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Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice

I. Jurisdiction Over Nationals: The Case of the Curiously Reluctant Prosecutor

In February of 1976, it was revealed in the international press that British nationals had been fighting as mercenaries in the Angolan civil war.[1] The English Prime Minister announced that a government committee had been set up under the direction of Lord Kenneth Diplock to investigate whether the existing British Foreign Enlistment Act[2] provided adequate legislation to control the recruitment of United Kingdom citizens for service as mercenaries.[3] The Diplock Committee Report,[4] released the following August, surprisingly recommended abolition of those portions of the Foreign Enlistment Act which made it a crime for British nationals to enlist as mercenaries[5] and indicated that a major reason for decriminalizing foreign enlistment was the impossibility of securing extraterritorial enforcement of British law. The Committee argued:[6]

> There is an important juristic distinction, as well as a practical one, between a law which seeks to control what is done by people when they are within the United Kingdom and what is done by them when they are not. National sovereignty is territorial and the national law of a state is not enforceable outside the state's own boundaries. If the law purports to prohibit a particular kind of conduct by its citizens when they are abroad the state itself has no means of enforcing the prohibition. All that it can do is to provide for prosecution and punishment of the offender when he returns.

From this key passage, it is unclear to what purpose the Committee is relying

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[1] *British Mercenaries Forced to Shoot Comrades* 15 Feb. 1976 Manchester Guardian Weekly 3.

[2] The Foreign Enlistment Act, 1870, 33 & 34 Vict., c. 90.

[3] *See* Chase, *Decriminalization of Foreign Enlistment* (manuscript, 1976).

[4] Report of the Committee of Privy Counsellors Appointed to Inquire Into the Recruitment of Mercenaries (Cmnd. 6569, 1976) (hereinafter cited as "DR").

[5] *Id.* 10-11.

[6] *Id.* 3.

upon the axiomatic[7] principle of law that, in general, and with certain well-recognized exceptions, criminal jurisdiction is territorial.[8] It is true that the principle prohibits a state from enforcing its laws within the jurisdiction of another sovereign.[9] Thus, British police cannot arrest accused criminals outside of Britain.[10] But this restraint placed upon a state's extraterritorial enforcement measures by the territorial principle prevents the arrest abroad of British nationals by British officials regardless of whether the nationals to be arrested are accused of having committed crimes within or outside British territorial jurisdiction. For example, if a British national robs a bank in Manchester, the territorial principle prevents his arrest in Marseilles by British police without permission from the French authorities. Yet the practical problems of extradition and enforcement do not provoke the British government to decriminalize bank robbery in England.

The evidentiary problems involved in prosecuting nationals for crimes committed abroad would again present practical difficulties for prosecution but would not constitute the basis for "an important juristic distinction" between laws which seek to prohibit certain conduct by nationals when within, as opposed to without, the state's territory.[11] The juristic distinction which the Diplock Committee appears to wish to make, and which is perhaps an implicit reason for their conclusion that British nationals should not be punished for foreign enlistment, is the conventional common law reluctance to exercise jurisdiction *at all* over extraterritorial criminal conduct. Thus while appearing to be concerned about "enforcement," the Committee's real concerns may rest upon the more difficult terrain of "jurisdictional competence," and it is to this area which we now turn.

At common law, a state could not exercise jurisdiction over its own citizens for crimes committed outside of the state's territory.[12] Nevertheless, Coke records that such jurisdiction was secured by the Court of the Constable and

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[7]Case Note, 61 U. PA. L. REV. 317, 317 (1913): "There is a general proposition of criminal law which has been so frequently reiterated and so generally accepted without question that it has become almost axiomatic. It is, that crimes are purely local and punishable only in the jurisdiction where committed."

[8]*See* 6 Whiteman, *Digest of International Law*, pp. 88 ff., BISHOP, INTERNATIONAL LAW, 3rd ed., pp. 535 ff., and Berge, *Criminal Jurisdiction and the Territorial Principle* 30 MICH. L. REV. 238 (1932).

[9]Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners* BRIT. YEARBOOK OF INT'L LAW 44 (1925).

[10]I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299-300 (1973).

[11]DR, *supra* 9-10; *see also* Roebuck, *The Diplock Report on Mercenaries* 13 August 1976 NEW STATESMAN 202.

[12]Case Note, *supra* note 7 at 318 (note 4): "Lord Brougham in *Warrender v. Warrender*, 9 Bligh 89 (Engl., 1934) at p. 119 says: 'The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction.'"

Marshal.[13] Although one continues to occasionally encounter constructions placed upon the territorial principle which cause it to appear exclusive,[14] by 1935 the Harvard Draft Convention on Jurisdiction with Respect to Crime[15] included a comment that "the competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded."[16] The Harvard Research project included an impressive list of American and British statutes under which nationals had been punished for crimes committed abroad,[17] including the British Foreign Enlistment Act of 1870[18] whose repeal is now urged by the Diplock Committee. Mssrs. Brierly and DeVisscher had in fact reported in 1926 to the League of Nations Committee on the Codification of International Law[19] that a statement of the sovereign right to exercise jurisdiction over nationals abroad could be eliminated since "no good purpose would be served by suggesting that a principle so well established should be embodied in a convention."[20]

Although various rationales are advanced in behalf of this nationality principle,[21] the generally agreed basis for the exercise of extraterritorial criminal jurisdiction over nationals is the allegiance owed by them to their sovereign.[22] Since the jurisdiction which a sovereign exercises over its own nationals is never the concern of another state,[23] such extraterritorial criminal jurisdiction exists outside of international law.[24] The specific safeguards under which extrater-

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[13]*Id.* (note 5): "Coke, 3 Inst. 48: 'If two of the king's subjects go over into a foreign realm and fight there, and the one kill the other, this murder being done out of the realm, cannot be for want of trial heard and determined by the common law, but it may be heard and determined before the constable and marshal.'"

[14]Niboyet, *Territoriality and Universal Recognition of Rules of Conflicts of Laws* 65 HARV. L. REV. 582, 585-586 (1952): "It seems normal to start from this indisputable social fact that whatever occurs in a given territory is subject to the law in force in that territory. *That law alone* can fix the circumstances under which a fact will become a legal fact and those under which it will remain without legal consequences . . . Occurences within the territory should be governed by the local law *without record* to the nationality of the interested parties." (emphasis added)

[15]Harvard Law School Research in International Law, *Jurisdiction with Respect to Crime* 29 AM. J. INT'L L., Supp. (1935), (hereinafter cited as *Harv. Res.*).

[16]*Id.* 519.

[17]*Id.* 528-530.

[18]*Id.* 530.

[19]Woolsey, *Extraterritorial Crimes* 20 AM. J. INT'L L. 757 (1926).

[20]*Id.* 757.

[21]*Harv. Res., supra* note 15 at 519-520.

[22]R. LEFLAR, AMERICAN CONFLICTS LAW 274 (1968): "The underlying theory is that duties owed by a citizen to his nation are so substantial and so permanent that they follow him anywhere and at all times persist even though he by his presence at another place may owe duties to the law of that place also."

[23]*Harv. Res., supra* note 15 at 531: "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."

[24]Becket, *supra* note 9 at 45: "The jurisdiction, which a state chooses to exercise over its own

ritorial jurisdiction is exercised and the circumstances justifying its use[25] are determined independently by individual states within their sovereign capacity.[26]

Common law countries tend to confine the exercise of extraterritorial jurisdiction over nationals more narrowly than civil law countries.[27] To some extent, this restricted practice is merely a result of the familiar process by which common law juridical notions (in this instance, the territorial principle) tend to develop a life of their own.[28] There are also real dangers implicit in the exercise of extraterritorial criminal jurisdiction arising from the fact that while an individual is subject to the law of his sovereign under the nationality principle, he remains within the territorial jurisdiction of the state where his criminal conduct took place.[29]

Thus there is the potential at least for confusion and perhaps double jeopardy associated with concurrent jurisdiction.[30] Further, there is a legitimate concern regarding the quality and availability of evidence when a defendant is tried a great distance from the location where he is purported to have committed a crime.[31] Consequently, some discretion must be employed in determining whether or not to bring a particular prosecution on the basis of extraterritorial criminal jurisdiction.[32]

Both American and English courts tend to treat legislative enactments as territorial in their application unless they are specifically designated extraterritorial in effect.[33] This principle of statutory construction is modified however by the practice of interpreting statutes in such a way as to avoid defeating their clear purpose. Thus in *United States v. Bowman,*[34] the Supreme Court held that American citizens could be found guilty of conspiring to defraud a United

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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." But for international legal control over some relations between states and their own nationals see *J. L. Brierly, The Law of Nations,* Sec. 6, LIMITS UPON A STATE'S TREATMENT OF ITS OWN NATIONALS (1963).

[25]*Harv. Res., supra* note 15 at 522.

[26]*Id.* 519.

[27]*Id.* 519-539; *Brownlie, supra,* note 10 at 293.

[28]George, *Extraterritorial Application of Penal Legislation* 64 MICH. L. REV. 609, 636 (1966): "[T]here is considerable inertia behind the verbal tradition that crimes can be based only on activity observable within the state." *See also* Case Note, *supra* note 7 at 317: "As a broad statement of the law, (the territorial principle) is true, but there is one important phase of the situation which seems to have been so engulfed by the very generality of this proposition, that it has been lost sight of by members of the bar, and has allowed some of our courts to go astray in its application, or rather non-application."

[29]George, *supra* note 28 at 637; BROWNLIE, *supra,* note 10 at 299.

[30]Moore, *Report on Extraterritorial Crime and the Cutting Case* U.S. FOR. REL. 757, 780 (1887).

[31]*Id.;* George, *supra,* note 28 at 637.

[32]*Harv. Res., supra,* note 15 at 531.

[33]*See American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 357 (1909); *The Sussex Peerage,* 11 CL. & FIN. 85, 146 (1844).

[34]260 U.S. 94 (1922).

States agency in violation of the Criminal Code even though the criminal conspiracy took place on the high seas and within the jurisdiction of another country.[35] Chief Justice Taft argued that some offenses:[36]

> are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. 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 offense.

Indeed, a very similar argument was advanced by Lord Russell, C.J., in the case of *Queen v. Jameson*[37] which resulted in a conviction under the British Foreign Enlistment Act of 1870.[38] The *Jameson* indictment was brought under Section 11[39] of the Act.[40] However Section 4,[41] applying to enlistment in the service of a foreign state (the repeal of which section is recommended by the Diplock Committee[42]), states specifically that the prohibition applies to any person "being a British subject, *within or without* Her Majesty's dominions. . . ."[43] Consequently it cannot be doubted but that Parliament has granted the courts extraterritorial criminal jurisdiction over British nationals who enlist as mercenaries in violation of the Act.

Of course, British and American courts are obligated to construe statutes in conformity with international law to the extent such a construction is at all possible.[44] Yet there is no question of international law involved in interpreting the Foreign Enlistment Act's applicability to British nationals since, again, this is a matter exclusively within the competence of England as a sovereign state. Thus, it cannot be contended that the internationally recognized[45] principle of territorial criminal jurisdiction precludes sovereign states from exercising extraterritorial criminal jurisdiction over their own nationals. Questions of concurrent jurisdiction, admissibility of evidence, and statutory interpretation may determine in specific instances whether or not the nationality principle is invoked to bring particular extraterritorial acts within the jurisdiction of British

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[35]*Id.* 96-97.
[36]*Id.* 98.
[37]2 Q.B. 425, 430-431 (1896).
[38]The Foreign Enlistment Act, 1870, 33 & 34 Vict., c. 90.
[39]Section 11 prohibits the preparation and fitting out of foreign military expeditions.
[40]*Jameson, op. cit.*, 425.
[41]Section 4 is titled "Penalty on enlistment in service of foreign state."
[42]DR, *supra*, note 4 at 10-11, 14.
[43]Emphasis added.
[44]INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT (ed. by E. Lauterpacht, 1970) Vol. I 157, 170.
[45]*Harv. Res., supra,* note 15 at 519-539; L. OPPENHEIM, INTERNATIONAL LAW (ed. by H. Lauterpacht, VIII ed.) Vol. I 330; WHEATON'S INTERNATIONAL LAW (ed. by A. Keith, 1929) Vol. I 270.

courts. However, it is far from clear what combination of these circumstances compels the Diplock Committee to propose that all foreign enlistment prohibitions be repealed, legislation without which no prosecution whatever may be brought.

II. Jurisdiction Over Non-Nationals: The Case of the Unexpectedly Similar Precedents

The development of judicial practice regarding the exercise of jurisdiction over extraterritorial violations of American antitrust legislation has had a controversial and inordinately complicated career.[46] Lengthy and uncertain doctrinal evolution has produced a correspondingly extensive literature within the business and legal communities[47] which has, on balance, tended to further confuse the central issues involved and has failed to resolve any more clearly than the courts the contradiction between the increasingly transnational character of functional economic units which affect the American domestic market and the political risks involved in exerting extraterritorial jurisdiction over economic practices within foreign jurisdictions and commercial spheres.[48] Nevertheless, an oversimplified and schematic rendition of the theoretical approaches to the exercise of extraterritorial jurisdiction in antitrust cases has the value of making possible a brief assessment of the entire scope of debate.

The participants, beyond the United States Justice Department, may include a variety of juristic persons ranging from American corporations doing business abroad and their subsidiaries to foreign subsidiaries of American firms or foreign corporations doing little or no business in this country.[49] The alleged *locus delicti* may include a boardroom in Switzerland or a Latin American jungle and its precise definition is frequently the center of disagreement.[50]

The theoretical positions fall along a spectrum whose polar limits are: (A) The "strict territoriality theory"[51] which asserts that American courts cannot take jurisdiction over antitrust cases (even when only American corporations are involved) if the alleged violations take place outside of the United States.[52] The

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[46]*See* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958) which remains the best single source in this area.

[47]Useful bibliographies are found in Raymond, *A New Look at the Jurisdiction in Alcoa* 61 AM. J. INT'L L. 558, 558 (note 3) (1967); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law* 7 VA. J. INT'L L. 100, 100 (note 1) (1967).

[48]R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 272-273 (1970).

[49]George, *Extraterritorial Application of Penal Legislation* 64 MICH. L. REV. 609, 632 (1966).

[50]Raymond, *supra* note 47 at 569.

[51]Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners* BRIT. YEARBOOK OF INT'L L. 44, 45 (1925): "The view, that the jurisdiction of states is limited by the law of nations to crimes committed on their territory, may be described as 'the strict territorial theory'. . . ."

[52]FALK, *supra,* note 48 at 280.

rationale for this position is either that the territoriality principle precludes giving extraterritorial effect to national legislation[53] or else the less extreme position that Congress did not intend the antitrust acts to have extraterritorial extension.[54] *American Banana Co. v. United Fruit Co.*[55] (the first extraterritorial antitrust adjudication) is frequently cited as authority for either of these arguments. (B) The "intended impact theory"[56] which contends that American courts can assume jurisdiction over antitrust cases (even when no American corporations are involved) if the allegedly illegal activity was intended to have an impact on American domestic commerce.[57] The rationale for this position is that without extraterritorial regulation, the sources of restraint upon trade affecting the domestic market can simply be located beyond the boundaries of American territorial jurisdiction.[58] The well known and controversial authority for this theory is *United States v. Aluminum Co. of America.*[59]

Professor Richard Falk reiterates the dichotomy in parallel terms:[60]

> There are two alternative constructions of *lex loci delicti*: first, the physical act or subjective territorial theory; secondly, the place of harm or objective territorial theory. The *Banana* case expresses the traditional physical act theory that limits jurisdiction to the place where the illegal act physically occurred.

"Courts have implicitly moved toward the place of harm theory," Falk continues,

> and in *Alcoa* jurisdiction was upheld because an agreement made in Switzerland caused harm to the United States, although no significant act, albeit an omission, was commited within the United States. This latter construction, permitting the regulation of any undesirable foreign activity, provided only that the defendant can be hauled before the court, has been challenged for its flexibility.

Substantially less moderate words than "flexibility" have been used to describe the jurisdictional authority claimed for American courts in the *Alcoa* decision.[61] It is interesting to investigate the sources of Judge Hand's opinion in *Alcoa* and contrast them with their counterpart, the *Banana* opinion rendered by Justice Holmes.

The critical passage from *Alcoa* which is frequently cited[62] as expressing the

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[53]Whitney, *Sources of Conflict Between International Law and the Antitrust Laws* 63 YALE L.J. 655, 656-657 (1954).

[54]Brewster, *supra*, note 46 at 65-67.

[55]213 U.S. 347 (1909).

[56]FALK, *supra*, note 48 at 271, 282-285.

[57]Raymond, *supra* note 47 at 560-561.

[58]FALK, *supra* note 48 at 272.

[59]148 F.2d 416 (2d Cir. 1945).

[60]FALK, *supra* note 48 at 276-277.

[61]Raymond, *supra* note 47 at 569 (note 23).

[62]Haight, *International Law and Extraterritorial Application of the Antitrust Laws* 63 YALE L.J. 639, 641 (1954); FALK, *supra* note 48 at 279; Raymond, *supra* note 47 at 560; Brewster, *supra* note 46 at 72.

essence of Judge Hand's "impact theory" includes the following language:[63]

> [I]t is settled law—as "limited" itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

The two major cases which Judge Hand cites as precedent for this argument are *Strassheim v. Daily*[64] and *Ford v. United States.*[65]

In the *Ford* case, the Supreme Court upheld the seizure of a British vessel and her crew who were convicted under the Prohibition Act of illegally importing liquor into the United States.[66] Although the sailors seized outside of American territorial waters committed acts which had consequences inside the country (the *Alcoa* situation[67]), they were also party to a criminal conspiracy which was followed by *overt acts*[68] within the country (not present in *Alcoa*). In any event, the *Ford* decision quoted from and rested primarily upon *Strassheim* for its authority.[69]

In *Strassheim,* the Supreme Court upheld a state's right to convict a defendant accused of defrauding the State through an agent even though the defendant was not present in the State on the days when the criminal acts were committed[70] arguing that:[71]

> the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. 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.

What is especially interesting about this opinion is that it was written only two years after *Banana,* by Justice Holmes himself, and includes as authority for the argument quoted—*American Banana Co. v. United Fruit Co.*[72]

The reference in *Strassheim* is to *Banana* at page 356[73]—the page which includes Justice Holmes' familiar statement of the territoriality principle: "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is

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[63]*Alcoa,* at 443.
[64]221 U.S. 280 (1911).
[65]273 U.S. 593 (1927).
[66]*Id.* 594.
[67]*Id.* 620.
[68]*Id.*
[69]*Id.* 620-621.
[70]*Strassheim* at 284-285.
[71]*Id.*
[72]Indeed, *Banana* is the only federal case which Holmes cites in behalf of his argument.
[73]The citation as it appears in *Strassheim* at 285 is: "American Banana Co. v. United Fruit Co., 213 U.S. 347, 356."

done."[74] The portion of Holmes' argument which *precedes* this statement (not surprisingly) is a list of circumstances under which states exercise various forms of extraterritorial jurisdiction.[75] And the only one of these examples from American practice which does not concern piracy[76] or regions subject to no sovereign[77] is a statement of the "protected interest principle":[78] "In cases immediately affecting national interests (states) may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction."[79]

The primary reason for tracing the winding and disconnected thread of authority upon which *Alcoa* is apparently based back to Justice Holmes and the *Banana* decision, *Alcoa's* presumed antithesis in terms of jurisdictional theory,[80] is simply to underscore the ultimate futility of trying to explain the course of American extraterritorial jurisdiction practice in the antitrust area exclusively in terms of neat and orderly principles of jurisdictional theory, which are frequently no more than labels conveniently applied to judicial outcomes. Had Holmes wished to exercise jurisdiction over the dispute between American banana companies in Latin America during the early period of that market's exploitation, he could have combined a "nationality principle" (the proposition that a sovereign has jurisdiction over its nationals everywhere)[81] with a theory of statutory interpretation permitting the presumption that Congress had intended extraterritorial extension of the Sherman Antitrust Act where failure to do so would defeat the usefulness of the legislation.[82]

But a second reason for this exercise in unraveling judicial precedents is to suggest metaphorically that it is the "protected interest principle" which comes closest to describing (though not justifying) Judge Hand's decision in *Alcoa.*[83]

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[74]*Banana* at 356.

[75]*Banana* at 355-356.

[76]*Banana* at 356: "They go further at times and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas."

[77]*Banana* at 355-356: "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

[78]*Harvard Research in International Law, Jurisdiction with Respect to Crime* 29 AM. J. INT'L L., Supp. 543 (1935) I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 296-297 (1973); M. 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, 575, 578.

[79]*Banana* at 356.

[80]FALK, *supra,* note 48 at 270-271, 276-277.

[81]Blackmer v. United States, 284 U.S. 421, 436-437 (1932).

[82]United States v. Bowman, 260 U.S. 94, 98.

[83]Haight, *supra,* note 62 at 639-640, cannot see how the "protected interest principle" could be the basis for Judge Hand's position because "No such 'protective' principle, however, is recognized by the United States or Great Britain." Even the pages from Harvard Research cited by Haight in support

The "objective territorial theory"[84]—far from being a legal imperative—is not even a plausible label for what the court did in *Alcoa,* since that notion would have to be stretched beyond the breaking point. R.Y. Jennings expressed the point very effectively:[85]

> [The objective territorial principle] is often said to apply where the offense "takes effect" or "produces its effects" in the territory. In relation to elementary cases of direct physical injury, such as homicide, this is unexceptionable, for here the "effect" which is meant is an essential ingredient of the crime.

"Once we move out of the sphere of direct physical consequences, however," Jennings continues,

> to employ the formula of "effects" is to enter upon a very slippery slope; for here the effects within the territory may be no more than an element of alleged consequential damage which may be more or less remote. . . . If indeed it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another territory, then there were virtually no limit to a State's territorial jurisdiction.

Indeed, both advocates[86] and opponents[87] of the "intended impact theory" have suggested that its interior rationale is in fact the "protected interest principle." If the United States has elevated its economic policy interests in the enforcement of antitrust legislation against foreign corporations abroad to a point where jurisdiction is asserted over them on the implicit ground that they are in effect threatening, through their conduct outside the United States, American national security—then we have gone a considerable distance toward reviving *Cutting Case* politics of judicial arrogance.[88]

Postscript: Laws and Men

It will be apparent that the two sections of this essay on extraterritorial criminal jurisdiction stand in a curious theoretical relationship to each other: one presents a sector of the legal apparatus (a blue-ribbon legislative committee) employing legal principle conservatively in order to avoid exercising juris-

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of his analysis indicate that he is wrong. *See* Harv. Res., *supra,* note 15 at 543-544; and especially Garcia-Mora, *supra,* note 78 at 575, 578; also Wiesner, *A Half Century of Jurisdictional Development: From Bananas to Watches* 7 MIAMI L.Q. 400, 403.

[84]Raymond, *supra,* note 47 at 368-369.

[85]Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws* BRIT. YEARBOOK OF INT'L L. 146, 159 (1957).

[86]Raymond, *supra,* note 47 at 568 (note 21); Timberg, A.B.A. Section of Int. and Comp. L., 1957 Proceedings 51.

[87]Brownlie, *supra,* note 10 at 294 (note 2): "*See* U.S. v. Aluminum Company of America . . . In American antitrust cases wide extension of the territorial principle might be explained by, though it is not expressed in terms of, a principle of protection"; George, *supra,* note 28 at 613 includes the antitrust controversy under the heading of problems involving the "protected interest principle."

[88]*See* Moore, *Report on Extraterritorial Crime and the Cutting Case* U.S. FOR. REL. 757, (1887); L. OPPENHEIM, INTERNATIONAL LAW (ed. by H. Lauterpacht, VIII ed.) Vol. I 331-332; Raymond, *supra,* note 47 at 568-569.

diction over nationals where that jurisdiction could be readily asserted without doing violence to the mainstream of legal precedent; the other presents a different sector of the legal apparatus (a federal district court) assuming an avant-garde position in relation to the same body of legal principle in order to legitimize the exercise of jurisdiction over non-nationals. A short-hand reconciliation of these apparently divergent practices can be achieved on the plane of identical subordination of legal ideology to social and economic interest: Britain does not want to prosecute its own citizens for fighting ("illegally") a war which Britain (tacitly) supported as part of a CIA-backed[89] counterinsurgency force; the United States is willing to prosecute foreign corporations for ("legally") interrupting the normal flow of strategic imports (e.g., aluminum).[90]

But it is submitted that this reconciliation is itself only "apparent" and constitutes a kind of reductionism of considerable magnitude. The "fundamental notions of international law" Lauterpacht refers to in the quotation at the beginning of the essay should not be given the appearance of standing in relation to the "more tangible political interests" which he also refers to, in the same way "superstructure" is so frequently related to "base" or phenomena to essence in the idealistic Hegelian model.

It is more complicated than that. In his social history of the Black Act, Edward Thompson concludes:[91]

> Thus the law (we agree) may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation. But we must press our definitions a little further. For if we say that existent class relations were mediated by the law, this is not the same thing as saying that the law was no more than those relations translated into other terms, which masked or mystified the reality. This may, quite often, be true but it is not the whole truth. For class relations were expressed, not in any way one likes, but *through the forms of law*; and the law, like other institutions which from time to time can be seen as mediating (and masking) existent class relations (such as the Church or the media of communication), has its own characteristics, its own independent history and logic of evolution.

So it is never a question of placing specific legislative enactments or recommendations, particular judicial decisions, in their "larger" social context. On the contrary, the problem is how to describe a fully articulated whole composed of relatively autonomous structures (law, science, economics, childhood, etc.), each independently animated by its own structure in dominance, dislocations, contradictions, and rhythm of development. The economy is determinant but as Engels said "only in the last instance." And as Althusser correctly observes, "the last instance never comes."[92]

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[89]Marcum, *Lessons of Angola* 54 FOREIGN AFFAIRS 407, 414.
[90]FALK, *supra*, note 48 at 265-272.
[91]E. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 262 (1975).
[92]*See* L. ALTHUSSER AND E. BALIBAR, READING CAPITAL (1970).