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International Law- Criminal Law- Jurisdiction Over Aliens for Crimes Committed Abroad

Frank G. Reeder S. Ed
University of Michigan Law School

INTERNATIONAL LAW — CRIMINAL LAW — JURISDICTION OVER ALIENS FOR CRIMES COMMITTED ABROAD — Six alien defendants were convicted under a federal statute[1] for knowingly making false statements before United States consular officials abroad in order to procure nonquota immigrant visas. Their motion to dismiss this count on the ground that the district court lacked jurisdiction to indict and try aliens for crimes committed outside the territorial limits of the United States was denied.[2] On appeal, *held*, affirmed. As a necessary incident to its sovereignty, the United States is competent to punish aliens apprehended within the United States for acts against its sovereignty committed outside the country. *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

Of the five general principles of international law used by nations as the basis of asserting penal jurisdiction,[3] the territorial principle, under which only acts committed within a country's borders are punishable, has often been expressed as the limit of the competence of the United States in exercising criminal jurisdiction.[4] Traditionally, however, the United States has also asserted the authority, based on the nationality principle, to punish its nationals for acts committed abroad in violation of laws of the United States made applicable to them.[5] This principle recognizes the almost unlimited legal control a state has over persons owing it allegiance.[6] In addition, the United States has expanded its basic territorial principle

1 The statute provides a fine or imprisonment for "whoever knowingly makes under oath any false statement . . . in any application, affidavit, or other document required by the immigration laws or regulations . . . ." 18 U.S.C. § 1546 (1958).

2 United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960).

3 These five principles are the territorial principle; the nationality principle; the protective principle; the universality principle, under which jurisdiction is based solely upon custody of the accused; and the passive personality principle, under which jurisdiction is determined by reference to the nationality or national character of the person injured. Research in International Law Under the Auspices of the Harvard Law School, Part II, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 445 (1935) [hereinafter cited as HARVARD RESEARCH]. The first three principles are discussed in the text; the last two are less widely accepted among nations and are not germane to this discussion.

4 See, *e.g.*, United States v. Bowman, 260 U.S. 94, 98-99 (1922); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824); Yenkichi Ito v. United States, 64 F.2d 73, 75 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933); United States v. Baker, 136 F. Supp. 546, 547-48 (S.D.N.Y. 1955); BRIERLY, THE LAW OF NATIONS 232 (5th ed. 1955); 2 HACKWORTH, A DIGEST OF INTERNATIONAL LAW § 136 (1941); HARVARD RESEARCH 435, 544, 556; JESSUP, TRANSNATIONAL LAW 39-40, 43 (1956); 2 MOORE, A DIGEST OF INTERNATIONAL LAW 255, 263 (1906).

5 See Kawakita v. United States, 343 U.S. 717 (1952); Blackmer v. United States, 284 U.S. 421 (1932); United States v. Bowman, *supra* note 4; Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948). The United States has also exercised extraterritorial jurisdiction over crimes committed by persons aboard ships flying its flag and acts of piracy. See United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820); United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820).

6 HARVARD RESEARCH 519.

to embrace the so-called "objective" territorial principle under which jurisdiction is asserted over crimes commenced extraterritorially which are consummated within the country, or over crimes committed entirely outside the country which produce detrimental effects internally.[7]

The principal case is the first instance in which a United States court has expressly asserted the protective principle as the basis for jurisdiction over the acts of an alien committed abroad.[8] This principle has been recognized, however, by most other nations[9] when the acts committed abroad were directed at their credit, security, political independence or territorial integrity. Jurisdiction under the protective principle is not based on the locus of the crime or the nationality of the offender but on the nature of the interest injured.[10] Its proponents justify such jurisdiction on a theory of self-defense[11]—the necessity of punishing those who would otherwise threaten a country's social, political and economic interests from abroad with impunity because of the lack of effective legislation by

7 Ford v. United States, 273 U.S. 593, 619-21 (1927); Strassheim v. Daily, 221 U.S. 280, 284-85 (1911); United States v. Aluminum Co. of America, 148 F.2d 416, 443 (1945). See HARVARD RESEARCH 487-94; Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 253-54 (1931).

8 However, similar results have been reached in a few cases without the protective principle being expressly adopted. See United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943) where an alien was convicted of falsely swearing under oath before a United States consular official in Mexico. The court based its jurisdiction on alternative grounds, the one pertinent to this discussion being that the offense had not been committed on foreign territory since the fraud was not in the act but in the result attained, that is, ". . . the attempt, through a false oath, to secure an advantage in the United States, by obtaining an affidavit which would have no validity except for the . . . [immigration laws]." *Id.* at 711. In other similar fact situations convictions have been affirmed without comment on the jurisdictional question. Chin Bick Wah v. United States, 245 F.2d 274 (9th Cir.), *cert. denied*, 355 U.S. 870 (1957); United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956). And the protective principle would seem to be the only basis for the Court in United States v. Bowman, 260 U.S. 94, 102-03 (1922) commenting on the possibility of punishing a British subject, when apprehended, for acts committed abroad to defraud the United States Government. *But see* United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955) where the court held it was without jurisdiction to try an alien who, while in Canada, falsified and concealed a material fact in a matter within the jurisdiction of the immigration authorities. Neither *Archer* nor the protective principle were discussed. The court concluded that Strassheim v. Daily, *supra* note 7, required a further act by the alien within the United States since jurisdiction over aliens can only be based on the territorial principle.

For apparent interstate applications of the protective principle, see Hanks v. State, 13 Tex. Ct. App. R. 289 (1882) (affirming conviction for forging Texas land titles in Louisiana); and N.Y. PEN. LAW § 1933, which represents an odd intermixture of the "objective" territorial principle and the protective principle.

9 HARVARD RESEARCH 543, 546; JESSUP, *op. cit. supra* note 4, at 50. *But see* Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 584 (1958), where the author cautions against ". . . inferring from the practice of the States any general rule of international law sanctioning the assumption of jurisdiction over foreigners for acts committed in foreign territory."

10 HARVARD RESEARCH 445, 543.

11 Garcia-Mora, *supra* note 9, at 579, 584.

the foreign country to punish such acts, and the absence of any effective international authority.[12] The previous opposition of the United States to the extraterritorial exercise of a country's penal jurisdiction is evidenced by the vigorous objections raised by our government when another country has presumed to exercise such jurisdiction over an American citizen.[13] This critical attitude stems from the knowledge that the comprehensive "protective" statutes of many foreign countries have often been used as a means of punishing crimes of a political nature,[14] and from an apprehension that express recognition of the principle by this country could lead to such unacceptable extensions of national power.[15] Although the statute involved in the principal case deals only with specific non-political acts, this formal cognizance of the protective principle runs counter to these long-held objections. But whatever may be the ultimate wisdom in now adopting this principle, the United States as a sovereign nation is clearly competent under the tenets of international law to do so.[16]

In considering the exercise of extraterritorial jurisdiction under the protective principle, the court was reluctant to recognize it as a clear departure from the territorial and nationality principles. On the one hand, the court held that the counts under which the defendants were convicted alleged only acts committed outside the United States[17] and did not rest upon defendants' subsequent entries into this country.[18] And in view of its determination that Congress intended the statute to reach such extraterritorial offenses,[19] the court flatly stated that ". . . under 'the protective principle' . . . there is, and should be, jurisdiction."[20] In addition, the court posed the hypothetical case of an alien who falsely swears an affidavit abroad on behalf of another alien who makes no use of the fraudulently-procured document. The court reasoned that the first alien should be subject to prosecution in the United States in the same manner as a citizen of the United States would be for such acts committed against the sovereignty of the United States.[21] This analogy is unfortunate since it overlooks the vital distinction that jurisdiction over acts of a citizen in such a case is based on his nationality and that no similar bond of allegiance exists in the case of an alien. But, importantly, the court's

12 HARVARD RESEARCH 552-53. *But see* Garcia-Mora, *supra* note 9, at 584-89 for a critical analysis of the arguments put forth in support of the protective principle.

13 See 2 MOORE, *op. cit. supra* note 4, at 228 for a discussion of "Cutting's Case," an attempt by Mexico to prosecute a United States citizen for libelous statements concerning a Mexican citizen published only in the United States.

14 Garcia-Mora, *supra* note 9, at 578-83.

15 JESSUP, *op. cit. supra* note 4, at 50.

16 HARVARD RESEARCH 546.

17 Principal case at 547-48.

18 *Id.* at 547.

19 *Ibid.*

20 *Id.* at 549.

21 *Id.* at 548.

use of this hypothetical situation indicates that the court accepted the protective principle as embracing acts committed wholly outside a country which produce no tangible effects within that country.[22] On the other hand, the court seemed unwilling to adopt this conclusion as its holding since it proceeded to analogize jurisdiction asserted under the protective principle to jurisdiction under the "objective" territorial principle. The court accurately reasoned that since the United States has always claimed the power under the "objective" territorial principle to punish aliens within the United States for acts committed abroad intended to produce, and producing, effects detrimental to persons and property within the United States, it logically can punish extraterritorial acts which have a detrimental effect on this country's sovereignty.[23] But by seemingly equating the country's sovereignty with its territorial limits, and when finding the requisite injurious effect on sovereignty in the aliens' subsequent entries into the country,[24] the court carried the analogy too far. The "objective" territorial principle requires that the act produce a tangible effect within the country in order to support the fiction that the actor is constructively "present" where the effect is felt, thus providing the basis for asserting jurisdiction in the name of the territorial principle. However, no such fictional "presence" is necessary under the protective principle which looks only to the nature of the interest affected, not to the locus of the act. Admittedly a nation's sovereign power (and thus its sovereignty) can extend beyond its territorial borders; logically, then, its sovereignty is subject to attack outside the country's borders without tangible effects necessarily resulting within the country's territorial limits. This distinction between the two principles is basic. Yet the language and reasoning of the court leave some doubt whether it viewed the protective principle as merely a facet of our basic territorial principle or as a separate basis of jurisdiction resting upon different considerations.

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22 The lower court disagreed: "Any act which would offend the sovereignty of a nation must, of necessity, have some effect within the territorial limits of that state or there would be no adverse effect upon the government justifying a penal sanction." United States v. Rodriguez, 182 F. Supp. 479, 489 (S.D. Cal. 1960).

23 Principal case at 548-49.

24 *Ibid.*