penal competence which are formulated in the earlier articles of the Convention. They provide the obvious answer to the objection, almost always forthcoming when penal jurisdiction is stated in terms of general principles, that the competence thus defined may be abused. In one aspect, at least, they concern jurisdiction intimately. A State has jurisdiction as defined and limited in the present Convention. It may not act in excess of its competence thus defined, nor may it abuse its competence by acting in an improper manner. The present article and the three articles following are concerned primarily with the manner of exercising competence with respect to aliens.

The difference between competence and the manner of exercising competence, it being admitted that each is subject to limitations, is something which may easily be over-emphasized. There is a logical difference, to be sure, between saying that a State may proceed only so far along a certain course in prosecuting aliens for crime and saying that a State may proceed along the same course in prosecuting aliens subject to procedural limitations; but the difference does not warrant a complete disassociation either of the underlying ideas or of the principles in which they find convenient expression. A convention so deferential to logical categories as to deal with one and ignore the other would hardly be complete.

The present article incorporates a group of procedural limitations which each State is obligated to respect whenever it undertakes to prosecute and punish an alien. These limitations are a part of the procedural minima which international law requires of all States. Inability or unwillingness to assure respect for such minima was long the principal justification for maintaining extraterritorial jurisdiction in eastern countries. That many States do not succeed at the present time in keeping the administration of justice within their borders consistently above the minimum standard is evidenced by the continued accumulation of international cases of familiar type in which indemnities are awarded by claims commissions. For the present article, as for the present Convention, there may be claimed the advantages which are usually conceded to *lex scripta*. It provides a text to which

States may recur whenever an issue is raised as to an alleged abuse of the competence with respect to aliens which is herein defined and limited. It sets a standard which must be maintained if jurisdiction is to be exercised without incurring international responsibility.

The constitutions, penal codes and legislation of most countries contain safeguards with respect to prosecution for crime which protect aliens as well as nationals and which, if made effective, serve to insure the observance of the minimum standard. In the aggregate they are evidence that such safeguards are required by "the general principles of law recognized by civilized nations" (Statute of the Permanent Court of International Justice, Art. 38, par. 3).

Thus the Constitution of the United States provides:

> Amendment 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> Amendment 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Amendment 14, sec. 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Similar safeguards are incorporated in the constitutions of states of the United States.

For constitutional provisions elsewhere, apparently having a more or less similar purpose, see Albania, Constitution (1928), Arts. 126, 128, 205; Argentina, Constitution (1853), Arts. 18, 102; Bolivia, Constitution (1880), Arts. 5–7, 9–10; Brazil, Constitution (1891), Art. 72, Nos. 13–16, 20–21; Chile, Constitution (1925), Arts. 11, 13–16, 18; Colombia, Constitution (1886), Arts. 23–26; Costa Rica, Constitution (1871), Arts. 39–40, 42–43; Cuba, Constitution (1901), Arts. 15–21; Denmark, Constitution (1915), Art. 78; Greece, Constitution (1927), Arts. 8–12, 17, 100; Guatemala, Constitution (1879), Arts. 30–36; Honduras, Constitution (1924), Arts. 30–40, 42,

48; Liberia, Constitution (1847), Art. 1, secs. 6–10, 20; Mexico, Constitution (1917), Arts. 19, 20, 22; Nicaragua, Constitution (1911), Arts. 24–37; Panama, Constitution (1904), Arts. 23–25; Paraguay, Constitution (1870), Arts. 20–22; Peru, Constitution (1919), Arts. 24, 27; Poland, Constitution (1921), Arts. 97, 98; Portugal, Constitution (1911), Art. 3, Nos. 20–24, 31; Uruguay, Constitution (1917), Arts. 153–156, 159, 164; Venezuela, Constitution (1931), Art. 13, No. 15; Yugoslavia, Constitution (1931), Arts. 6–8. See also Afghanistan, Constitution (1931), Arts. 19, 91; Austria, Constitution (1929), Art. 90; Bulgaria, Constitution (1879), Arts. 73–75; Estonia, Constitution (1920), Arts. 8, 9; Liechtenstein, Constitution (1921), Arts. 32, 33; Salvador, Constitution (1886), Arts. 19, 22; Turkey, Constitution (1924), Arts. 72, 73.

If to such constitutional provisions as those noted are added the provisions of similar effect in national codes of penal procedure and other legislation, and also the decisions of courts in the various countries determining the scope and effect of such provisions, there may be assembled an impressive body of evidence in support of the conclusion that the standards of international jurisprudence are the sublimation of national practice or at least of the ideals which set a standard for national practice.

The Draft Convention on Piracy, dealing with a particular crime, contains safeguards with respect to the prosecution of aliens for that crime. Article 14 of the Draft Convention provides:

> 1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
> 2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
> 3. The law of the state must, however, assure protection to accused aliens as follows:
>
> (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
>
> (b) The accused person must be given humane treatment during his confinement pending trial.
>
> (c) No cruel and unusual punishment may be inflicted.
>
> (d) No discrimination may be made against the nationals of any state.
>
> 4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state. (Research in International Law, 1932, pp. 739, 852.)

The Draft Convention on the Responsibility of States, Research in International Law [*Am. Jour. Int. L., Spl. Supp.*] (1929), pp. 131–239, formulates the general principle governing denial of justice in terms which are applicable to the criminal prosecution of aliens generally. Article 9 of the Draft Convention provides:

> A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted

> delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice. (Research in International Law, 1929, pp. 131, 173.)

The subject is generally treated under the responsibility of States for injuries to aliens and reference may be made to the Draft Convention on the Responsibility of States, *op. cit.*, pp. 131–239, and to the authorities there cited. See also Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 96–101; Moore, *Digest of International Law* (1906), VI, 273–285, 698–701, 767–773; Verdross, "*Les Règles internationales concernant le Traitement des Etrangers,*" *Académie de Dr. Int., Recueil des Cours* (1931), III, 323; and the literature on the responsibility of States.

The following cases decided by the Claims Commission established between Mexico and the United States under the Convention of Sept. 8, 1923, as extended by subsequent conventions, may be noted as examples of a type of supporting authority: Case of *Faulkner*, Nov. 2, 1926, *Opinions*, p. 86 (also in 21 *Am. Jour. Int. L.*, 1927, 349); Case of *Roberts*, Nov. 2, 1926, *Opinions*, p. 100 (also in 21 *Am. Jour. Int. L.*, 1927, 357); Case of *Strother*, July 8, 1927, *Opinions*, p. 392; Case of *Chattin*, July 23, 1927, *Opinions*, p. 422; Case of *Turner*, July 23, 1927, *Opinions*, p. 416 (also in 22 *Am. Jour. Int. L.*, 1928, 663); Case of *Dillon*, Oct. 3, 1928, *Opinions*, p. 61; Case of *Kalkosch*, Oct. 18, 1928, *Opinions*, p. 126; Case of *Peter Koch*, Oct. 18, 1928, *Opinions*, p. 118; see also Case of *Quintanilla*, Nov. 16, 1926, *Opinions*, p. 136 (also in 21 *Am. Jour. Int. L.*, 1927, 568). And see cases cited in Ralston, *Law and Procedure of International Tribunals* (rev. ed. 1926), sec. 467 and *passim;* and de Lapradelle et Politis, *Répertoire de Dr. Int.* (1930), VI, 25. The records of other international tribunals may be made to yield similar supporting materials.

Turning to the particular safeguards which are incorporated in the present article, it will be noted that they are at once closely related to the exercise of penal jurisdiction and of fundamental importance. They express indispensable minima which must be observed in exercising jurisdiction over aliens under this Convention.

In the first place, no State shall prosecute an alien "who has not been taken into custody by its authorities." In other words, the prosecution of aliens shall not be initiated *in absentia, par contumace,* or *par défaut.* The codes of a few States contain provisions to the contrary; but no cases have been found in which such code provisions have been invoked to justify the prosecution of an alien who has not been taken into custody. Code provisions of this type have been widely criticized by writers. It is believed that diplomatic protest might follow if they were to be so invoked. The principle which forbids prosecution without custody is so obviously just as to make it an essential

complement to the broad principles of penal jurisdiction formulated elsewhere in this Convention.

In the second place, in exercising jurisdiction under this Convention, no State shall "prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national." "The representatives of foreign governments often undertake by active attendance to watch criminal proceedings in which their countrymen are parties in interest." Borchard, *op. cit.*, p. 98. The right of the resident diplomatic or consular representative to communicate with any of his nationals who are held abroad on a criminal charge is indispensable if diplomatic interposition in behalf of nationals is to be effective. See Draft Convention on Diplomatic Privileges and Immunities, Art. 14, par. 2, Research in International Law [*Am. Jour. Int. L., Supp.*] (1932), pp. 15, 80; and Draft Convention on Consuls, Art. 11 (d), *ibid.*, pp. 189, 267. Disregard of this essential right has been the ground of diplomatic protest. See *U. S. For. Rel.* (1894), 302–315; Moore, *Digest of International Law* (1906), VI, 273. Like the exclusion of prosecution without custody, noted briefly above, it is a necessary complement to the broad principles of competence which are formulated in the earlier articles.

In the third place, it is stipulated that no State shall "subject an alien held for prosecution or punishment to other than just and humane treatment." The general principle is universally accepted. Controversies arise only with respect to its meaning in particular cases. "Unduly harsh or oppressive or unjust treatment during arrest, detention, trial or imprisonment, whether the accused was guilty or not," has frequently provided a ground for international reclamation and award. See, for example, Borchard, *op. cit.*, pp. 98–99, and cases cited. A similar safeguard is incorporated in the Draft Convention on Piracy, Art. 14, quoted *supra*. It is not to be doubted that international responsibility will ordinarily ensue from a failure to make this fundamental safeguard effective. Its relevancy in a draft convention on jurisdiction of crime seems obvious.

In the fourth place, no State shall "prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay." "If citizens of the United States are charged with a crime committed in a foreign country," said President Cleveland, "a fair and open trial, conducted with decent regard for justice and humanity, will be demanded for them." Richardson, *Messages and Papers of the Presidents*, VIII, 497, 502. Judicial proceedings must be "regular and conducted in good faith and in accordance with the law and with the forms of civilized justice, and must not be arbitrary or unnecessarily harsh or discriminate against the alien on account of his nationality." Borchard, *op. cit.*, p. 98; and cases cited. "Treaties usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be

heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against a denial of justice." *Ibid.*, p. 100. A similar safeguard is incorporated in the Draft Convention on Piracy, Art. 14, quoted *supra*. Failure to secure a "fair trial before an impartial tribunal and without unreasonable delay" would undoubtedly amount to a denial of justice. See Draft Convention on Responsibility of States, Art. 9, and comment, Research in International Law (1929), pp. 173–187.

In the fifth place, no State shall "inflict upon an alien any excessive or cruel and unusual punishment." A "punishment disproportionate in severity to the offense charged" has been the ground for international reclamation and award. Borchard, *op. cit.*, p. 99; and cases cited. A similar safeguard is incorporated in the Draft Convention on Piracy, Art. 14, quoted *supra*. An "unnecessarily harsh, cruel, or arbitrary punishment" inflicted upon an alien constitutes a denial of justice. Draft Convention on Responsibility of States, Art. 9, Research in International Law (1929), pp. 173, 185.

Finally, no State shall "subject an alien to unfair discrimination." There may be reasonable discriminations between aliens and nationals, and between aliens who are nationals of different States. Indeed, treaties according special privileges to the nationals of one State may involve a discrimination against the nationals of another State. But such discriminations must be reasonable and just when tested by an international standard. Unfair discrimination has been the basis of numerous diplomatic interpositions; and the awards of claims commissions provide ample authority for the principle stated. There is good reason, therefore, for including it among the essential safeguards of the present article.

ARTICLE 13. ALIENS—NON BIS IN IDEM

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.

COMMENT

This article safeguards the alien accused of crime against more than one prosecution for the same offence. It embodies the just and salutary principle that no State may prosecute an alien after it is proved that he has been prosecuted in another State for substantially the same acts or omissions and has been acquitted, or has been convicted and punished, or has been convicted and paroled or pardoned. The principle is known throughout countries of the civil law as the rule of *non bis in idem*. In the Roman Law the underlying idea was expressed in the *Corpus Juris Civilis*, D.48.2.7.2, and C.9.2.9. A comparable, though not identical, common law principle is

incorporated in the Fifth Amendment of the Constitution of the United States in the following terms: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb."

Since it is quite impracticable under present conditions to establish in all cases a single jurisdiction for each offence, and since the present Convention incorporates principles under which there may be concurrent jurisdiction in two or more States over many offences, it is indispensable that the principle of *non bis in idem* should be accepted as an integral part of the conventional scheme. An accused who has been acquitted should not be required to prove his innocence again. One who has been convicted and punished has paid his debt to society and should not be again placed in jeopardy. So also as to one who, having been convicted, has obtained a parole or pardon. The principle is so obviously just, indeed, and so widely approved in the world's legal systems, that it hardly seems necessary to adduce reasons in its support. The reasons which have led to practically universal acceptance of the principle as between different tribunals of the same State are equally applicable as between the tribunals of different States. As Barbey, author of one of the most thorough and most recent studies of the subject, has said:

> Point n'est besoin d'insister longuement sur les inconvients qui résulteraient, pour le justiciable, de l'inobservation, à son égard, de la règle *Non bis in idem*. Ils sont les mêmes d'ailleurs, soit que la question d'application de ce principe se pose sur le plan interne, soit qu'elle se pose, au contraire, sur le plan international. Autant dans le cas d'un acquittement que dans celui d'une condamnation exécutée, l'individu qui a été jugé et qui a subi la peine éventuellement prononcée contre lui doit pouvoir recouvrer son entière liberté individuelle et considérer son sort comme définitivement réglé. (*De l'Application Internationale de la Règle Non Bis in Idem*, 1930, p. 169.)

The prestige of judicial administration no less than fairness to the accused requires that the principle of *non bis in idem* be observed. A definitive judgment, appellate procedure having been exhausted, should be regarded as *res adjudicata* (*chose jugée*). Barbey says:

> Le prestige de la justice ne pourrait manquer d'être affecté par une dualité ou une multiplicité éventuelles de sentences répressives divergentes à l'occasion d'un même délit. (*Op. cit.*, p. 71.)

Montéage says:

> De l'énergique sanction assurée au respect de la chose jugée, dépendent en grande partie l'autorité de la justice et la confiance accordée à ses décisions. ("*De l'autorité de la chose jugée qui s'attache aux jugements étrangers rendus en matière criminelle*," Clunet, 1885, 397.)
>
> La confiance en la justice et le respect de ses décisions reposent, de la part du plaideur, sur l'autorité de la chose jugée par le magistrat compétent, de quelque souveraineté qu'émane son pouvoir. Il faut donc, avec soin, lui éviter le spectacle d'un conflit, presque toujours inexplicable pour lui, entre deux juridictions mêmes ressortissant de deux souverainetés différentes. (*Ibid.*, p. 404.)

Failure to respect the definitive judgments of tribunals of a competent State indicates, indeed, a lack of respect for the tribunals of that State. Donnedieu de Vabres says:

> De quel droit l'Etat qui intervient en second lieu s'arroge-t-il, vis-à-vis d'une affaire qui a déjà été jugée, un pouvoir de révision? Même s'il admet la déduction de la peine subie, n'est-ce pas, en définitive, son appréciation personnel du fait imputé qu'il a la prétention d'imposer? Cette prétention n'est-elle pas contraire au principe de l'égalité des Etats? (*Les Principes Modernes du Droit Pénal International*, 1928, p. 311.)

While most States apply the principle of *non bis in idem* as between tribunals within the State, some have been more conservative than others in applying it to foreign judgments. Among States allowing fullest scope for the operation of the principle, the Netherlands is noteworthy. Foreign penal judgments appear to be given virtually the same effect as domestic judgments, even in cases in which the crime may have been committed in the Netherlands.

> Penal Code (1866), Art. 68.—A l'exception des cas où les décisions judiciaires sont susceptibles de revision, personne ne peut être poursuivi une seconde fois en raison d'un fait à l'égard duquel un juge néerlandais ou un juge d'une colonie néerlandaise ou d'une possession du royaume dans une autre partie du monde a rendu un jugement en dernier ressort.
>
> Dans les cas où la décision ayant de force de chose jugée émane d'un autre juge, la même personne ne peut être poursuivie pour le même fait, s'il y a eu:
>
> 1. Acquittement ou renvoi de la poursuite.
> 2. Condamnation suivie d'exécution intégrale, de grâce ou de prescription de la peine.

Of like effect, see Peru, Code of Crim. Proc. (1920), Art. 10; and the Swiss Cantons of Fribourg, Penal Code (1924), Art. 3, and Neuchâtel, Penal Code (1891), Art. 4.

France would appear to go almost as far, applying the principle of *non bis in idem* to offences committed by French nationals abroad and to offences committed by aliens in France. The *Code d'Instruction Criminelle* (*ainsi remplacé L. 26 févr. 1910*) provides:

> Art. 5. Tout Français qui, hors du territoire de la France . . .
>
> Toutefois, qu'il s'agisse d'un crime ou d'un délit, aucune poursuite n'a lieu si l'inculpé justifie qu'il a été jugé définitivement à l'étranger, et en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce . . .
>
> Art. 7 (Ainsi complété, L. 3 avr. 1903). . . . Aucune poursuite ne peut être dirigée contre un étranger pour crime ou délit commis en France, si l'inculpé justifie qu'il a été jugé définitivement à l'étranger et, en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce.

See case of *Burcklé* (July 29, 1905), Clunet (1907), 725, applying Art. 7, *supra*, in favor of a German who had been previously prosecuted in Germany

for a murder committed in France. See also Switzerland, Project of Penal Code (1918, altered 1928), Art. 3 (applying to those accused of crimes committed in Switzerland only if the former trial abroad was at the request of the Swiss authorities).

A number of States apply the principle to all crimes committed abroad over which they take jurisdiction. For example, see:

> Belgium, *Code d'Instruction Criminelle* (1878), Art. 13.—Les dispositions précédentes ne seront pas applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, aura été acquitté.
>
> Il en sera de même lorsque, après y avoir été condamné, il aura subi ou prescrit sa peine, ou qu'il aura été gracié.
>
> Toute détention subie à l'étranger, par suite de l'infraction qui donne lieu à la condamnation en Belgique, sera imputée sur la durée des peines emportant privation de la liberté.

Similar provisions are found in Congo, Penal Code (1896), Art. 85; Egypt, Native Penal Code (1904), Art. 4; Guatemala, Penal Code (1889), Art. 7; Honduras, Law of Organization of the Courts (1906), Arts. 174 and 176; Monaco, Code Penal Proc. (1905), Art. 9; Paraguay, Penal Code (1914), Art. 10; Salvador, Code of Crim. Proc. (1904), Art. 21; Spain, Organic Law of the Judicial Power (1870), Art. 337; Spain, Penal Code (1928), Arts. 12, 14, 15; Uruguay, Project of Penal Code (1932), Art. 11; Zurich, Penal Code (1897), sec. 3.

In some States the principle of *non bis in idem* is applicable to foreign penal judgments only in case the judgment has been one of conviction. For example, see:

> Sweden, Penal Code (1864), Art. 3.—Personne ne peut être puni dans le royaume pour une infraction commise au dehors s'il a déjà subi pour la même une peine dans un autre pays.

Provisions to the same effect are found in Nicaragua, Penal Code (1891), Art. 13; Palestine, Code Crim. Proc. (1924), Arts. 5 and 7; Panama, Penal Code (1922), Art. 7 (requires that the penalty undergone abroad be as great as that provided by Panama Law); Portugal, Penal Code (1886), Art. 53; and San Marino, Penal Code (1865), Art. 5 (acquittal is sufficient in case of certain crimes; see Art. 6).

A somewhat anomalous position is taken by Italy in its Penal Code of 1930. Under the provisions of this Code, application of the principle would appear to depend upon the discretion of the Minister of Justice:

> Art. 11. In the case specified in Article 6 the national or foreigner shall be tried in the State, even if he has been tried abroad.
>
> In the cases specified in Articles 7, 8, 9 and 10, the national or foreigner who has been tried abroad shall be tried again in the State should the Minister of Justice so demand.
>
> Art. 138. When a trial which took place abroad is repeated in the State, the punishment served abroad shall always be calculated, ac-

count being taken of its nature; and if detention prior to sentence took place abroad, the provisions of the preceding article shall apply.

In a considerable number of States, the principle of *non bis in idem* is applied to some or most crimes committed abroad, certain exceptions being made in consequence of the political nature of the crime or the nationality of the offender. For example, see:

> Brazil, Law 2416 (1911), Art. 14, sec. 2.—La procédure et le jugement des crimes dont il est parlé à l'art. 14 n'auront pas lieu, si les criminels ont déjà été, pour ces mêmes crimes, absous, punis ou pardonnés à l'étranger ou si la peine ou le crime est déjà prescrit d'après la loi la plus favorable.
>
> La procédure et le jugement des crimes dont il est parlé à l'art. 13 ne feront pas obstacle à la sentence ou à tout acte de l'autorité étrangère; toutefois, il sera tenu compte, dans l'exécution de la peine, du temps de prison passé à l'étranger pour ces crimes.

Legislation of similar effect is found in Bolivia, Law of Nov. 29, 1902, Art. 8; Chile, Code Crim. Proc. (1906), Art. 2, sec. 6; China, Penal Code (1928), Art. 7; Colombia, Penal Code (1890), Art. 20; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37; Dominican Republic, Law of June 28, 1911, replacing Code Crim. Proc., Art. 5; Germany, Penal Code (1871), Arts. 4 and 5; Germany, Project of Introductory Law to Penal Code and Code of Criminal Procedure (1929), Tit. II (see Barbey, *De l'Application Internationale de la Règle Non Bis in Idem*, p. 112); Haiti, Code Crim. Proc. (1835), Art. 7; Hungary, Penal Code (1878), Art. 7 ff; Italy, Penal Code (1890), Art. 7; Luxembourg, Code Crim. Proc. (modified by law of Jan. 18, 1879), Art. 5; Mexico, Federal Penal Code (1871), Art. 186, Federal Penal Code (1929), Art. 6, sec. 3, and Federal Penal Code (1931), Art. 4, sec. 2; Peru, Penal Code (1924), Art. 6; Rumania, Penal Code (1865), Art. 4, and Project of Penal Code (1928), Art. 10; Russia, Penal Code (1903), Art. 10, in force in Latvia, Estonia and Lithuania (see case of *Jacques J.* reported in Clunet, 1894, 921); Siam, Penal Code (1908), Art. 10; Switzerland, Cantons of Geneva, Code Penal Proc. (1884), Art. 8, and Vaud, Code Penal Proc. (1850), Art. 15; Uruguay, Penal Code (1889), Art. 8; Yugoslavia, Penal Code (1929), Art. 8.

In some of the national codes or projects the principle of *non bis in idem* is made applicable only in certain cases, while in other cases the accused is merely given credit for any punishment he may have already undergone abroad. See Albania, Penal Code (1927), Arts. 7 and 8; Brazil, Law 2416 (1911), Art. 14, sec. 2, quoted *supra;* Brazil, Project of Penal Code (Sa Pereira, 1927), Arts. 6–8; France, Project of Penal Code (1932), Art. 17; Venezuela, Penal Code (1926), Arts. 4–5. See also Switzerland, Project of Federal Penal Code (1918, modified 1928), Arts. 3–6; Turkey, Penal Code (1926), Art. 7.

A few States merely give the accused credit for any punishment he may have undergone abroad for the same offence. By way of example, see

> Poland, Penal Code (1932), Art. 11, sec. 1.—En cas de condamnation en Pologne d'une personne punie à l'étranger pour le même acte, le tribunal imputera sur la peine, selon son appréciation, la peine qui a été subie à l'étranger.

See also Austria, Penal Code (1852), Art. 36; Czechoslovakia, Project of Penal Code (1926), Art. 66; Denmark, Penal Code (1866), sec. 7, and Penal Code (1930), Art. 10, sec. 4; Finland, Penal Code (1889), sec. 5; Japan, Penal Code (1907), Art. 5; and Norway, Penal Code (1902), Art. 13.

According to Barbey, *op. cit.*, p. 99, the only national legislation which contains no provision either for *non bis in idem* or for imputation of a punishment undergone abroad for the same offence is that of Soviet Russia in its Penal Code of 1922 (also true for the Code of 1926), and Switzerland in its Federal Penal Code of 1853 and its Code of Penal Procedure of 1851.

That the principle of *non bis in idem* is approved by the English common law, upon the plea of *autrefois acquit* or *autrefois convict*, see *Rex* v. *Hutchinson* (1677), cited in 1 Leach 135, 1 Show. 6, 3 Mod. 194, and Buller N. P. 245; *Rex* v. *Roche* (1775), 1 Leach 134; *Rex* v. *Aughet* (1918), 26 Cox C. C. 232. Stephen says:

> Art. 265. . . . A plea of *autrefois convict* or *acquit* is sustained by proof of a previous conviction or acquittal in a foreign country. (*Digest of the Law of Criminal Procedure*, 1883.)

See also Archbold, *Pleading, Evidence and Practice in Criminal Cases* (27th ed. 1927), p. 159.

The same principle is widely approved in decisions and legislation in the United States. The American Law Institute incorporates the principle in its Restatement on the Administration of the Criminal Law (Tentative Draft No. 2, March 1, 1932) Double Jeopardy, sec. 21, as follows:

> *Acquittal or conviction elsewhere a bar to prosecution in this state.* A conviction unreversed, or an acquittal on the merits of a person of a violation of a provision of the criminal law of the United States or of another state or country is a bar to a prosecution of such person in this State based on the same facts as was the prosecution in such other state or country.

It has been held in the United States that an acquittal or conviction in a federal court does not bar prosecution in a state court, or vice versa, for a crime based on the same facts. See *Moore* v. *Illinois* (1852), 14 How. (U. S.) 13, 19; *United States* v. *Lanza* (1922), 260 U. S. 377; *United States* v. *McCain* (1924), 1 F. (2d) 985; *State* v. *Moore* (1909), 143 Iowa, 240; *Hall* v. *Commonwealth* (1923), 197 Ky. 179; *State* v. *Gendron* (1922), 80 N. H. 394; *State* v. *Rhodes* (1922), 146 Tenn. 398; *State* v. *Jewett* (1922), 120 Wash. 36. But cases of conflict between federal and state authorities under a federal government are different from those which may arise between the courts of independent States of coördinate status; and, even so, under the modern statutes such cases are resolved in conformity with the principle stated in the

American Law Institute's Restatement. Among modern statutes of states of the United States, see, for example:

> Arizona, Rev. Code (1928), sec. 4889.—Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States or of another state or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.
>
> Virginia, Code (1930), sec. 4775.—If the same act be a violation of both a State and Federal statute a prosecution or proceeding under the Federal statute shall be a bar to a prosecution or proceeding under the State statute.

Substantially similar to the provision of the Arizona Revised Code, quoted above, though in some cases applying only to decisions of other states or countries, see California, Penal Code (1931), sec. 656; Montana, Rev. Codes (1921), sec. 11583; North Dakota, Comp. Laws (1913), sec. 10330; South Dakota, Rev. Code (1919), sec. 3603; Utah, Comp. Laws (1917), sec. 8522. The phraseology varies in other legislation, though the underlying idea is the same.

> Minnesota, Mason's Stat. (1927), sec. 9926.—Whenever, upon the trial of any person indicted for a crime, it appears that the offence was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission to act in respect of which he is upon trial, such former acquittal or conviction is a sufficient defense.

For similar statutes, see Nevada, Comp. Laws (1929), sec. 9963; and Washington, Rem. Comp. Stat. (1922), sec. 2271. Slightly varied texts incorporating the same general principle are the following:

> California, Penal Code (1931), sec. 793.—When an act charged as a public offense is within the jurisdiction of another state or country, as well as of this state, a conviction or acquittal thereof in such state or country shall be a bar to a prosecution or indictment therefor in this state.
>
> Mississippi, Code (1930), sec. 1189.—Every person charged with an offense committed in another state, territory or country may plead a former conviction or acquittal for the same offense in such other state, territory or country; and if such plea is established, it shall be a bar to any further proceedings for the same offense here.
>
> New York, Penal Law (Cons. Laws 1918; Cahill's Cons. Laws 1930, ch. 41) sec. 33.—Whenever it appears upon the trial of an indictment that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to

which he is upon trial, such former acquittal or conviction is a sufficient defense.

The California statute, quoted above, is followed in Idaho, Comp. Stat. (1919), sec. 8699 ("state, territory or country"); Indiana, Burns Stat. (1926), sec. 2045 (like Idaho); Montana, Rev. Codes (1921), sec. 11719 ("county" is misprint; "country" in earlier codes); Nevada, Comp. Laws (1929), sec. 10717 (like Idaho); North Dakota, Comp. Laws (1913), sec. 10512 (like Idaho); Oklahoma, Comp. Stat. (1921), sec. 2435 (like Idaho; "county" is misprint; "country" in earlier codes); Oregon, Code (1930), sec. 13-309 (like Idaho, but omits "or indictment"); South Dakota, Rev. Code (1919), sec. 4516 (like Oregon); Utah, Comp. Laws (1917), sec. 8652 (like Oregon). See also Texas, Rev. Crim. Stat. (1925), Crim. Prac., Art. 208, referring only to crimes committed out of the state by its inhabitants.

The principle is applied to allow a plea of acquittal or conviction in another State or country of the same charge of stealing or robbing and bringing into the State in Arkansas, Dig. Stat. (1921), secs. 2881-2882; Kansas, Rev. Stat. (1923), sec. 21-104; Michigan, Comp. Laws (1929), sec. 17278; Missouri, Rev. Stat. (1919), sec. 3686; and Wisconsin, Stat. (1929), sec. 353. 14. It is applied to dueling and acting as a second in a duel outside the State in Florida, Comp. Gen. Laws (1927), sec. 7120; Illinois, Rev. Stat. (1929), ch. 38, sec. 178; Maine, Rev. Stat. (1930), ch. 129, sec. 9; Massachusetts, Gen. Laws (1921), ch. 265, sec. 5; Rhode Island, Gen. Laws (1923), sec. 6023; Vermont, Gen. Laws (1917), sec. 6812; Virginia, Code (1930), sec. 4422; Washington, Rem. Comp. Stat. (1922), sec. 2422; West Virginia, Code (1931), ch. 61, Art. 2, sec. 23.

That the principle is a part of the common law, see, in addition to the English authorities cited above, *State* v. *Smith* (1921), 101 Ore. 127 (offences against prohibition laws). Accord, under the statutes, see *La Forge* v. *State* (1924), 28 Okla. Cr. 37. For the contrary, in some of the States of the United States, see *Strobhar* v. *State* (1908), 55 Fla. 167; *Phillips* v. *People* (1876), 55 Ill. 429; *Bloomer* v. *State* (1878), 48 Md. 521; *Commonwealth* v. *Andrews* (1806), 2 Mass. 13; and *Marshall* v. *State* (1877), 6 Neb. 120.

Not only has the principle of *non bis in idem* won a prominent place in most systems of national law, but it has been widely accepted, in one form or another, in treaties and in the resolutions of international bodies. It was given a place in the first general treaty on jurisdiction of crime, the Treaty of Lima of 1878, in the following article:

> Art. 37. The foregoing provisions shall not be effective:
> 1. If the criminal has been tried and punished in the place of perpetration of the crime;
> 2. If he has been tried and acquitted or has obtained pardon of the punishment;
> 3. If the crime or the punishment has been prescribed according to the law of the country where he committed it.

And compare the following from the Resolutions of the Institute of International Law, adopted at Munich in 1883, the Resolutions of the International Prison Congress, adopted at Brussels in 1900, and from the Resolutions of the International Conference for the Unification of the Penal Law, adopted at Warsaw in 1927:

> Institute of International Law, Resolutions of Munich (1883).—Art. 12. Les peines prononcés par jugement régulier des tribunaux d'un Etat quelconque, même non compétent, mais dûment subies, doivent empêcher toute poursuite dirigée à raison du même fait contre le coupable.
>
> Seraient exceptés, toutefois, les délits contre la sûreté des Etats et ceux mentionnés ci-dessus, à l'article 8.
>
> Toutes les fois qu'il y a lieu d'exercer de nouvelles poursuites après un jugement prononcé à l'étranger, on tiendra compte de la peine que le coupable a déjà subie du chef du même fait. L'appréciation du tribunal quant à la mitigation de la peine, dans ces cas, sera souveraine.
>
> Art. 13. Les acquittements prononcés du chef d'insuffisance des preuves produites contre l'accusé seraient valables partout. De même, les grâces accordées par le souverain d'un pays ayant sous main le coupable.
>
> Les acquittements motivés par la non-criminalité du fait auraient même force que la loi du pays déclarant non punissable ce même fait.
>
> S'il y avait doute quant à la portée du jugement, la présomption serait en faveur du prévenu. . . .
>
> Ces règles ne s'appliquerent pas aux délits contre la sûreté de l'Etat, ni aux cas exceptionnels mentionnés à l'article 8.

It should be noted that the above articles in the resolutions adopted by the Institute in 1883 were not among those which it was considered necessary to revise when the Institute returned to the subject of penal competence in 1931.

> International Prison Congress (1900).—Art. 3. Les règles qui précèdent ne sont plus applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, a été acquitté; ou bien lorsque, après avoir été condamné, il a subi ou prescrit sa peine ou qu'il a été gracié.

> International Conference for the Unification of the Penal Law, Resolutions of Warsaw (1927).—Art. 2. . . . Sous la même réserve, aucune poursuite n'aura lieu si le national prouve qu'il a été acquitté ou condamné définitivement à l'étranger et, en cas de condamnation, qu'il a exécuté sa peine ou a bénéficié d'une mesure d'exemption.
>
> Art. 3. Si le condamné se soustrait à l'exécution intégrale de sa condamnation, la durée de la peine subie à l'étranger sera déduite de la peine prononcée contre lui . . .

Later articles of the Warsaw Resolutions apply these rules to aliens in various cases.

The principle has likewise found a place in extradition laws and treaties. The following are sufficiently typical of national extradition laws:

France, Extradition Law (March 10, 1927), Art. 5.—L'extradition n'est pas accordée: . . . 4. Lorsque les crimes ou délits, quoique commis hors de France ou des possessions coloniales françaises, y ont été poursuivies et jugés définitivement.

Sweden, Extradition Law (June 4, 1913), Art. 9.—L'extradition ne doit pas être accordée: 1. Lorsque avant la démande un jugement aura été prononcé en Suède sur les faits imputés ou bien si la poursuite a été intentée devant un tribunal suédois.

See also Travers, *L'Entr'aide Répressive Internationale* (1928), pp. 135–144. And the following are sufficiently typical of the provisions incorporated in extradition treaties:

Bustamante Code (1928), Art. 358.—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 offense upon which the request is based.

Finland and Sweden, Extradition Treaty (1924), Art. 4.—Extradition shall not be granted (1) If a sentence has already been passed, or judicial proceedings instituted, in the country to which application for extradition is made, in respect of the offence for which extradition is demanded. (23 *League of Nations Treaty Series*, 42.)

France and Great Britain, Extradition Treaty (1876), Art. 11.—The claim for extradition shall not be complied with if the individual claimed has been already tried for the same offence in the country whence extradition is demanded. (67 *Brit. & For. State Papers*, 5, 16.)

See, by way of further example, the following extradition treaties: Bulgaria and Rumania (1924), Art. 4f, 33 *League of Nations Treaty Series*, 222; Czechoslovakia and Poland (1925), Art. 35, 46 *ibid.* 201; Denmark and Finland (1923), Art. 6, 18 *ibid.* 34; Estonia and Finland (1925), Art. 5, 43 *ibid.* 12; Estonia and Great Britain (1925), Art. 4, 50 *ibid.* 226; Estonia and Latvia (1921), Art. 4, 37 *ibid.* 424; Finland and Latvia (1924), Art. 5, 38 *ibid.* 344; Great Britain and Latvia (1924), Art. 4, 37 *ibid.* 370; Latvia and Lithuania (1921), Art. 4, 25 *ibid.* 312; and United States and Germany (1931), Art. 6, *United States Treaty Series*, No. 836. Such examples might be multiplied in considerable number.

In addition to the support for the principle of the present article which is found in national legislation and jurisprudence, in the resolutions of international bodies, and in treaties, there is significant approval of the principle in the works of reliable writers. The works of Barbey, *De l'Application Internationale de la Règle Non Bis in Idem* (1930), the latest important monograph on the subject, and of Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), ch. 8, one of the most important of recent general works on jurisdiction of crime, have already been quoted. See also Alcorta, *Principios de Derecho Penal Internacional* (1931), I, 168–185; Bar, *"Rapport sur Conflit des Lois Pénales," Annuaire de l'Inst. de Dr. Int.* (1883–1885), pp. 143–146; Faustin-Helie, *Traité de l'Instruction*

Criminelle (2d ed. 1866), II, 656 ff; Garraud, 6 *Rev. Int. de Dr. Pén.* (1929), pp. 328, 349; Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind* (1919), pp. 74–75; Montéage, "*De l'autorité de la chose jugée qui s'attache aux jugements étrangers rendus en matière criminelle,*" Clunet (1885), 397; Ortolan, *Eléments de Droit Pénal* (4th ed. 1875) I, 392–393.

It is to be noted, on the other hand, that there is distinguished opinion among the writers which does not support the broad principle of the present article. Some would allow the principle of *non bis in idem* to be invoked only when the foreign penal judgment is based upon a jurisdiction of superior merit. See Gidel, *De l'Efficacité Extraterritoriale des Jugements Répressifs* (1905), pp. 52–57; and Peiron, *De l'Effet des Jugements Etrangers Rendus en Matière Pénale* (1885). Gidel sums up this position as follows:

> La justice exige qu'un jugement pénal étranger fasse obstacle à l'exercice de poursuites contre un individu à l'occasion du même fait dans un autre pays, à la condition toutefois que le premier jugement ait été légalement rendu et qu'il soit définitif et qu'en cas de condamnation, la peine ait été subie ou éteinte par la prescription, la grâce ou l'amnistie. Il conviendra d'ailleurs, avons-nous fait remarquer, de n'accorder une pleine autorité au jugement étranger à ce point de vue négatif, que lorsque il émanera d'une juridiction dont la compétence l'emporte rationnellement sur celle du pays où il est question de renouveler les poursuites. Mais il est de toute nécessité, en tout cas, de tenir compte de la peine déjà subie à l'étranger. (*Op. cit.*, p. 169.)

Other writers would reject the principle of *non bis in idem* entirely on the ground that the ends of justice are served adequately by a rule of *non bis poena in idem*. Proponents of this limitation would allow a multiplicity of prosecutions but require that account be taken of any punishment already undergone. See Deloume, *Principes Généraux du Droit International en Matière Criminelle* (1882), pp. 115–121; Travers, *Le Droit Pénal International* (1922), III, sec. 1544; Travers, "*Les Effets Internationaux des Jugements Répressifs,*" *Académie de Dr. Int., Recueil des Cours* (1924), III, 415. As Barbey observes:

> Nous avons remarqué que même les adversaires les plus convaincus de l'application internationale de la règle *Non bis in idem* tempèrent, par une mesure d'humanité, la rigueur excessive de leur système; ils admettent, en effet, que si le délinquant ne peut invoquer à son profit une sentence prononcée contre lui à l'étranger, pour se soustraire à de nouvelles poursuites pénales, il ne doit cependant pas avoir à subir dans leur intégralité les diverses peines auxquelles il pourrait être condamné, dans les Etats différents, pour une même infraction. (*Op. cit.*, p. 239.)

The present Convention rejects both of the proposed limitations. In view of the difficulties involved in any attempt in complicated cases to rank the different jurisdictions according to merit, of the patent injustice of a rule of

non bis poena in idem in a system under which concurrent jurisdiction in two or more States must be a relatively frequent occurrence, of the many cases in which concurrent jurisdiction in two or more States is unavoidable under a convention based upon existing practice, of the extent to which the principle of *non bis in idem* has become established in contemporary practice, and of the fundamental justice of the principle, it is difficult to see how the present Convention could be made adequate otherwise. The principle must be so stated as to safeguard against a multiplicity of prosecutions as well as against a multiplicity of punishments. See Barbey, *op. cit.*, pp. 170–171.

In view of the support which the present article finds in contemporary practice, it hardly seems necessary to consider various theoretical objections which may be advanced by way of criticism of certain of its implications. The principle is an eminently practical one in a convention which seeks to reconcile and incorporate as much as is essential in the existing practices of States. The text is not one which can be easily abused since its principle can only be invoked after an acquittal elsewhere, *i.e.*, after a decision on the merits that the guilt of the accused has not been proved, or after a conviction elsewhere followed by discharge of penalty through punishment, pardon, or parole. Dismissal of prosecution for want of jurisdiction or on a procedural technicality is nowhere regarded as an acquittal on the merits and is in no case to be regarded as an acquittal under the present article.

The text safeguards aliens only, including alien corporations or juristic persons as well as natural persons. See Art. 1 (f). It does not protect nationals. It is to be noted that most States apply the principle of *non bis in idem* in prosecuting their subjects on a nationality principle for offences committed abroad. Certainly it is just and desirable that they should continue to do so. In the present state of international law, however, it would seem inappropriate for a convention on jurisdiction with respect to crime to incorporate limitations upon a State's authority over its nationals. Consequently the matter is left to the discretion of each State.

The text makes no provision for the case of a conviction elsewhere followed by partial discharge only of the penalty imposed. Under the penal codes of most civil law countries it is the practice in such cases to permit a second prosecution but to require that account be taken of the penalty already undergone. The rule is one of *non bis poena in idem* rather than *non bis in idem*. While this practice seems eminently just and desirable, it concerns a type of case which will not arise frequently, and it would appear to affect the measure of punishment only and not the competence to institute or continue a second prosecution. It has seemed most appropriate, therefore, to leave the matter to the discretion of each State.

The most difficult of application will be that part of the text which deals with identity of offences. The phrase used is "a crime requiring proof of substantially the same acts or omissions." In various national laws such

expressions as "same crime", "same offence", or "same facts" are used without qualification. For a relatively detailed study of the problem, see the American Law Institute's *Restatement on Administration of the Criminal Law* (Tentative Draft No. 2, March 1, 1932), pp. 9–20, 62–148, citing and discussing American cases. Under the text of the present article, it is an identity of the objective facts which produces an identity of offences. If two or more States have jurisdiction, there will be a crime against the laws of each and hence, in one sense, two or more crimes. But if substantially the same acts or omissions constitute the crime under the laws of each of the several States, there will be an identity of offences and the principle of *non bis in idem* will apply. It is immaterial by what name the crime may be called. Thus certain acts may constitute embezzlement under the laws of State X, larceny under the laws of State Y, and statutory theft under the laws of State Z, yet the safeguard which the present article provides against a multiplicity of prosecutions may be invoked. On the other hand, if the accused killed a man while stealing certain property, a former prosecution for larceny would present no bar to prosecution by another State for the homicide. Likewise if a single act of poisoning caused the death of both A and B, an acquittal or conviction in State X on a charge of killing A would be no bar to a prosecution in State Y on the charge of killing B. It is neither appropriate nor possible to anticipate the various types of case in which the text may have to be applied. As a statement of general principle, the text would appear to be sufficiently clear. Its application to particular cases must be left to the processes of jurisprudence.

It is to be emphasized, finally, that in making the principle of *non bis in idem* applicable even to offences committeed wholly within the State or a place subject to its authority, the text of the present article gives wider scope to the principle than is given at the present time in the legislation of most States. This will be apparent if reference is made to the review of contemporary legislation incorporated *supra*. The wider scope given the principle would probably be disapproved by those writers who accept it only when the foreign penal judgment is based upon a jurisdiction of superior merit. See Gidel, *De l'Efficacité Extraterritoriale des Jugements Répressifs* (1905), pp. 52–53; Peiron, *De l'Effet des Jugements Etrangers Rendus en Matière Pénale* (1885), pp. 24–37. Even so consistent an advocate of *non bis in idem* as Barbey is constrained to admit that

> L'unanimité avec laquelle les législations et la doctrine consacrent le principe de la territorialité de la loi pénale, des considérations d'ordre pratique—telles que la plus grande facilité dont bénéficie normalement l'instruction au lieu de commission—et la nécessité, dans certain cas, de donner une satisfaction légitime à l'opinion publique, à l'endroit même où le délit a été commis, semblent donc motiver une . . . exception à l'application internationale de la maxime *Non bis in idem* . . . Il paraît devoir être admis . . . dans les conditions actuelles du droit pénal international, qu'une sentence répressive étrangère ne saurait, en

> principe, paralyser le droit de poursuite dans l'Etat où l'infraction a été perpétrée. Plus exactement, il ne devrait être fait application de la règle *Non bis in idem*, à l'encontre de la compétence territoriale, qu'en vertu des dispositions d'un accord international assurant aux Etats contractants, en compensation d'une telle concession, le bénéficie d'une stricte réciprocité. (*De l'Application Internationale de la Règle Non Bis in Idem*, 1930, pp. 183–184.)

The adoption of the principle formulated in the present article will be a legislative measure. It is believed that it should be acceptable nevertheless. Practically all States have given some recognition to the principle. A number of States have legislation which goes as far as the present text. The extent to which jurisdiction may be concurrent in consequence of the overlapping of the several general principles recognized in the present Convention makes it of the utmost importance that adequate safeguards against multiplicity of prosecutions be provided. There will be some cases in which the State having territorial jurisdiction will be less concerned in prosecution than another competent State. The adoption of a general convention incorporating the present article will assure the reciprocity which is emphasized in the passage just quoted from Barbey. Limited as it is to a safeguard against multiple prosecutions of aliens for the same offence, it is believed that the present article will commend itself to all States as an essential part of the present Convention. As Garraud says:

> Il serait illégitime d'obliger le juge à distinguer suivant que la décision rendue à l'étranger l'a été, suivant les circonstances d'espèce, par un juge ayant une compétence législative et judiciare plus accentuée que la sienne propre (par exemple jugement étranger émanant du juge territorialement compétent, tandis que le juge ayant à statuer sur l'autorité de la chose jugée, n'aurait pu invoquer qu'une compétence subsidiare personnelle,) auquel cas l'autorité de chose jugée de la sentence étrangère devrait être admise; ou au contraire moins élevée (situation inverse de la précédente: le juge étranger a statué par compétence personnelle, le juge local aurait eu compétence territoriale), auquel cas l'autorité de la chose jugée ne serait pas admise, et le procès pourrait être recommencé. La règle *non bis in idem*, règle de justice absolue, domine les principes sur la hiérarchie des compétences: une poursuite a eu lieu pour un fait déterminé, dans un Etat et par un juge faisant partie de la communauté internationale; quel que soit le titre en vertu duquel a agi le premier juge, si ce titre est certain au regard de la loi de l'Etat sur le territoire duquel il s'agit de donner effet à la sentence étrangère, une nouvelle poursuite dans un Etat et par un juge appartenant à la même communauté internationale, serait une injustice. (Rapport, "*De l'application par le juge d'un état des lois pénales étrangères*," Congrès de Bucarest, 6 *Rev. Int. de Dr. Pénal*, 1929, 328, 349.)

Contemplating the adoption of a general treaty such as the present Convention, there is every reason to agree with Donnedieu de Vabres:

> La vérité est toujours en faveur du respect de la *res judicata* étrangère. Dans la plupart des législations internes, en droit français notamment,

> il existe une compétence concurrente au profit du *judex loci*, du juge du domicile, du juge du lieu d'arrestation. La compétence fondée sur le lieu du délit a une supériorité certaine, que nous avons signalée, et qui trouve parfois son expression dans la loi. Admet-on cependant que le juge du domicile ayant été saisi par prévention, une nouvelle instance est possible devant le juge territorial? Non, sans doute! De même, en droit international. Pour subsidiaire ou très subsidiaire que soit la compétence du juge étranger, elle n'a pas moins une valeur universelle. Et lorsque les circonstances de fait lui ont permis de s'exercer la première, elle a donné naissance à un droit acquis. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 319.)

See, however, Donnedieu de Vabres, "*La Valeur Internationale des Jugements Répressifs d'après le Mouvement Législatif Actuel*," 10 *Rev. de Dr. Pén.* (N. S., 1930), 457.

ARTICLE 14. ALIENS—ACTS REQUIRED BY LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission.

COMMENT

There are few precedents for the text of this article, either in national legislation or in treaties or the resolutions of international bodies. But see Italy, Penal Code (1930), Art. 242 (former Italian bearing arms against Italy); Binding, *Handbuch des Strafrechts* (1885), p. 376, note 11; von Martitz, *Internationale Rechtshilfe in Strafsachen* (1888), p. 57, note 17. The principle formulated is so obviously just, however, that its acceptance as an integral part of the present Convention may be anticipated. Here, again, the limitation incorporated provides a safeguard for aliens only. A similar safeguard for nationals is left to the discretion of each State. The proviso of Article 7, *supra*, gives wider scope to a somewhat similar limitation applicable to offences against the security, territorial integrity or political independence of a State. The principle of *non bis in idem*, incorporated in Article 13, *supra*, is based upon an underlying concept of fairness and justice which is not wholly unlike the idea underlying the present article. The individual should not suffer, through no fault of his own, because one State punishes what another State requires. As in case of acts of State, discussed under Article 11, *supra*, the two States whose laws are in conflict should assume responsibility and settle the matter between them. The individual should not be victimized. The need for such a safeguard becomes apparent as soon as jurisdiction based upon the several principles recognized in this Convention is reduced to a coherent system. Without such a safeguard, there might result on occasion a wholly unnecessary and unwarranted hardship. The article is included, therefore, as legislation so eminently desirable and just that it can hardly fail to commend itself to the favorable consideration of States.

While the principle of the present article is probably in harmony with relevant national and international practice, and while such departures as might be discovered are probably exceptions tending to demonstrate the soundness of the general principle, it should be noted that the unratified Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington, February 6, 1922, and since abandoned, contained provisions which were based upon a different principle. The Treaty of Washington provided:

> Art. 3. The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found. (Hudson, *International Legislation*, 1931, II, 794, 796.)

It would of course be permissible for contracting parties to the present Convention to ratify such a treaty as the above. See Article 2, *supra*. Such ratification would invest the parties to such a treaty with a competence with respect to their respective nationals which they would not have under the present Convention. However, the special competence thus created would rest upon a principle not in harmony with the principle of the present article and its exercise would be limited strictly to nationals of States ratifying such a treaty.

ARTICLE 15. ALIENS—ASSISTING ADMINISTRATION OF JUSTICE

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien during his presence within its territory or a place subject to its authority at the request of officials of that State for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice, except for crimes committed while present for such purpose.

COMMENT

When the competent authorities of a State ask an alien to come into the State or a place subject to its authority from abroad in order to assist in the administration of justice, fairness requires that the State should not take advantage of presence thus obtained to prosecute or punish the alien for an offence which he may have committed previously. If the State wishes to prosecute or punish for such an offence, it should either wait until he can be lawfully apprehended or obtain his surrender in the usual way. The State must decide whether the alien's testimony or other assistance is of more importance than his prosecution or punishment for prior offences. Having made its decision, the State should abide the result.

The principle thus stated is rather widely recognized in national practice and finds formal expression in the national laws of a number of countries. Thus the French Extradition Law of March 10, 1927, Art. 33, provides:

> Si, dans une cause pénale, la comparution personnelle d'un témoin résidant en France est jugée nécessaire par un gouvernement étranger, le Gouvernement français, saisi de la citation par la voie diplomatique, s'engage à se rendre à l'invitation qui lui est adressée.
>
> Néanmoins, la citation n'est réçue et signifiée qu'à la condition que le témoin ne pourra être poursuivi ou détenu pour des faits ou des condamnations antérieures à sa comparution.

In the United States, while there is relatively little legislation dealing with the matter, a broad immunity from prosecution or service of process for persons summoned from without the State is stipulated in a number of statutes. The legislation of New York is typical:

> Laws of New York, 1932, ch. 255 (being section 618a of Code of Criminal Procedure, as amended), sec. 1, clause 3.—If a person comes into this state in obedience to a subpoena directing him to attend and testify in a criminal prosecution in this state he will not while in this state pursuant to such subpoena be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.
>
> If a person passes through this state while going to another state in obedience to a subpoena to attend and testify in a criminal prosecution in that state or while returning therefrom, he shall not while so passing through be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.

See also South Dakota, Sess. Laws (1923), p. 134, ch. 157, sec. 1; Wisconsin, Laws (1933), ch. 48, sec. 2, clause 3.

While it cannot be said that the principle of the present article is well established in Great Britain or the United States, in the absence of express statutory provision, the immunity probably being assured at common law only with respect to civil proceedings (see Alexander, *Law of Arrest*, 1932, p. 30; Archbold, *Criminal Pleading*, 27th ed., 1927, p. 494; Wharton, *Criminal Procedure*, 10th ed., 1918, I, 11–18; *United States* v. *Kirby* (1868), 7 Wall. (U. S.), 483; *In re Freston* (1883), 11 Q.B.D. 54), there is nevertheless something of a trend toward the principle here recognized. In *United States* v. *Baird* (1897), 85 Fed. 633, a witness who came under subpoena from Pennsylvania to New Jersey to testify there before a United States commissioner was arrested by New Jersey officers on a New Jersey criminal warrant while leaving the commissioner's office after testifying. The Federal District Court for New Jersey held that he must be discharged from custody and escorted safely to the New Jersey border by Federal officers. The National Conference of Commissioners on Uniform State Laws has recommended a similar provision for immunity. After consultation with the Commissioners,

and consideration of their draft and its own, the American Law Institute adopted (see *Am. L. Inst. Proc.*, IX, 174–178) a provision almost identical with the New York statute quoted *supra*. See American Law Institute, *Restatement on the Administration of the Criminal Law* (Tentative Draft No. 1), sec. 3, p. 9.

The principle has had its most impressive development in Europe, where it has been incorporated in a significant number of treaties of extradition and of judicial assistance. The formula most frequently used is that found in a recent extradition treaty between Latvia and the Netherlands (1930):

> Art. 12. Aucun témoin, quelle que soit sa nationalité, qui, cité dans l'un des deux pays, comparaîtra volontairement devant les juges de l'autre pays, ne pourra y être poursuivi ou détenu pour des faits ou condamnations criminels antérieurs, ni sous prétexte de complicité dans les faits, objets du procès où il figuera comme témoin. (117 *League of Nations Treaty Series*, No. 2701.)

Substantially the same formula is found in the following treaties: Argentina and Belgium (1880), Art. 15, 15 Martens, *N.R.G.* (2me sér.), 736; Argentina and Spain (1881), Art. 15, 12 *ibid.* 486; Monaco and Rumania (1881), Art. 15, 14 *ibid.* 117; Monaco and Switzerland (1885), Art. 16, 14 *ibid.* 312; Spain and Uruguay (1885), Art. 16, 14 *ibid.* 456; Austria-Hungary and Monaco (1886), Art. 14, 12 *ibid.* 509; Portugal and Russia (1887), Art. 13, 14 *ibid.* 175; Serbia and Switzerland (1887), Art. 16, 14 *ibid.* 387; Colombia and Spain (1892), Art. 18, 27 *ibid.* 171; Italy and Montenegro (1892), Art. 16, 22 *ibid.* 302; Luxembourg and Russia (1892), Art. 15, 18 *ibid.* 607; Argentina and the Netherlands (1893), Art. 16, 33 *ibid.* 635; Luxembourg and the Netherlands (1893), Art. 12, 22 *ibid.* 387; the Netherlands and Orange Free State (1893), Art. 12, 27 *ibid.* 207; the Netherlands and Russia (1893), Art. 12, 21 *ibid.* 3; Belgium and Orange Free State (1894), Art. 11, 22 *ibid.* 627; Denmark and the Netherlands (1894), Art. 12, 21 *ibid.* 701; Guatemala and Mexico (1894), Art. 16, 33 *ibid.* 567; the Netherlands and Portugal (1894), Art. 12, 22 *ibid.* 568; the Netherlands and Rumania (1894), Art. 12, 22 *ibid.* 619; the Netherlands and Spain (1894), Art. 12, 21 *ibid.* 707; Brazil and the Netherlands (1895), Art. 13, 37 *ibid.* 417; the Netherlands and Sweden (1895), Art. 13, 23 *ibid.* 105; Austria-Hungary and Switzerland (1896), Art. 19, 23 *ibid.* 244; Belgium and Serbia (1896), Art. 15, 23 *ibid.* 195; Germany and the Netherlands (1896), Art. 13, 23 *ibid.* 423; France and Italy (for Tunis, 1896), Art. 14, 23 *ibid.* 375; the Netherlands and Serbia (1896), Art. 12, 24 *ibid.* 636; Belgium and the Netherlands (1898), Art. 12, 15 *ibid.* 546; Denmark and Spain (1898), Art. 13, 15 *ibid.* 792; the Netherlands and Switzerland (1898), Art. 13, 28 *ibid.* 153; Congo and France (1899), Art. 17, 33 *ibid.* 105; Italy and Mexico (1899), Art. 16, 29 *ibid.* 392; Austria and Rumania (1901), Art. 14, 30 *ibid.* 567; the Netherlands and San Marino (1902), Art. 12, 31 *ibid.* 428; Belgium and San Marino (1903), Art. 17, 31 *ibid.* 565; Belgium and Montenegro (1905), Art. 15, 34 *ibid.* 731; Denmark

and Monaco (1905), Art. 12, 2 Martens, *N.R.G.* (3me sér.), 294; Paraguay and Switzerland (1906), Art. 17, Martens, *N.R.G.* (2me sér.), 281; Germany and Greece (1907), Art. 17, 2 *L.N.T.S.* No. 54; Belgium and Bulgaria (1908), Art. 14, 3 Martens, *N.R.G.* (3me sér.), 782; Germany and Paraguay (1909), Art. 13, 9 *ibid.* 388; Austria-Hungary and Serbia (1911), Art. 15, 6 *ibid.* 612; Mexico and Salvador (1912), Art. 16, 6 *ibid.* 456; Bulgaria and Rumania (1924), Art. 17, 35 *L.N.T.S.* No. 846; Hungary and Rumania (1924), Art. 18, 24 Martens, *N.R.G.* (3me sér.), 450; Belgium and Latvia (1926), Art. 14, 63 *L.N.T.S.* No. 1497; Austria and Finland (1928), Art. 15, 89 *ibid.* No. 2007; Finland and Italy (1929), Art. 18, 111 *ibid.* No. 2593; Finland and Estonia (1929), Art. 15, 23 Martens, *N.R.G.* (3me sér.), 328; Austria and Belgium (1932), Art. 16, 26 *ibid.* 157; Finland and the Netherlands (1933), Art. 15, 139 *L.N.T.S.* No. 3221.

Some of the more recent treaties incorporate a formula which is similar in effect but somewhat more precise in terms. See, for example, the treaty between Czechoslovakia and Yugoslavia (1923):

> Art. 61. No witness or expert, whatever his nationality may be, who appears of his own free will in answer to a summons before the authorities of the State making application can be prosecuted or detained in that State for previous criminal offences or convictions. Such persons may not claim this privilege, however, if through their own fault, they failed to leave the territory of the State making application within forty-eight hours from the time when their presence before the Court was no longer required. (30 *League of Nations Treaty Series*, No. 768.)

This formula appears in the following treaties: Czechoslovakia and Rumania (1925), Art. 16, 54 *L.N.T.S.* No. 1273; Bulgaria and Czechoslovakia (1926), Art. 17, 60 *ibid.* No. 1412; Czechoslovakia and Estonia (1926), Art. 17, 61 *ibid.* No. 1495; Czechoslovakia and Latvia (1926), Art. 17, 60 *ibid.* No. 1465; Belgium and Czechoslovakia (1927), Art. 16, 73 *ibid.* No. 1720; Czechoslovakia and Spain (1927), Art. 17, 121 *ibid.* No. 2791; Czechoslovakia and France (1928), Art. 19, 114 *ibid.* No. 1660; Hungary and Yugoslavia (1928), Art. 15, 104 *ibid.* No. 2385; Bulgaria and Spain (1930), Art. 17, 114 *ibid.* No. 2653; Czechoslovakia and Turkey (1930), Art. 24, 138 *ibid.* No. 3196; Germany and Turkey (1930), Art. 17, 133 *ibid.* No. 3071; Latvia and Spain (1930), Art. 17, 113 *ibid.* No. 2641; Belgium and Poland (1931), Art. 17, 131 *ibid.* No. 3005; Czechoslovakia and Denmark (1931), Art. 17, 26 Martens, *N.R.G.* (3me sér.), 139; Czechoslovakia and Latvia (1931), Art. 17, 126 *L.N.T.S.* No. 2889; Czechoslovakia and the Netherlands (1931), Art. 17, 26 Martens, *N.R.G.* (3me sér.), 148.

Provisions to the same effect, but in varying phraseology, are found also in the following treaties: Argentina and Paraguay (1877), Art. 16, 12 Martens, *N.R.G.* 460; Argentina and Italy (1886), Art. 15, 33 Martens, *N.R.G.* (2me sér.), 47; Brazil and Uruguay (1887), Art. 12, 14 *ibid.* 444; Peru and Spain (1898), Art. 14, 29 *ibid.* 574; Estonia and Latvia (1921), Art. 15,

37 *L.N.T.S.* No. 964; Estonia and Lithuania (1921), Art. 15, 43 *ibid.* No. 1054; Latvia and Lithuania (1921), Art. 15, 25 *ibid.* No. 620; Bulgaria and Yugoslavia (1923), Art. 15, 26 *ibid.* No. 643; Finland and Sweden (1923), Art. 15, 23 *ibid.* No. 575; Austria and Poland (1924), Art. 80, 56 *ibid.* No. 1326; Albania and Yugoslavia (1926), Art. 15, 91 *ibid.* No. 2056; Italy and Panama (1930), Art. 19, 140 *ibid.* No. 3240.

The same immunity is stipulated in practically all treaties of recent times which provide for the summoning of witnesses for personal appearance. The only treaties in which it is not included appear to be some of the earlier treaties, such as those between France and Switzerland (1828), Art. 6, 7 Martens, *N.R.G.* 665; France with Norway and Sweden (1869), Art. 11, 5 Martens, *N.R.G.* (3me sér.), 684; and those cited by Travers, *L'Entr'aide Répressive* (1928), sec. 649, between France and Hesse-Darmstadt (1853), Lippe-Detmold (1854), Portugal (1854), Waldeck and Pyrmont (1854), Austria-Hungary (1855), and Saxe-Weimar (1858). In short, the evidence of international practice which is revealed in the treaties of the last century shows an overwhelming preponderance in support of the principle incorporated in the present article. See Travers, *L'Entr'aide Répressive* (1928), sec. 649; Travers, *Le Droit Pénal International* (1922), IV, sec. 1858; von Martitz, *Internationale Rechtshilfe in Strafsachen* (1897), II, sec. 74. And see Fiore, *Effetti Internazionale delle Sentenze e degli Atti* (1877), II, p. 163.

Taking account particularly of the international practice which is recorded in a network of bilateral treaties, the League of Nations Committee of Experts for the Progressive Codification of International Law has prepared, through its subcommittee, a Draft Convention on Communication of Judicial and Extra-Judicial Acts in Penal Matters and Letters Rogatory in Penal Matters which contains the following:

> Art. 2. The Contracting Parties reciprocally undertake, at the request of a competent authority, to serve writs of summons upon witnesses or experts resident in their territory, irrespective of the nationality of such witnesses or experts. A witness or expert appearing voluntarily before an authority of the requesting Party in response to a writ of summons served upon him by the authority of the Party requested shall in no case, whatever his nationality, be subject, during his presence in the territory of the requesting Party, to criminal prosecution on a charge of having been a principal, an accomplice or an accessory, or of having helped to promote the act in respect of which the criminal proceedings are taken or any other act committed before he entered the territory of the requesting State. In like manner, no sentence passed upon him, on account of acts committed before he entered the country, may be executed on his person, nor may he be arrested for any infringement of the law which took place before his journey. . . .
>
> The special position of the witness or expert as regards the jurisdiction of the foreign State shall be forfeited if he fails to leave the territory of that State within a reasonable time after having been heard. This time limit shall be fixed for him by the tribunal making the requisition. (*League of Nations Document*, 1927. V. 6. p. 28.)

Thus it may be claimed for the present article that it is scarcely more than a crystallization in text of a principle which is at once in harmony with general international practice and the most obvious requirements of fairness and justice. It represents no new departure, but is a principle which is clearly ripe for statement in the form in which it appears in this Convention.

As in the three articles immediately preceding (Articles 12, 13 and 14), the text protects aliens only. It is common practice to extend the same immunity or privilege to nationals and this practice is to be commended; but the present Convention consistently avoids the inclusion of safeguards which would protect individuals against action by the State or States to which they owe allegiance as nationals. It is assumed that in the existing state of international law provision for such safeguards should be left in all cases to the discretion of each State. It is of course clear that there is nothing in the present Convention which prevents States from concluding other treaties, or from giving effect to other treaties in force, which assure such protection to their nationals. *Cf.* Article 2, *supra.*

The text provides a temporary immunity only. The alien is safeguarded "during his presence . . . for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice." The immunity begins at the moment the alien enters the State or a place subject to its authority. It continues, of course, until he has had a reasonable time in which to leave the State or a place subject to its authority after testifying or otherwise assisting. If the alien remains of his own free will after a reasonable time has elapsed, his immunity will be terminated. If he remains because of illness, interruption of the transport system, detention by local authorities, or other circumstance over which he has no control, he cannot be said to remain of his own free will and the immunity will continue. After the termination of the temporary immunity, the State resumes its original right to apprehend within its territory or a place subject to its authority or to obtain the surrender of the alien from another State for prosecution and punishment.

The text assures the alien an immunity while he is assisting either civil or criminal administration. While the legislation and treaties supporting the text deal chiefly with the immunity of persons called in by the State's officials to assist in the administration of criminal justice, and while it seems less likely that a State will call in aliens to assist in civil cases, there seems to be no good reason why the principle should not apply whether the proceedings assisted are civil or criminal. Some civil litigation may be quite as important to the good order and well-being of a State as are criminal cases. If the State concludes that it is more important to have an alien's aid in a civil case than it is to proceed with the prosecution of a crime previously committed, the same reasons of fairness and justice should prevent the State from taking advantage of his presence thus obtained.

The immunity provided prevents punishment as well as prosecution so

long as the immunity lasts. Consequently if one who has been convicted but not punished returns to testify or otherwise assist, at the request of State officials, he may not be punished until he has had a reasonable opportunity to leave the State or a place subject to its authority. On the other hand, the alien may claim the immunity which this article provides only if he enters the State or a place subject to its authority "at the request of officials of that State." No immunity may be claimed by one who enters at the request of a party to a civil action or other person having no authority from the State to make a request in its behalf.

Finally, the immunity does not safeguard against prosecution or punishment for offences committed "while present for such purpose" (*e.g.*, perjury in giving testimony before the tribunal). See *Ex parte Levi* (1886), 28 Fed. 651. The French Extradition Law, quoted *supra*, allows immunity only "pour des faits ou des condamnations antérieures à sa comparution," the Laws of New York, quoted *supra*, only for "matters which arose before his entrance into this state under the subpoena," and a similar limitation is incorporated in the extradition treaties, the treaties of judicial assistance, and the Draft submitted to the League of Nations Committee of Experts. In conformity with practice and sound principle, the present article protects against prosecution or punishment for acts or omissions committed "before entering the territory of the requesting State" (see the Draft prepared for the League of Nations Committee of Experts, quoted *supra*) and expressly excepts "crimes committed while present for such purpose."

ARTICLE 16. APPREHENSION IN VIOLATION OF INTERNATIONAL LAW

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.

COMMENT

If custody of "any person", national or alien, is obtained "by recourse to measures in violation of international law or international convention," the present article provides that the State thus obtaining custody may neither prosecute nor punish such person until it has first obtained the consent of the State or States whose rights were violated by such measures. The principle thus formulated is in part a restatement of existing practice and in part a reconciliation of conflict between contemporary doctrines. It is believed that its inclusion in a comprehensive convention on the subject of international penal competence is indicated by the most persuasive considerations of policy.

It is everywhere agreed, of course, that "recourse to measures in violation of international law or international convention" in obtaining custody of a

person charged with crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise. It is not everywhere agreed that there may be no prosecution or punishment in reliance upon custody thus obtained "without first obtaining the consent of the State or States whose rights have been violated by such measures." Thus the present article assures an additional and highly desirable sanction for international law in the matter of recovery of fugitives from criminal justice. It removes much of the incentive to such irregular or illegal recoveries as have been the source of international friction in the past. *Cf.* the *Savarkar Case* (1911), Scott, *The Hague Court Reports*, p. 276; *Dominguez* v. *State* (1921), 90 Tex. Cr. 92, Dickinson, *Cases*, p. 755; *Vaccaro* v. *Collier* (1930), 38 F. (2d) 862, (1931), 51 F. (2d) 17; *Ex parte Lopez* (1934), 6 F. Supp. 342; Moore, *Treatise on Extradition and Interstate Rendition* (1891), I, ch. 7; Moore, *Digest of International Law* (1906), IV, 328. It provides an added incentive for recourse to regular methods in securing custody of fugitives. And if, peradventure, the custody of a fugitive has been obtained by unlawful methods, the present article indicates an appropriate procedure for correcting what has been done and removing the bar to prosecution and punishment. The desirability of such a provision in a convention which embodies a comprehensive statement of the broad penal competence supported by contemporary practice would seem to require no emphasis.

While it is frankly conceded that the present article is in part of the nature of legislation, it is not to be understood that the principle stated is without support in national jurisprudence or international practice. In the United States, for example, the law is in accord with this article in cases in which a person has been brought within the country by recourse to measures in violation of an international convention. A complete lack of jurisdiction in such cases has been asserted in noteworthy language in *United States* v. *Ferris* (1927), 19 F. (2d) 925, *Annual Digest*, 1927–1928, Case No. 127, Hudson, *Cases*, p. 676, a prosecution of members of the crew of a foreign ship for conspiracy to violate the Prohibition and Tariff Acts following seizure of the ship some 270 miles off the west coast of the United States. In sustaining pleas to the jurisdiction, Judge Bourquin said:

> Hence, as 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 there. 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 honor, 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 illegally before the court, in violation of a treaty, likewise cannot be subjected to trial. Equally in both cases is there an absence of jurisdiction.

Cf. Ford v. *United States* (1927), 273 U. S. 593; 21 *Am. Jour. Int. L.* (1927), 505; *Annual Digest*, 1925–1926, Case No. 110, in which it was held that an extraterritorial arrest was within the limits prescribed by treaty.

A similar principle has been emphatically approved by the Supreme Court of the United States in case of proceedings instituted to forfeit for violation of the customs statutes a foreign vessel seized outside territorial waters in violation of treaty. The court said:

> The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority. (*Cook* v. *United States*, 1933, 288 U. S. 102, 121.)

Lacking the power to seize, in consequence of the treaty, the United States had no power to subject the vessel to its laws. The objection was not to the jurisdiction of the court alone, but to "the jurisdiction of the United States." The objection was not met by seeking to distinguish between the custody of the Coast Guard and the subsequent custody of the marshall of the court, nor was the defect of jurisdiction cured by an answer to the merits on the part of the individual claimant. The Supreme Court concluded that "to hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty." "The ordinary incidents of possession of the vessel and the cargo," said the court, "yield to the international agreement." *Cook* v. *United States* (1933), 288 U. S. 102, 121–122; 27 *Am. Jour. Int. L.* (1933), 305. See Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 *Am. Jour. Int. L.* (1934), 231.

The principle of the present article finds further support in the rule of Anglo-American jurisprudence which forbids the trial of an extradited person for any offence, committed prior to his extradition, other than the offence for which he was surrendered under the extradition treaty. The rule is stated in the leading American case as follows:

> 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. (*United States* v. *Rauscher*, 1886, 119 U. S. 407, 430; Dickinson, *Cases*, pp. 738, 744.)

See *Re Alice Woodall* (1888), 16 Cox C. C. 478. See also *Cosgrove* v. *Winney* (1899), 174 U. S. 64; *Johnson* v. *Browne* (1907), 205 U. S. 309. *Cf. In re Rowe* (1896), 77 Fed. 161; *State* v. *Rowe* (1898), 104 Ia. 323; *Cohn* v. *Jones* (1900), 100 Fed. 639; *State* v. *Spiegel* (1900), 111 Ia. 701; *Greene* v. *United States* (1907), 154 Fed. 401; *Collins* v. *O'Neil* (1909), 214 U. S. 113; *People* v. *Hanley* (1925), 240 N. Y. 455. Custody is legally obtained in such a case, but only for a particular purpose, and the extradited person may be subjected to the national authority for that purpose only. As the Supreme Court of the United States has said:

> As this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. (*United States* v. *Rauscher*, 1886, 119 U. S. 407, 422.)
>
> In the case of United States v. Rauscher . . . the effect of extradition proceedings under a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was, that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. (*Ker* v. *Illinois*, 1886, 119 U. S. 436, 443.)
>
> It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then to punish him for another and different offense. (*Johnson* v. *Browne*, 1907, 205 U. S. 309, 321.)

For an exhaustive study of the whole subject, see Moore, *Treatise on Extradition and Interstate Rendition* (1891), I, ch. 6.

The same rule has been applied in the United States, in even more striking circumstances, where the national court was convinced that an international agreement must be implied, in the absence of a formal treaty, in order to escape the conclusion that there had been a violation by national authorities

of an obligation of international law. The case is *Dominguez* v. *State* (1921), 90 Tex. Cr. 92; Dickinson, *Cases*, p. 755; 20 *Mich. L. Rev.* 536; 31 *Yale L. Jour.* 443. A United States expeditionary force had been sent into Mexico in "hot pursuit" of bandits. Having apprehended a Mexican, the force discovered upon its return that he was not one of the bandits pursued and he was thereupon surrendered to local Texas authorities who proceeded to prosecute him for a murder previously committed in Texas. Relying upon the rule of the extradition cases, it was contended in behalf of the accused that the Texas court was without jurisdiction to prosecute him for the murder until he had been allowed an opportunity to return to Mexico. The prosecution contended, on the other hand, that the accused had been abducted or kidnapped without Mexico's consent and consequently that he could be prosecuted for the murder without any breach of treaty obligation. The only information as to the source and scope of the expedition's authority which the court had before it was the testimony of the officer in command that he was acting under instructions from the United States War Department. It was held that an agreement between Mexico and the United States must be presumed, consequently that the rule of the extradition cases was applicable, and that the accused might resist trial for the murder until such time as he should voluntarily subject himself to the jurisdiction of the United States or until the consent of Mexico should be obtained. The entry of the expeditionary force into Mexico for the purpose of apprehending bandits, said the court, would have been "a violation of Mexican territory contrary to the law of nations in the absence of consent of the Mexican Government." 90 Tex. Cr. 92, 97. Consequently it was to be assumed that the instructions from the War Department were in accord with a permission granted by the Mexican Government. The court concluded that

> the same moral obligation that would restrain the United States Government from transgressing the implied limitations upon it under its treaty [of extradition] with Mexico, would necessarily prevail with reference to the agreement resting upon the "comity of nations", and if the legal obligation is the same, the appellant cannot be held for the offense which we are now considering without the opportunity to return to his country in order that it may there determine whether he shall be surrendered for trial under the treaty of extradition. (90 Tex. Cr. 92, 98–99.)

The principle of Anglo-American jurisprudence which forbids the trial of an extradited person for any offence other than that for which he was extradited is also a principle of international practice. Moore says:

> Among writers on international law there is almost uniform concurrence in the opinion that a person surrendered for one offence should not be tried for another until he shall have been replaced within the jurisdiction of the surrendering state or had an opportunity to return thereto. (*Treatise on Extradition and Interstate Rendition*, 1891, I, p. 217.)

See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 293 ff; Travers, *Le Droit Pénal International* (1922), V, sec. 2534 ff; Travers, *L'Entr'Aide Répressive Internationale* (1928), sec. 354 ff. The principle is expressly stipulated in practically all modern extradition treaties and is incorporated in the Draft Convention on Extradition, Art. 23, Research in International Law (1935), *supra*, pp. 28, 99.

In Great Britain, the United States, and perhaps elsewhere, the national law is not in accord with this article in cases in which a person has been brought within the State or a place subject to its authority by recourse to measures in violation of customary international law. It is of course everywhere agreed that the State or States whose rights have been violated by such measures are entitled to satisfaction from the responsible State. See the *Colunje Claim* (1933), American and Panamanian General Claims Arbitration, p. 733. "As a rule, the release or restoration of the person carried away, is requested" (Moore, *Treatise on Extradition and Interstate Rendition*, I, p. 288); and such a request ordinarily brings prompt and unconditional compliance. See Moore, *op. cit.*, I, ch. 7; Moore, *Digest of International Law* (1906), IV, p. 328; Travers, "*Des arrestations au cas de venue involontaire sur le territoire,*" 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 627, 642; Clunet, *Questions de Droit relatives à l'Incident Franco-Allemand de Pagny* (1887). *Cf.* the *Savarkar Case* (1911), Scott, *The Hague Court Reports*, p. 276. But the competence of the national authorities to proceed with prosecution and punishment, in the absence of an international reclamation, is asserted. A plea in behalf of the individual accused that custody was obtained irregularly and in violation of international law will not be entertained. The view is held that only the injured State can be permitted to raise the issue, that the issue is essentially international and political in character, and that the national authorities may proceed with prosecution and punishment as in case of custody lawfully obtained. See *Ex parte Scott* (1829), 9 B. & C. 446; *State* v. *Brewster* (1835), 7 Vt. 118; *Ker* v. *People* (1884), 110 Ill. 627; *Ker* v. *Illinois* (1886), 119 U. S. 436; *Ex parte Wilson* (Tex. Crim. App. 1911), 140 S. W. 98; *United States* v. *Unverzagt* (1924), 299 Fed. 1015, *Annual Digest*, 1923–1924, Case No. 161; *Ex parte Ponzi* (1926), 106 Tex. Cr. 58; *Ex parte Lopez* (1934), 6 F. Supp. 342; the position of the United States in the Martinez controversy with Mexico, *U. S. Foreign Relations* (1906), II, p. 1121; Moore, *Treatise on Extradition and Interstate Rendition* (1891), I, ch. 7; Travers, "*Des arrestations au cas de venue involontaire sur le territoire,*" 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 627.

In the American case of *State* v. *Brewster* (1835), 7 Vt. 118, in which it was moved that the indictment be dismissed on the ground that the accused had been forcibly taken against his will from Canada by citizens of the United States for the purpose of being prosecuted for the offences named, the court said:

> It is a well settled rule of international law, that a foreigner is bound to regard the criminal laws of the country in which he may sojourn, and for any offence there committed, he is amenable to those laws. In this case, the offence, if committed at all, was committed within our jurisdiction, and is punishable by our laws. The respondent, although a foreigner, is, if guilty, equally subject to our jurisdiction with our own citizens. His escape into Canada did not purge the offence, nor oust our jurisdiction. Being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice.
>
> It becomes then immaterial, whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there were anything improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court. (7 Vt. 118, 121–122.)

In the case of *Ex parte Lopez* (1934), 6 F. Supp. 342, there was a petition for habeas corpus in behalf of one who had been abducted from Mexico to stand trial in the United States for violation of the United States narcotic laws and the Government of Mexico intervened and asked that the accused be delivered into its custody:

> Where he will be detained and held under provisional arrest, if requested, pending further disposition in accordance with the form and procedure in such cases made and provided, under and by virtue of the Treaty between said Governments; all to the end that the friendly relations existing between the Government of the United States of America and the United States of Mexico may continue unimpaired by reason of the unhappy occurrence of the invasion of the sovereignty of Intervenor, and the abduction of one of its citizens from its soil, and that the solemn compact between said governments may not be nullified by the unlawful and illegal acts of individual citizens of either of said governments.

The writ of habeas corpus was denied and the intervention dismissed, the court saying:

> 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. *State* v. *Brewster*, 7 Vt. 121.

See also *The Ship Richmond* (1815), 9 Cr. (U. S.) 102, and *The Merino* (1824), 9 Wh. (U. S.) 391, in which forfeitures for violation of national laws were prosecuted to a successful conclusion although the ships had been seized within the territorial waters of a friendly State.

British and American prize law is to the same effect. It has been held consistently that captures made in violation of neutral territorial waters will be restored only upon demand of the neutral State. As against an individual enemy or neutral claimant, such captures are regarded as valid.

Lord Stowell said that it was "a known principle" of his court that "the privilege of territory will not itself enure to the protection of property, unless the state from which that protection is due, steps forward to assert the right." *The Purissima Conception* (1805), 6 C. Rob. 45, 47. See also *The Twee Gebroeders* (1800), 3 C. Rob. 162, 162 n.; *The Anna* (1805), 5 C. Rob. 373; *The Eliza Ann* (1813), 1 Dods. 244; *The Bangor* [1916] P. 181; *The Düsseldorf* [1920] A. C. 1034, 1037; *The Valeria* [1921] 1 A. C. 477; *The Pellworm* [1922] 1 A.C. 292; *The Anne* (1818), 3 Wh. (U. S.) 435; *The Santissima Trinidad* (1822), 7 Wh. (U. S.) 283, 349; *The Lilla* (1862), 2 Sprague 177; *The Sir William Peel* (1866), 5 Wall. (U. S.) 517; *The Adela* (1868), 6 Wall. (U. S.) 266; *The Florida* (1880), 101 U. S. 37, 42.

On the other hand, there is some evidence that the principle of the present article has support in the practice of important European countries. French courts would appear to go even farther than the present article requires in holding that there is no jurisdiction unless the return of the accused is voluntary or by regular extradition procedure. See the cases cited by Travers, in 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 627, and by Clunet, *Questions de Droit relatives à l'Incident Franco-Allemand de Pagny* (1887). It is noted that Germany freed on Sept. 22, 1886, two Swiss nationals and a German national, who had been arrested by German officials in Switzerland, without awaiting a protest by Swiss authorities. See Clunet, *op. cit.*, p. 9. In harmony with the same practice, it is said that the prize tribunals of France, Germany and Italy consider a capture made in violation of neutral territorial waters as "absolutely illegal irrespective of whether the neutral power in whose waters the capture was made intervenes or not." Garner, *Prize Law During the World War* (1927), pp. 227–230.

However, Travers concludes:

> 1° L'application d'une loi pénale, préalablement reconnue compétente, n'est nullement subordonnée à un acte de soumission volontaire ou à l'agrément de l'auteur du fait incriminé. De ce principe découle la règle de la parfaite légalité des arrestations opérées à l'encontre d'individus arrivés contre leur plein gré sur le territoire, que ces arrestations aient lieu en vue d'extraditions ou en raison soit de poursuites en cours sur le territoire, soit de décisions répressives prononcées par des juridictions locales.
>
> 2° Le respect des souverainetés étrangères constituant une des règles fondamentales du droit international, exception doit être fait à la règle générale lorsque l'acte, qui a été la cause de la venue involontaire sur le territoire, a constitué une atteinte à une souveraineté étrangère, mais les États étant seuls juges des exigences de leur droit de souveraineté, le vice, existant en ce cas, ne peut être invoqué que par le gouvernement lésé. Il ne saurait appartenir à un malfaiteur quelconque de parler au nom de la souveraineté violée. ("*Des arrestations au cas de venue involontaire sur le territoire*," 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.*, 1917, 627, 646.)

It will be seen that the practical effect of the Anglo-American rule, approved by Travers, *supra*, is that the national law lends no support whatever

to the observance of admitted international obligations. On the contrary, it takes advantage of an admitted violation of international obligation to proceed with the prosecution and punishment of a person of whom custody has been illegally obtained. Whatever refinements of distinction may be invoked, its practical consequences are in direct conflict with the salutary rule of United States law that there is no jurisdiction to prosecute a person who has been arrested in violation of treaty. It is believed that the distinction made in United States law between arrests in violation of treaty and arrests in violation of customary international law is arbitrary and unsound, prompted by a shortsighted desire to prosecute the person of whom custody has been illegally obtained, and that it should not be approved in a general international convention on jurisdiction with respect to crime. The present article adopts the United States rule applicable to arrests in violation of treaty. It rejects the rule of such English and American cases as *Ex parte Scott, State* v. *Brewster, Ker* v. *People, United States* v. *Unverzagt,* and *Ex parte Lopez,* noted *supra.* It thus accomplishes a desirable clarification and simplification of the law in conformity with the best traditions of both national and international jurisprudence.

> If the person or thing which is the subject of controversy has been brought within reach of the court's process by a breach of treaty or international law, the court should approve no arbitrary or face-saving distinctions. The court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation which it represents. If there was no jurisdiction in the nation to make the original seizure or arrest, there should be no jurisdiction in the court to subject to the nation's law. In terms of American precedents, this means that the underlying principle of United States v. Rauscher is correct and that the distinction attempted in Ker v. Illinois is arbitrary, unsound, and should be repudiated; that the principle of *The Mazel Tov* [Cook v. United States, 288 U. S. 102] is unimpeachable; and that such cases as *The Ship Richmond* and *The Merino* must be relegated to the category of cases discredited and overruled. To hold otherwise would go far to nullify the purpose and effect of the salutary principle, well established in Anglo-American jurisprudence, that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 *Am. Jour. Int. L.,* 1934, 231, 244.)

It only remains to be emphasized that by no means every irregularity in the recovery of a fugitive from criminal justice is a "recourse to measures in violation of international law or international convention." If the State in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality. In the *Savarkar Case* (1911), Scott, *The Hague Court Reports,* p. 276, a tribunal of the Permanent Court of Arbitration held that there was no violation of international law even

though there was evidence of a mistake on the part of a local officer of the State from which the fugitive was taken. The award declared that

> Whereas, while admitting that an irregularity was committed by the arrest of Savarkar and by his being handed over to the British police, there is no rule of international law imposing in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

Cf. the *Colunje Claim* (1933), American and Panamanian General Claims Arbitration, p. 733. The determination of debatable questions as to whether there has been "a violation of international law or international convention," in particular circumstances, may be safely left to the processes of international settlement and adjudication.

ARTICLE 17. INTERPRETATION OF CONVENTION

The provisions of the present Convention shall in no case be interpreted

(a) To impose upon a State an obligation to exercise the jurisdiction which it is entitled to exercise under this Convention;

(b) To invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds;

(c) To foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention.

COMMENT

In view of the scope of the competence which is recognized in the present Convention, in conformity with national legislation and international practice, the Convention should safeguard explicitly against certain implications or interpretations. Such safeguards, applicable to the Convention as a whole as well as to each and every provision incorporated therein, are embodied in the text of the present article.

In the first place, the Convention is in no case to be so interpreted as to impose upon a State an obligation to exercise all of "the jurisdiction which it is entitled to exercise under this Convention." A State may be under an international obligation to exercise penal competence in certain cases, by virtue of some principle of international law or treaty provision; but the present Convention imposes no such obligation. A State may not wish to exercise in full, for example, the territorial competence which is formulated in Article 3, the competence with respect to its public or private ships or aircraft which is stated in Article 4, the competence with respect to nationals or persons assimilated to nationals which is stated in Articles 5 and 6, or the competence with respect to aliens for acts done outside the State which is defined and limited in Articles 7, 8, 9, and 10. The Convention imposes no

obligation to exercise such competence; it attempts only to define and limit the jurisdiction which a State may exercise. It is conceivable, furthermore, that a State may wish to delegate to another State by treaty or otherwise the exercise of some part of its penal competence. Thus States under an extra-territorial régime have done something of the kind in the past; and it is not inconceivable that States under some form of guaranty, protection, mandate or other special relationship may find it advantageous to do something of the kind in the future. The Convention does not prevent such a delegation.

In the second place, while the Convention expressly negatives any inference that a State is competent because competence is not expressly denied (see Article 2, *supra*), a State should not be regarded as incompetent in a particular case because it has misconceived the principle upon which its jurisdiction is properly based. For example, if a State in a particular case should proceed to prosecute and punish in reliance upon evidence that the person prosecuted was a national (see Article 5, *supra*), only to discover upon additional evidence that the person prosecuted had been naturalized in another State before the act or omission was committed, it should not be regarded as incompetent to continue the prosecution if the additional evidence also revealed that the act or omission was committed in whole or in part within its territory (see Article 3, *supra*).

In the correspondence between Mexico and the United States concerning the Cutting incident, arising out of the arrest in Mexico of a United States national charged with publishing in the United States defamation of a Mexican national, it was contended in behalf of the United States that Mexico could not properly base its claim to jurisdiction over Cutting on the ground that he had committed an offence against a Mexican national in the United States; but it was conceded that Mexico could properly base its claim to jurisdiction on the ground that Cutting had circulated in Mexico a libel printed in the United States "in such manner as to constitute a publication of the libel in Mexico within the terms of the Mexican law." See Bayard to Connery, Nov. 1, 1887, *U. S. For. Rel.* (1887), 751, 753; Dickinson, *Cases*, 673, 679. *Cf. Commonwealth* v. *Blanding* (1825), 3 Pick. (Mass.) 304; *State* v. *Piver* (1913), 74 Wash. 96.

In the case of the *S.S. Lotus*, before the Permanent Court of International Justice, it was contended in behalf of France that Turkey was without jurisdiction to prosecute for involuntary manslaughter the officer in charge of a French ship which had run down and sunk a Turkish ship on the high seas with the resulting loss of eight Turkish nationals. It was not clear whether the Turkish prosecution had been based upon Article 6 of the Turkish Penal Code, asserting jurisdiction to prosecute a foreigner for an offence committed abroad to the prejudice of a Turkish subject, or upon other provisions of Turkish legislation. The court was evenly divided, but it was decided, by the President's casting vote, that the court was not required to pass upon the international competence of Turkey to prosecute under Article 6 of its

Penal Code since Turkey's competence could be sustained on the ground that the offence might be regarded as having been committed on the Turkish ship. The court said:

> For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 24.)

It is believed that this is correct in principle and that it is not unlike the practice often followed in administering national law in cases in which a complaining party is clearly entitled to relief but has misconceived the course to be pursued. *Cf. Dupont de Nemours & Co.* v. *Vance* (1856), 19 How. (U. S.) 162. Consequently the present article stipulates that nothing in the Convention shall be so interpreted as to "invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds."

In the third place, it is necessary to emphasize, while defining the jurisdiction to prosecute and punish for crime in the broadest terms, that the present Convention does not recognize an unlimited competence to make acts or omissions punishable. It is true that this is a matter of substantive penal law and hence is outside the scope of the present Convention. The Convention assumes that the formulation of substantive penal law is generally reserved to States. It must not be implied, however, that States may denounce acts or omissions as punishable without limitation. National standards of approved and objectionable behavior have varied greatly in the past and will undoubtedly vary greatly in the future. *Cf.* Sellin, "Crime," *Encyclopedia of the Social Sciences*, IV, 563. While perhaps unlikely, it is conceivable that one or more States may attempt at some time in the future to denounce as criminal certain acts or omissions with respect to which an overwhelming majority of States would refuse emphatically to admit any objectionable quality whatever. The right to object to such a conceivable attempt is not in any way affected by the Convention's provisions. The broad definition of competence to prosecute and punish for crime which the Convention incorporates, especially in the matter of crimes committed by aliens outside the territory, makes it imperative that there should be no possibility of unintended implications in this respect. Hence nothing in the Convention shall ever be so interpreted as to "foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention."

ARTICLE 18. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

[See comment on identic Article 28, Draft Convention on Extradition, Research in International Law (1935), *supra*, pp. 223–228.]

APPENDIX 1

TREATY TO ESTABLISH UNIFORM RULES FOR PRIVATE INTERNATIONAL LAW

Signed at Lima, November 7, 1878[1]

FIFTH TITLE. NATIONAL JURISDICTION OVER CRIMES COMMITTED ABROAD

Art. 34. Those who outside of the country commit the crimes of falsifying the national money, bank-notes having legal circulation, public bonds or other national documents, will be tried by the courts of the Republic according to its laws, when they are arrested on its territory or their extradition is obtained.

The national courts are likewise competent to try:

1. Citizens of the Republic who have committed abroad a crime of arson, murder, robbery, or any other which gives rise to extradition; provided that there is a complaint of the victim or a request by the Government of the country where the crime was committed; and

2. Aliens who, after having committed the same crimes against citizens of the Republic, come to reside in it; provided that a complaint by the interested party precedes [the action]; and

3. Pirates.

Art. 35. The proceedings in these cases will be subject to the laws of the country [where the trial occurs].

Art. 36. When the punishment for the crime is different in the place of its perpetration from the place of the trial, the less severe shall be applied.

Art. 37. 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 by lapse of time according to the law of the country in which the crime was committed.

APPENDIX 2

RESOLUTION RELATIVE TO CONFLICTS OF PENAL LAWS WITH RESPECT TO COMPETENCES

Adopted by the Institute of International Law at Munich, September 7, 1883.[2]

Art. 1er. La compétence territoriale de la loi pénale est celle du pays où se trouve le coupable lors de son activité criminelle.

Art. 2. La justice pénale d'un pays dans le territoire duquel se réalisent ou devaient se réaliser, selon l'intention du coupable, les effets de son activité, n'est pas compétente à raison de ces effets seuls.

Art. 3. Par contre, si la réalisation desdits effets devait, selon l'intention de l'agent, avoir lieu seulement dans un pays dont la législation pénale ne regarde comme criminels ni l'action

[1] The signatories were Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela. Translation from text in Seijas, *El Derecho Internacional Hispano-Americano*, I, pp. 260–269 (Caracas, 1884).

[2] *Annuaire de l'Institut de Droit International*, VIIe année, 1883–1885, p. 156.

destinée à produire ces effets, ni ces effets mêmes, l'Etat dans le territoire duquel l'*action* est commise ne pourra déclarer punissable cette action comme tentative ou acte préparatoire.

Il pourra déclarer punissable cette action expressément comme délit spécial, en faisant abstraction des effets que l'agent voulait atteindre.

Art. 4. Par le mot "coupable," on comprend toutes sortes de "coupables"—principaux, secondaires ou accessoires—participant d'une façon quelconque à l'infraction (auteurs, provocateurs, aides et complices en général, continuateurs, recéleurs et tous ceux qui favorisent l'impunité).

Art. 5. Toutefois, des Etats limitrophes ou voisins pourraient, en vertu d'un traité et après consentement préalable du gouvernement, s'accorder réciproquement une prorogation de leur compétence territoriale en vue de réunir, dans le même procès, le jugement du coupable accessoire ou secondaire avec celui du coupable principal, ou d'un autre coupable accessoire ou secondaire, pourvu qu'il ne s'agisse pas d'infractions ou attentats à la sûreté politique d'un Etat, et que le tribunal décrète la peine encourue selon la loi de l'activité criminelle (Art. 1–3).

Art. 6. Lorsque la loi pénale d'un pays, compétente d'après la principe de la territorialité (Art. 1–3), considère comme infraction une et indivisible dans le sens juridique, des actes commis en partie au dedans des frontières et en partie au dehors, la justice pénale de ce pays pourrait juger et punir même les actes commis à l'étranger.

Il y aurait donc une compétence pénale double ou même multiple, dont l'une, dûment exercée par prévention, exclurait l'autre et serait respectée partout, sauf les cas de délit contre la sûreté de l'Etat et des infractions mentionnées à l'article 8.

Art. 7. Chaque Etat conserve le droit d'étendre sa loi pénale nationale à des faits commis par ses nationaux à l'étranger.

Art. 8. Tout Etat a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'Etat en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.

Art. 9. Les nationaux restent responsables, selon la législation de leur patrie, pour toute infraction dont ils se rendent coupables dans des pays qui ne sont soumis à aucune souveraineté quelconque ou qui sont régis par une justice pénale fondée sur des principes tout à fait différents de ceux qui sont adoptés par les législations des pays chrétiens ou reconnaissant les principes du droit des pays chrétiens.

Dans cette hypothèse, cependant, le juge est tout particulièrement tenu d'avoir égard aux circonstances de fait qui peuvent amoindrir ou exclure la culpabilité.

La législation nationale peut établir des règles spéciales pour ces cas.

Art. 10. Chaque Etat chrétien (ou reconnaissant les principes du droit des pays chrétiens), ayant sous sa main le coupable, pourra juger et punir ce dernier, lorsque, nonobstant des preuves certaines de prime abord d'un crime grave et de la culpabilité, le lieu de l'activité ne peut être constaté ou que l'extradition du coupable, même à sa justice nationale, n'est pas admise ou est réputée dangereuse.

Dans ces cas, le tribunal jugera d'après la loi la plus favorable à l'accusé, eu égard à la probabilité du lieu du crime, à la nationalité du coupable et à la loi pénale du tribunal même.

Art. 11. Le tribunal qui, d'après les règles mentionnées ci-dessus, doit appliquer la loi la plus favorable à l'accusé en cas de divergence des peines sanctionnées dans les législations différentes, apprécie souverainement la gravité des peines. La peine de mort est toujours regardée comme étant la plus sévère.

Art. 12. Les peines prononcés par jugement régulier des tribunaux d'un Etat quelconque, même non compétent, mais dûment subies, doivent empêcher toute poursuite dirigée à raison du même fait contre le coupable.

Seraient exceptés, toutefois, les délits contre la sûreté des Etats et ceux mentionnés ci-dessus, à l'article 8.

Une peine subie seulement en partie, s'il n'y a pas eu remise du reste, n'entraverait pas la poursuite devant les tribunaux d'un autre pays.

Cependant, dans ce cas, on offrira l'extradition même d'un national, lorsqu'il y a extradition entre les pays respectifs et que le coupable préfère l'extradition; excepté seulement les cas des crimes et délits contre la sûreté de l'Etat et ceux mentionnés ci-dessus, à l'article 8.

Toutes les fois qu'il y a lieu d'exercer de nouvelles poursuites après un jugement prononcé à l'étranger, on tiendra compte de la peine que le coupable a déjà subie du chef du même fait. L'appréciation du tribunal quant à la mitigation de la peine, dans ces cas, sera souveraine.

Art. 13. Les acquittements prononcés du chef d'insuffisance des preuves produites contre l'accusé seraient valables partout. De même, les grâces accordées par le souverain d'un pays ayant sous sa main le coupable.

Les acquittements motivés par la non-criminalité du fait auraient même force que la loi du pays déclarant non-punissable ce même fait.

S'il y avait doute quant à la portée du jugement, la présomption serait en faveur du prévenu.

La prescription est traitée de la même manière que l'acquittement motivé par la non-criminalité.

Ces règles ne s'appliquent pas aux délits contre la sûreté de l'Etat, ni aux cas exceptionnels mentionnés à l'article 8.

Art. 14. L'exécution de la peine ne peut jamais avoir lieu hors du pays où le jugement est prononcé, sauf le cas d'une convention internationale ou conclue entre les membres d'un Etat formant un système fédératif.

Art. 15. L'aggravation de la peine à raison de récidive, quand la condamnation antérieure est émanée d'un tribunal étranger, ne peut être appliquée qu'après examen préalable de l'infraction antérieure. Cependant, selon l'avis du tribunal, le *dossier* de l'instruction étrangère pourra suffire. Le tribunal, vu les circonstances et les doutes soulevés, pourra écarter souverainement la question d'aggravation à raison de récidive.

APPENDIX 3

TREATY ON INTERNATIONAL PENAL LAW

Signed at Montevideo, January 23, 1889[1]

TITLE I. JURISDICTION

Art. 1. 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.

Art. 2. Acts of a criminal nature committed in a State, which would be justiciable by its authorities if their effects were produced there; but which only injure rights and interests protected by the laws of another State, will be tried by the courts and punished according to the laws of the latter.

Art. 3. When a crime affects different States, the jurisdiction of the courts of the injured country on whose territory the criminal is apprehended will prevail to judge it.

If the criminal takes refuge in a State different from those injured, the jurisdiction of the courts of the country which had priority in seeking extradition will prevail.

Art. 4. In the cases covered by the preceding article, treating of a single criminal, only one trial shall take place; and the more severe penalty of those provided by the various penal laws infringed shall be applied.

Art. 6. Acts done in the territory of a State, which were not punishable according to its laws, but which were punishable by the nation where their effects were produced, cannot be judged by the latter except when the criminal falls within its jurisdiction.

[1] The signatories were Argentina, Bolivia, Paraguay, Peru and Uruguay. Translation from text in 18 Martens, *Nouveau Recueil Général de Traités* (2me sér.), p. 432.

Art. 7. For the trial and punishment of crimes committed by anyone of the personnel of a legation, the rules established by public international law shall be observed.

Art. 8. Crimes committed on the high seas or in neutral waters, whether on board of warships or merchant vessels, are tried and punished by the laws of the State to which the vessel's flag belongs.

Art. 9. Crimes committed on board warships of a State, which are in territorial waters of another, are tried and punished according to the laws of the State to which the said vessels belong.

There likewise are tried and punished according to the laws of the country to which the warships belong, the punishable acts committed outside the vessel by members of the crew or those who have some office on board, when the said acts chiefly concern the disciplinary order of the vessels.

If in the performance of the criminal acts there took part only persons not belonging to the personnel of the warship, the trial and punishment will take place according to the laws of the State in whose territorial waters the vessel is.

Art. 10. Crimes committed on board of a warship or merchant vessel under the conditions laid down by Article 2 shall be tried and punished according to the provisions of that article.

Art. 11. Crimes committed on board merchant vessels are tried and punished by the law of the State in whose jurisdictional waters the vessel was at the time of the commission of the offence.

Art. 12. For the purposes of criminal jurisdiction, there are declared territorial waters those within five miles from the coast of the mainland and islands which form part of the territory of each State.

Art. 13. Crimes considered as piracy by public international law fall within the jurisdiction of the State under whose power the criminals come.

APPENDIX 4

RESOLUTIONS OF THE INTERNATIONAL PRISON CONGRESS

Brussels, August 10, 1900 [1]

Art. I. Chaque Etat peut punir, conformément à ses lois, les crimes et les délits commis hors de son territoire, par des nationaux ou par des étrangers, soit comme auteurs, soit comme complices, contre la sûreté, la fortune, ou le crédit publics de cet Etat.

La poursuite n'est pas subordonnée à la présence de l'inculpé sur le territoire de l'Etat lésé.

Art. II. Chaque Etat peut punir, conformément à ses lois, toutes les autres infractions d'une certaine gravité dont ses nationaux se sont rendus coupables hors du territoire, soit comme auteurs, soit comme complices, alors même que le fait incriminé ne serait pas punissable dans le pays sur le territoire duquel il a été commis.

Parmi ces infractions doivent être comprises toutes celles qui peuvent donner lieu à extradition.

La poursuite n'a lieu que si l'inculpé est trouvé sur le territoire national.

Lorsque l'infraction a été commise contre un étranger, la poursuite peut être subordonnée à une plainte de la partie lésée ou de sa famille ou à un avis officiel donné par l'autorité du pays sur le territoire duquel le fait a été perpétré.

Art. III. Les règles qui précèdent ne sont plus applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, a été acquitté; ou bien lorsque, après avoir été condamné, il a subi ou prescrit sa peine ou qu'il a été gracié.

Art. IV. La loi pénale du pays où une infraction a été commise est applicable non seulement à cette infraction elle-même, mais aussi à tous les actes de participation, eussent-ils été accomplis à l'étranger ou par des étrangers.

[1] *Actes* (1901), Vol. I, 177–178.

APPENDIX 5

TRAVERS, PROJET DE DISPOSITIONS DE DROIT INTERNATIONAL A INSÉRER DANS UN CODE PÉNAL[1]

Art. 1. La loi pénale est applicable à toutes les infractions et à toutes les tentatives d'infraction par elle prévues lorsque s'est réalisé, sur le territoire, en tout ou en partie, soit un élément constitutif de ladite infraction ou de ladite tentative, soit un fait influant sur la qualification même ou sur la quotité de la peine et tenant à l'activité de l'agent.

Les ambassadeurs, légats, chefs et membres de missions et représentations diplomatiques envoyés auprès du gouvernement, ne pourront être ni arrêtés ni poursuivis à dater du moment où ils seront entrés en fonctions près du gouvernement jusqu'au jour où, après les avoir cessés, ils auront eu le temps de gagner la frontière. Le gouvernement pourra leur notifier qu'ils ont à cesser immédiatement leurs fonctions et les faire reconduire à la frontière.

Les chefs d'États étrangers et les courriers diplomatiques ne pourront être poursuivis pendant la durée de leur présence sur le territoire.

Art. 2. La loi pénale est également applicable aux faits par elle prévus dont tous les éléments se seront accomplis hors du territoire à la condition:

ou que l'infraction ait eu à bord d'un bateau portant le pavillon national,

ou que la personne poursuivie ait la qualité de national et que soit il n'existe point de loi pénale locale, soit la loi locale ait renoncé à toute compétence, soit l'infraction consiste dans la violation d'une disposition de la loi nationale obligatoire pour le ressortissant à l'étranger,

ou que la partie lésée ait la qualité de national et que soit la loi locale n'existe point, soit ladite partie lésée se soit trouvée à l'étranger comme prisonnier de guerre, otage, évacué civil ou membre d'un mission officielle,

ou que l'infraction ait été commise dans un territoire voisin ne possédant pas de législation pénale,

ou que l'acte incriminé ait intéressé ou pu intéresser la sécurité soit des armées nationales se trouvant à l'étranger soit de leurs membres,

ou que l'acte incriminé soit l'un des faits réprimés par le Code pénal comme portant atteinte au crédit ou à la sécurité de l'État,

ou que l'auteur de l'acte incriminé soit trouvé sur le territoire, que son extradition ne soit pas demandée ou ne puisse être accordée et que la peine édictée par le Code pénal puisse être de un an de prison au moins.

Art. 3. Les compétences ci-dessus précisées s'étendent aux faits connexes.

Art. 4. La compétence se détermine vis-à-vis des complices en appliquant les règles posées pour les auteurs principaux. Peu importe que les poursuites contre ces derniers soient ou ne soient pas recevables.

Art. 5. Les poursuites n'auront lieu, au cas d'acte accompli dans tous ses éléments hors du territoire, que sur l'initiative du ministère public. Cette initiative pourra être provoquée par la plainte de la partie lésée ou la dénonciation d'autorités étrangères. La partie lésée et les autorités étrangères pourront, si le ministère public refuse d'agir, se pourvoir devant le Cour d'appel.

Les poursuites pourront avoir lieu même si le fait a déjà été poursuivi à l'étranger. Déduction devra seulement être faite au cas de condamnations successives, de la peine subie à l'étranger.

[1] Travers, *Le Droit Pénal International* (1922), V, § 2739.

APPENDIX 6

RESOLUTION ON INTERNATIONAL PENAL LAW

Adopted by the Conference for the Unification of Penal Law, Warsaw, November 5, 1927 [1]

PRINCIPE DE TERRITORIALITÉ

Art. 1er. Les lois pénales de l'Etat . . . (x) s'appliquent à quiconque commet une infraction sur le territoire . . . (x).

Ces lois s'appliquent également aux infractions commises soit sur un navire . . . (x), soit dans les eaux territoriales, soit au-dessus du territoire . . . (x).

Ne sont pas soumises aux lois pénales, les personnes qui, d'après le droit international ou d'après les conventions spéciales, sont soustraites à la juridiction pénale des tribunaux . . . (x).

L'infraction sera considérée comme ayant été commise sur le territoire de l'Etat . . . (x), quand un acte d'exécution a été tenté ou accompli sur ce territoire ou quand le résultat de l'infraction s'est produit sur ce territoire.

PRINCIPE DE LA PERSONNALITÉ

Art. 2. Les lois pénales de l'Etat . . . (x) s'appliquent à tout national qui participe comme auteur, instigateur ou auxiliaire à une infraction commise à l'étranger, si celle-ci est aussi prévue par la loi du lieu de l'infraction.

S'il y a une différence entre les deux lois, le juge tiendra compte de cette différence en faveur du prévenu dans l'application de la loi nationale.

Sauf les exceptions prévues à l'article . . . , la poursuite est subordonnée contre le national, pour les infractions par lui commises à l'étranger, à son retour ou séjour volontaires, ou à son extradition.

Sous la même réserve, aucune poursuite n'aura lieu si le national prouve qu'il a été acquitté ou condamné définitivement à l'étranger et, en cas de condamnation, qu'il a exécuté sa peine ou a bénéficié d'une mesure d'exemption.

Art. 3. Si le condamné se soustrait à l'exécution intégrale de sa condamnation, la durée de la peine subie à l'étranger sera déduite de la peine prononcée contre lui.

Aucune poursuite ne pourra être exercée pour l'infraction commise à l'étranger qui, d'après la loi du lieu du délit, est subordonnée à une plainte, si cette plainte n'a pas été portée ou a été légalement retirée.

Art. 4. Les dispositions des deux articles précédents sont applicables aux étrangers domiciliés en . . . (x), s'ils ne sont pas citoyens d'un pays avec lequel l'Etat . . . (x) a signé un traité d'extradition ou si leur extradition n'a pas été demandée par leur pays. Elles sont également applicables aux apolytes domiciliés en . . . (x).

Ces dispositions sont applicables également aux instigateurs et auxiliaires qui ont participé en Etat . . . (x) à une infraction commise à l'étranger.

Art. 5. Sera punissable, même par défaut, quiconque aura participé à l'étranger à un crime ou délit: 1° contre la sûreté de l'Etat; 2° de contrefaçon ou falsification de sceau, poinçons, cachets ou timbres de l'Etat.

Si l'agent a été arrêté sur le territoire . . . (x) ou si son extradition est obtenue, la peine prononcée contre lui par les tribunaux . . . (x) sera exécutée, même si pour les faits prévus aux alinéas précédents il avait été jugé définitivement à l'étranger.

Au cas d'une condamnation prononcée à l'étranger pour la même infraction, la peine déjà subie sera déduite de celle prononcée par les tribunaux de . . . (x).

Un étranger, qui aura participé à l'étranger à un crime ou délit contre un citoyen ou contre l'administration de l'Etat . . . (x), sera poursuivi au pays . . . (x), sous condition que l'acte commis soit punissable selon la loi de l'Etat où il a été commis, et que l'inculpé se trouve sur le territoire de l'Etat . . . (x).

[1] *Conférence Internationale d'Unification du Droit Pénal* (Varsovie, 1er–5 Novembre 1927). *Actes de la Conférence*, I, p. 131.

DELITS DU DROIT DES GENS

Art. 6. Sera également puni d'après les lois . . . (x), indépendamment de la loi du lieu où l'infraction a été commise et de la nationalité de l'agent, quiconque aura commis à l'étranger une des infractions suivantes:

a) piraterie;
b) falsification de monnaies métalliques, autres effets publics ou billets de banque;
c) traite des esclaves;
d) traite des femmes ou enfants;
e) emploi intentionnel de tous moyens capables de faire courir un danger commun;
f) trafic de stupéfiants;
g) trafic de publications obscènes;
h) autres infractions punissables, prévues par les conventions internationales conclues par l'Etat . . . (x).

Art. 7. Tout autre crime ou délit commis à l'étranger, par un étranger, pourra être puni dans le pays . . . (x) dans les conditions prévues aux articles précédents, si l'agent se trouve sur le territoire de l'Etat . . . (x) et si l'extradition n'a pas été demandée ou n'a pu être accordée et si le ministre de la Justice requiert la poursuite.

CHANGEMENT DE NATIONALITÉ

Art. 8. La loi . . . (x) s'appliquera également à l'étranger qui, au moment de la perpétration de l'acte, était ressortissant de . . . (x); elle s'appliquera également à celui qui a obtenu la nationalité . . . (x) après la perpétration de l'acte.

APPENDIX 7

BUSTAMANTE CODE

ANNEXED TO THE CONVENTION ON PRIVATE INTERNATIONAL LAW

Adopted at Havana, February 20, 1928 [1]

BOOK III

INTERNATIONAL PENAL LAW

CHAPTER I

PENAL LAWS

Article 296. Penal laws are binding on all persons residing in the territory, without other exceptions than those established in this chapter.

Article 297. The head of each of the contracting States is exempt from the penal laws of the others when he is in the territory of the latter.

Article 298. The diplomatic representatives of the contracting States in each of the others, together with their foreign personnel, and the members of the families of the former who are living in his company enjoy the same exemption.

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

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

Article 301. The same is the case in respect to offenses committed in territorial waters or in the national air, on foreign merchant vessels or aircraft, if they have no relation with the country and its inhabitants and do not disturb its tranquillity.

[1] Final Act of the Sixth International Conference of American States, p. 16. In force January 1, 1935, for the following States: Brazil, Bolivia, Costa Rica, Cuba, Dominican Republic, El Salvador, Chile, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela.

Article 302. When the acts of which an offense is composed take place in different contracting States, each State may punish the act committed within its jurisdiction, if it by itself constitutes a punishable act.

In the contrary case, preference shall be given to the right of the local sovereignty where the offense has been committed.

Article 303. In case of related offenses committed in the territories of more than one contracting State, only the one committed in its own territory shall be subject to the penal law of each.

Article 304. No contracting State shall apply in its territory the penal laws of the others.

Chapter II

Offenses committed in a foreign contracting state

Article 305. Those committing an offense against the internal or external security of a contracting State or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting State.

Article 306. Every national of a contracting State or every foreigner domiciled therein who commits in a foreign country an offense against the independence of that State remains subject to its penal laws.

Article 307. Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory an offense, such as white slavery, which said contracting State has bound itself by an international agreement to repress.

Chapter III

Offenses committed outside the national territory

Article 308. Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offenses of a similar nature against international law committed on the high sea, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter.

Article 309. In cases of wrongful collision on the high sea or in the air, between ships or aircraft carrying different colors, the penal law of the victim shall be applied.

Chapter IV

Sundry questions

Article 310. For the legal concept of reiteration or recidivism will be taken into account the judgment rendered in a foreign contracting State, with the exception of the cases in which same is contrary to local law.

Article 311. The penalty of civil interdiction shall have effect in each of the other States upon the previous compliance with the formalities of registration or publication which may be required by the legislation of such State.

Article 312. Prescription of an offense is subordinated to the law of the State having cognizance thereof.

Article 313. Prescription of the penalty is governed by the law of the State which has imposed it.

APPENDIX 8

RESOLUTION ON THE CONFLICT OF PENAL LAWS WITH RESPECT TO COMPETENCE

Adopted by the Institute of International Law at Cambridge, July 31, 1931 [1]

L'Institut, prenant en considération l'évolution de la science du droit pénal international et du droit positif, estime qu'il y a lieu de modifier et de compléter les résolutions votées dans sa session de Munich, en 1883, en remplaçant les articles 1 à 11 par les dispositions suivantes:

Article 1er

"La loi pénale d'un Etat régit toute infraction commise sur son territoire, sous réserve des exceptions consacrées par le droit des gens."

Article 2

"La loi d'un Etat peut considérer une infraction comme ayant été commise sur son territoire aussi bien lorsqu'un acte de commission ou d'omission qui la constitue y a été perpétré ou tenté que lorsque le résultat s'y est produit ou devait s'y produire.

"Cette règle est aussi applicable aux actes de participation."

Article 3

"Chaque Etat a le droit d'étendre sa loi pénale à toute infraction ou à tout acte de participation délictueuse commis par ses nationaux à l'étranger."

Article 4

"Tout Etat a le droit de punir des actes commis en dehors de son territoire, même par des étrangers, lorsque ces actes constituent:

"a) Un attentat contre sa sécurité;

"b) Une falsification de sa monnaie, de ses timbres, sceaux ou marques officiels.

"Cette règle est applicable lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis."

Article 5

"Tout Etat a le droit de punir des actes commis à l'étranger par un étranger découvert sur son territoire lorsque ces actes constituent une infraction contre des intérêts généraux protégés par le droit international (tels que la piraterie, la traite des noirs, la traite des blanches, la propagation de maladies contagieuses, l'atteinte à des moyens de communication internationaux, canaux, câbles sous-marins, la falsification des monnaies, instruments de crédit, etc.), à condition que l'extradition de l'inculpé ne soit pas demandée ou que l'offre en soit refusée par l'Etat sur le territoire duquel le délit a été commis ou dont l'inculpé est ressortissant."

APPENDIX 9

RESOLUTION ON INTERNATIONAL PENAL LAW

Adopted by the Fourth Section of the International Congress of Comparative Law, The Hague, August 2–6, 1932 [2]

1. Le principe général en vertu duquel la loi pénale de chaque Etat régit les infractions commises sur son territoire n'exclut pas la possibilité d'attribuer compétence judiciaire à un Etat pour la poursuite de certaines infractions commises hors de son territoire, même par des étrangers.

[1] *Annuaire de l'Institut de Droit International*, II, 1931, p. 235.

[2] Text supplied by a member of the United States delegation.

2. Une infraction est considérée comme ayant eu lieu sur le territoire, lorsqu'un des actes d'omission ou de commission qui la constituent y a été perpétré ou tenté.
3. Tout Etat a le droit de punir les actes commis en dehors de son territoire, même par des étrangers lorsque les actes constituent
   a) Un attentat contre sa sécurité;
   b) Un délit de contrefaçon du sceau de cet Etat ou d'usage du sceau contrefait;
   c) Un délit de falsification de monnaie ou de valeur du timbre ou d'effet de crédit public de cet Etat.

   Cette règle est applicable, lors même que les faits considérés ne sont pas prévus par le loi pénale du pays sur le territoire duquel ils sont été commis.
4. Tout Etat a le droit de punir les actes commis en dehors de son territoire par un étranger, même contre un étranger, lorsque les faits constituent, d'après sa loi pénale, un acte délictueux, si l'inculpé se trouve sur son territoire, et s'il ne peut être extradé. L'exercice de ce droit doit être limité à la poursuite d'infractions graves, dirigées contre les intérêts généraux de l'humanité; ce sont notamment:
   A. La piraterie.
   B. La traite des esclaves.
   C. La traite des femmes et des enfants.
   D. Le trafic des stupéfiants.
   E. Le trafic des publications obscènes.
   F. Le faux monnayage, la falsification des papiers de valeur et des instruments de crédit.
   G. La propagation des maladies contagieuses.
   H. L'attentat à des moyens de communication, canaux et câbles sous-marins.
   I. Ou d'autres infractions prévues par les conventions internationales.

   Pour tous autres délits, l'exercice de le droit doit être subordonné à la requête de la personne lésée ou à la dénonciation de l'autorité étrangère, ainsi qu'à l'initiative de l'autorité nationale.

APPENDIX 10
LIST OF PENAL CODES, STATUTES, AND PROJECTS[1]

AFGHANISTAN. German translation of Penal Code of 1924, by Sebastian Beck, Abdruck aus 11 *Die Welt des Islams* (1928), Heft 1–2.

ALBANIA. *Kodi Penal Shqiptar* (1927). Tiranë. 1929.

ARGENTINA. *Código Penal de la Nación Argentina* (*Ley no. 11179 of 1921*). Buenos Aires. 1922.

AUSTRIA:

Allgemeines Strafgesetz vom 27. Mai 1852. (Various editions; that used is L. Altmann, S. Jacob, M. Weiser, *Die österreichische Strafgesetzgebung nach dem Stande vom 30. Juni 1927.* Vienna. 1927.)

Erläuternde Bemerkungen zum Vorentwurf eines österreichischen Strafgesetzbuches vom September 1909 und zum Vorentwurfe des Einführungsgesetzes. Vienna. 1910.

BELGIUM:

Code d'Instruction criminelle, loi du 17 avril 1878 contenant le titre préliminaire. (Various editions; that used is J. Servais and E. Mechelynck, *Les Codes et les Lois spéciales les plus usuelles en vigueur en Belgique.* 14th ed. Brussels. 1925.)

Loi modifiant le Code pénal, etc. (July 12, 1932; as to counterfeiting), 12 *Revue de Droit Pénal* (n. s. 1932), 930.

[1] This is not a bibliography of penal legislation. It is a list of national penal codes, statutes, and projects, not including legislation of the British Commonwealth of Nations and the United States, which have been used in the preparation of the Comment. It indicates for each item listed where the text may be found and notes some available translations.

BOLIVIA:

Código Penal (1834). (Various editions; that used is Hernando Siles, *Código Penal, Concordado*. Santiago de Chile. 1910.)

Ley de 29 de noviembre de 1902. Ernesto Palza S., *Diccionario de la Legislación Boliviana*, I, pt. 2, 653.

BRAZIL:

Código Penal (Decreto 847, Oct. 11, 1890.) (Various editions; among those used is Bento de Faria, *Annotações Theorico-Practico ao Código Penal do Brasil*. 4th ed. Rio de Janeiro. 1929.)

Lei n. 2416 de 28 de Junho de 1911 (extradição internacional). (Text in Candido Mendes de Almeida, *Código de Processo Penal para o Districto Federal, 1924*, p. 259. Rio de Janeiro. 1925.) (French translation quoted in Comment is in 6 *Revue de l'Institut de Droit Comparé* (1913), 488.)

Project of Penal Code (Virgilio de Sa Pereira, 1927). Text (in Portuguese) in Brazil, *Diario Official* (Nov. 10, 1927), p. 23687; also in 52 *Revista forense*, 5, and 54 *ibid.*, 35.

BULGARIA. German translation of Penal Code of 1896 in A. Teichmann, *Das Bulgarische Strafgesetz vom 2. Februar 1896*. Berlin. 1897.

CHILE:

Código penal (1874). (Various editions; used *Colección de Códigos de la República de Chile*, p. 1333. Valparaiso. 1912.)

Código de Procedimiento Penal (1906). (Various editions, used *ibid.*, p. 1505.)

Proyecto de Código Penal (1929), 1 *Revista de derecho penal* (Buenos Aires, 1929), 431.

CHINA:

French translation of Penal Code of 1928 in J. Escarra, *Code pénal de la République de Chine*. Paris. 1930.

English translation of Provisional Penal Code of 1912, in T. T. Yuen and T. S. Loh, *The Provisional Criminal Code of the Republic of China*. Peking. 1915.

English translation of Revision of Provisional Penal Code, in The Law Codification Commission, *The Criminal Code of the Republic of China (Second Revised Draft)*. Peking. 1919.

COLOMBIA. *Código Penal (Ley 19 de 1890)*. (Various editions; that used is E. Rodriguez Piñeres, *Código Penal Colombiano y Leges Vigentes que lo Adicionan y Reforman*. 5th ed. Bogotá. 1929.)

CONGO. Code Pénal (1896). In Octave Louwers and Iwan Grenade, *Codes et Lois du Congo Belge*, p. 415. 2nd ed. Brussels. 1923.

COSTA RICA. *Código Penal* (July 1, 1924). (Edition by José Astúa Aguilar, San José, 1924.)

CUBA:

Spanish *Código Penal* (1879). In Angel C. Betancourt, *Código Penal*. Habana. 1922.

For existing legislation, see Bustamante, *Derecho Internacional Privado*, III, pp. 1–89. Habana. 1931.

Project of Penal Code (1926), French translation in République de Cuba, *Projet de Code Criminel Cubain (Livre I, Rapport officiel par Fernando Ortiz)*. Paris. 1927.

Proyecto de Código Penal (Vieites). 1926.

CZECHOSLOVAKIA:

Existing penal code (Austrian Code of 1852, with modifications), in German in Karl Kneisal, *Das Strafgesetz vom 27. Mai 1852, R.-G.-Bl. Nr. 117, samt den bis September 1931 ergangenen Entscheidungen*. Reichenberg. 1932.

Project of Penal Code (1926), French translation in *Avant-Projets de la loi pénale relative aux crimes et délits et de la loi sur les contraventions.* Prague. 1927. Also in Première Conférence Internationale d'Unification du Droit Pénal (Warsaw, 1927), *Actes de la Conférence*, 181.

DANZIG. *Strafprozessordnung* (1927), in Rumpf, *Strafprozess, Textausgabe mit kurzen Anmerkungen.* Danzig. 1927.

DENMARK:

Penal Code (1930), in *Lovtidende* (1930, Apr. 26), 697; and in *Samling af Love, Anordninger*, &c. (1930), A, 406. Also in Oluf H. Krabbe, *Borgerlig Straffelov af 15 April 1930 (udgivit med Kommentarer).* Copenhagen. 1931.

Penal Code (1866), in Frantz Dahl, *Almindelig Borgerlig Straffelov af 10. Februar 1866.* Copenhagen. 1918. German translation by Hans Bittl, Berlin, 1909. French translation of relevant parts in Fiore, *Traité de droit pénal international et de l'extradition* (trans. by Ch. Antoine), p. 245. Paris. 1880.

DOMINICAN REPUBLIC. *Código de Procedimiento Criminal* (June 26-27, 1884) (Used authorized edition of 1927, Santo Domingo; giving on p. 84 the law of June 28, 1911, revising parts of this code, which law appeared in 6 *Revista judicial* (1911), 1467.)

ECUADOR. *Código Penal* (1906), in Francisco Perez Borja, *Apuntes para el Estudio de Código Penal.* Quito. 1927.

EGYPT. *Code pénal indigène* (1904), in J. A. Walthelet and R. G. Brunton, *Codes égyptiens et lois usuelles en vigueur en Egypte.* Brussels. 1925. See also F. M. Goadby, *Commentary on Egyptian Criminal Law*, 43. Cairo. 1924.

ESTONIA. *Kriminaalseadustik.* Tallinn. 1929. [Criminal Code of 1929, in Estonian; based on Russian Penal Code of 1903.]

FINLAND. Penal Code of 1889, French translation by Ludovic Beauchet, *Code pénal de Finlande du 19 décembre 1889.* Nancy. 1890.

FRANCE:

Code d'Instruction criminelle (1808); modified by *loi du 27 juin 1866, loi du 8 avril 1903, loi du 26 février 1910;* and concerning aircraft, by *loi du 31 mai 1924.* (There are numerous editions; Charpentier, *Code d'Instruction criminelle et Code pénal*, Paris, 1927, is a convenient one.)

Ministère de la Justice, Commission, *Avant-Projet de Code Pénal Français*, in 9 *Revue international de droit pénal* (1932), 281.

GERMANY:

Strafgesetzbuch für das Deutsche Reich (vom 15. Mai 1871). (Many editions; a useful one is L. Ebermayer, A. Lobe, and W. Rosenberg, *Reichs-Strafgesetzbuch mit besonderer Berücksichtigung der Rechtssprechung des Reichsgerichts.* 3rd ed. Berlin and Leipzig, 1925.) An English translation is found in R. H. Gage and A. J. Waters, *Imperial German Criminal Code*, Johannesburg, 1917.

Gesetz zum Schutze der Republik vom 25. März 1930 (RGBl. 1930, I, 91), 2 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1931), pt. 2, 547.

Vorentwurf zu einem deutschen Strafgesetzbuch. Berlin. 1909.

Entwurf eines Allgemeinen Deutschen Strafgesetzbuchs. Reichstag III. 1924/27. Drucksache Nr. 3390. 19. Mai 1927.

GREECE:

Code of Criminal Procedure (1834, modified by Law of Dec. 22, 1887), in A. N. Malagarde, *Κωδηξ Ποινικης Δικονομιας.* Athens (1932)

Project of Penal Code (1924); French translation in Première Conférence Internationale d'Unification du Droit Pénal (Warsaw, 1927), *Actes de la Conférence*, 157; German translation in Demetrius G. Venturas, *Entwurf eines griechischen Strafgesetzbuches*. Berlin and Leipzig. 1928.

GUATEMALA. *Código Penal de la República de Guatemala*. Guatemala. 1889.

HAITI:

Code d'Instruction criminelle (1835). (Various editions; that used is A. A. Héraux, *Code d'Instruction criminelle*. Port au Prince. 1930.)

Extradition Law of Nov. 21, 1912, in Haiti, *Annuaire de Législation* (1912), 123.

HONDURAS. *Ley de Organización y Atribuciones de las Tribunales*. 1906.

HUNGARY:

Penal Code (1878). The French translation quoted is C. Martinet and P. Dareste, *Code pénal hongrois des crimes et des délits (28 mai 1878)*, Paris, 1885. There is a German translation by Ernst Rosenfeld, *Das Ungarische Strafgesetzbuch über Verbrechen und Vergehen*, Berlin, 1910.

ICELAND. *Almindelig Straffelov for Island* (June 25, 1869), in Denmark, *Love og Forordninger samt Reskripter*, 8de Haefte 1865–9, p. 372. Copenhagen, 1888. [Adapts the Danish Penal Code of 1866.]

IRAQ:

Baghdad Penal Code (Nov. 21, 1918).

Baghdad Penal Code Amendment Law, 1924, in Iraq, *Compilation of Laws and Regulations issued between 1st Jan. 1924 and 31st Dec. 1925*, p. 10. Baghdad. 1926.

ITALY:

Codice Penale (Oct. 19, 1930), in *Raccolta Ufficiale delle Leggi e dei Decreti del Regno d'Italia* (1930), vol. 6, n. 1727. Also in Ministero della Giustizia e degli Affari di Culto, *Codice Penale*. Rome 1930. English translation in British Foreign Office, *Penal Code of the Kingdom of Italy as Approved by Royal Decree of October 19, 1930*. London. 1931.

Ferri Project, in Ministero della Giustizia, Commissione Reale per la Riforma delle Leggi Penali, *Relazione sul Progetto Preliminare de Codice Penale Italiano*. Rome. 1921.

Penal Code of 1889. (Various editions; that used is A. Bruno, *Codice Penale del Regno d'Italia* (9th ed.) Firenze. 1920.) [No longer in force.]

Projects preliminary to the Code of 1889, see *Sunto delle Osservazionice dei Pareri . . . sugli Emendamenti al libro primo del Progetto de Codice Penale Italiano*. Rome. 1878.

JAPAN. Penal Code of 1907. English translation in J. E. de Becker, *The Criminal Code of Japan*. Yokohama. 1918.

LATVIA. *Sodu Likumi. 1903. gada 22. marta*. Riga. 1932. [Adaptation of Russian Penal Code of 1903.]

LEBANON. *Loi de 29 mai 1929* (modifiant Art. 7, *Code d'Instruction criminelle*), 3 *Recueil des Lois et Décrets du Gouvernement de la République Libanaise* (1929–1930), 177. [*Code d'Instruction criminelle* is the *Ottoman Code of Criminal Procedure;*—see Turkey.]

LIBERIA. *Criminal Code*. 1914.

LITHUANIA. *Baudžiamasis Statutas*. Kaunas. 1930. [Chiefly based on Russian Penal Code of 1903.]

LUXEMBOURG. *Code d'Instruction criminelle* (1808), modified by *Loi de 18 janvier 1879, sur crimes et délits commis à l'étranger;* see also *Code pénale (loi de 10 juin 1879)*; in P. Ruppert, *Code Pénal et Code d'Instruction criminelle*. Luxembourg. 1900.

MEXICO:

Código Penal para el Distrito y Territorios Federales (1929). Mexico. 1929. [No longer in force.]

Código Penal para el Distrito y Territorios Federales (1931). 67 *Diario Oficial* (Aug. 14, 1931), núm. 39.

MONACO. *Code de Procédure pénale* (1904). Monaco. 1904.

NETHERLANDS. Penal Code of 1881. (Various editions; that used is P. A. J. Losecaat Vermeer, *Wetboek van Strafrecht.* Zwolle. 1931. French translation in W. J. Wintgens, *Code Pénal des Pays-Bas (3 mars 1881).* Paris. 1883.

NICARAGUA. *Código Penal.* 1891.

NORWAY:

Almindelig Borgerlig Straffelov av 22 mai 1902. (Various editions; that used was published at Oslo, 1929.) French translation in M. du Mouceau, *Le Code Pénal Norwégien.* Paris. 1903.

Preliminary project: B. Getz, *Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge.* Christiana. 1893. German translation of project in Ernst Rosenfeld and Andreas Urbye, *Entwurf eines Allgemeinen bürgerlichen Strafgesetzbuches für das Königreich Norwegen.* Berlin. 1898.

PALESTINE. *Criminal Procedure Code* [Based on Ottoman Code of Criminal Procedure]. In S. G. Kermack, *Handbook of the Law of Criminal Procedure in Palestine.* Jerusalem, 1928.

PANAMA. *Código Penal (ley 6ª de 1922).* Panama. 1932.

PARAGUAY. *Código Penal de la República del Paraguay.* Asuncion. 1914.

PERU. *Código Penal (Ley n. 4868,* of 1924). (Various editions; that used is in A. Gustave Cornejo, *Comentario al Nuevo Código Penal.* Lima. 1926.)

POLAND:

Penal Code of 1932. Polish text in *Kodeks Karny.* Warsaw. 1932. French translation of Conrad Berezowski, *Code Pénal Polonais du 11 juillet 1932.* Paris. 1932. German translation of J. Makarewicz, *Das Strafgesetzbuch für die Republik Polen.* Warsaw. 1932.

Projects preliminary to the Code: *Projet du Code pénal polonais* (1926), Première Conférence Internationale d'Unification du Droit Pénal (Warsaw, 1927), *Actes de la Conférence,* 167. German translation in J. Makarewicz, *Der Polnische Strafgesetzentwurf.* Lwow. 1928. W. Makowski, *Projet séparé. Partie générale du Code pénal,* 2 *Revue internationale de droit pénal* (1925), 153.

PORTUGAL. *Código Penal Português* (1886). (Various editions; that used was published at Coimbra, 1931.) German translation by F. Zander, *Das Portugiesische Strafgesetzbuch.* Berlin. 1903.

RUMANIA:

Penal Code (1865, modified by law of Feb. 15, 1894). (Various editions; that used is Mihail Papadopolu, *Codul Penal Adnotat.* Bucharest. 1930.)

Project of Penal Code; a French translation of the proposal of 1926 is found in Première Conférence Internationale d'Unification du Droit Pénal (Warsaw, 1927), *Actes de la Conférence,* 170. Parts of the revision of 1928 are found in Buzea, Règle de Droit pénal et ses applications extraterritoriales, 8 *Revue international de droit pénal* (1931), 125, 136; and in Pella, 33 *Recueil des Cours de l'Académie de Droit International* (1930–III), 677, 779. See also Jean Radulesco, Le Projet de Code Pénal Roumain, 57 *Bulletin mensuel de la Société de Législation Comparée* (1928), 540.

RUSSIA:

Penal Code of 1903. French translation in E. Eberlin, *Code Pénal Russe, Ratifié par sa Majesté Impériale le 22 mars 1903.* Paris. 1906. German translation by O. S. Bernstein, *Das neue russische Strafgesetzbuch.* Berlin. 1908.

Penal Code of 1922. English translation in Great Britain, H.M. Stationery Office, *The Criminal Code of the Russian Socialist Federated Soviet Republic.* London. 1922.

Penal Code of 1926. Уголовный кодекс РСФСР. Moscow. 1932. German translation by Wilhelm Gallas, *Strafgesetzbuch der Russischen sozialistischen föderativen Sowjet-Republik vom 22. November 1926, mit den Änderungen bis zum 1. August 1930.* Berlin. 1931.

SALVADOR. *Código de Instrucción Criminal* (1904). (Edition of 1926.)

SAN MARINO. *Codice Penale della Reppubblica di San Marino (1865).* Pesaro. 1865.

SERBIA. Project of Penal Code, German translation by Topalovitz and Landsberg, *Vorentwurf zu einem Strafgesetzbuch für das Königreich Serbien.* Berlin. 1911.

SIAM. *The Penal Code of the Kingdom of Siam.* Bangkok(?). 1908. French translation by Georges Padoux, *Code pénal du Royaume de Siam, promulgué le 1er juin 1908; entré en vigueur le 22 septembre 1908.* Paris. 1909.

SPAIN:

Ley sobre Organización del Poder Judicial (Sept. 15, 1870), 34 *Boletín de la revista general de legislación y jurisprudencia; sección legislativa* (3 of 1870), 3.

Q. Saldaña, *Projet de Code pénal espagnol,* Première Conférence Internationale d'Unification du Droit Pénal (Warsaw, 1927), *Actes de la Conférence,* 151.

Penal Code of 1928, to take effect in 1929; 215 *Boletín de la revista general de legislación y jurisprudencia; sección legislativa* (5 of 1928), 35: see also E. Cuello Calón, *El Nuevo Código Penal Espagnol,* Barcelona, 1929. This code was abrogated and the Penal Code of 1870 restored to effect, April 15, 1931. A new revision of the Penal Code of 1870 was enacted by the law of Oct. 27, 1932, 235 *Boletín de la revista general de legislación y jurisprudencia; sección legislativa* (4 of 1932), 595. Neither the Code of 1870 nor the revisions contain material on jurisdiction with respect to crime. Apparently the provisions of the *Ley sobre Organización del Poder Judicial* (1870) are still in force, since the abrogation of the Penal Code of 1928.

SUDAN. *The Penal and Criminal Procedure Codes of the Sudan.* London. 1924.

SWEDEN:

Penal Code of 1864. (Various editions, that used is *Strafflagen Jämte Specialförfattningar,* Stockholm, 1932.) French translation in R. de la Grasserie, *Les Codes Suédois de 1734,* Paris, 1895.

Projects for a new Penal Code: J. C. W. Thyren, *Forberedande Itkast till Strafflag.* Lund. 1916. Strafflagskomissionen, *Förslag till Strafflag, Almänna delen.* Stockholm. 1923.

SWITZERLAND:

Bundesgesetz über das Bundesstrafrecht der schweizerischen Eidgenossenschaft (1853), 3 *Amtliche Sammlung der Bundesgesetze und Verordnungen der schweizerischen Eidgenossenschaft* (1853), 404.

Vorentwurf zu einem Schweizerischen Strafgesetzbuch nach den Beschlüssen der Expertenkommission. Berne. 1896.

Project of 1918. French text in 4 *Feuille fédérale* (1918), 121; German in *Botschaft des Bundesrates an die Bundesversammlung zum Entwurf eines schweizerischen Strafgesetzbuches (vom 23. Juli 1918).*

[No effort is here made to list the cantonal legislation; some of it is cited in the Comment on Article 3. The earlier codes may be found in Carl Stoos, *Les Codes Pénaux Suisses,* Basle, 1890.]

TRANSJORDAN. *Act of Nov. 24, 1924* (amending Art. 7 of Code of Criminal Procedure), in C. R. W. Seton, *Legislation of Transjordan, 1918–1930*, p. 89. London. 1931. [The Code of Criminal Procedure in force is the Ottoman Code of Criminal Procedure; see Turkey.]

TURKEY:

Penal Code of 1926. French translation in Rizzo, *La Législation Turque, Code Pénal.* Constantinople, 1927. German translation in Kurt Ziemke, *Das türkische Strafgesetzbuch vom 1. März 1926.* Berlin and Leipzig, 1927.

Ottoman Penal Code (1858). English translation in J. A. S. Bucknill and H. A. Utidjian, *The Imperial Ottoman Penal Code.* London, 1913.

Ottoman Code of Criminal Procedure. French translation in George Young, *Corps de Droit Ottoman*, vol. 7, p. 226. Oxford. 1906.

URUGUAY:

Código Penal (1889). (Various editions; that used was E. Jiménez de Aréchaga, *Código Penal y Código de Instrucción Criminal*, 5th ed. Montevideo. 1926.)

Irureta Goyeno, *Proyecto de Código Penal*, 34 *Revista de derecho, jurisprudencia y administración* (1932), 2.

VATICAN CITY. *Loi sur les sources du droit* (June 7, 1929), *Annuaire de l'Institut International de Droit Public* (1930), 1356. [Adopts Italian Penal Code provisions.]

VENEZUELA. *Código Penal* (July 15, 1926), 49 *Recopilación de Leyes* (1926), 506.

YUGOSLAVIA:

Penal Code of 1929. Кривични законик за краљевину Југославију. Belgrade. 1932.

Project of Penal Code (1926), French translation in Première Conférence Internationale d'Unification du Droit Pénal (Warsaw, 1927), *Actes de la Conférence*, 177.