International Conflict of Laws -- The Protective Principle in Extraterritorial Criminal Jurisdiction

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Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol15/iss4/10
INTERNATIONAL CONFLICT OF LAWS— THE PROTECTIVE PRINCIPLE IN EXTRATERRITORIAL CRIMINAL JURISDICTION

Appellant, an alien, was prosecuted in a federal district court for false statements made at an American consulate in Mexico in order to procure a nonquota immigrant visa. The court based its denial of a motion to dismiss on the ground that jurisdiction was established by reference to the offense against the integrity of the United States, irrespective of the locus of the crime and the nationality of the defendant. On appeal, the court affirmed: there are no constitutional prohibitions against the exercise of jurisdiction, under the "protective" principle, over an alien found within the sovereign's territory. *Rocha v. United States*, 29 U.S.L. Week 2411 (9th Cir. 1961), petition for cert. filed, 29 U.S.L. Week 3331 (U.S. April 28, 1961) (No. 932).

International jurists postulate five possible referents for the exercise of criminal jurisdiction: (1) the territorial principle, jurisdiction being based on the locus of the crime as within the state's geographical boundaries; (2) the nationality principle, jurisdiction being founded on the allegiance of the citizen-defendant to the prosecuting state, although the crime was committed abroad; (3) the protective principle, jurisdiction being predicated on the national interest injured by the offense committed abroad; (4) the universality principle, jurisdiction resting on custody of the alien offender, and (5) the passive personality principle, jurisdiction being laid on the nationality of the injured person.

Anglo-American jurists, presumably unable to shake off the Austinian concept of state sovereignty, traditionally limited criminal jurisdiction to the state within whose geographical limits the offense occurred, whether the defendant were a citizen or an alien. The "big name" literature of early American law is studded with evidence of this preoccupation with the "locus" of the crime. But the demands of federalism soon pressured the

1. The indictment was under Crimes and Criminal Procedure, 18 U.S.C. § 1546 (1958), which provides fine or imprisonment for fraud and misuse of visas, permits, and other entry documents.
5. See, for example, *Story, Commentaries on the Conflict of Laws* §§ 17, 18 (8th ed. 1883): "[N]o state or nation can by its laws directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural-born subjects or others . . . . It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey." (Emphasis added.) See also *Holmes J.*, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909): "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."
CASES NOTED

American courts into rather picturesque fictions. In *Simpson v. State,* the defendant shot across the Savannah River from the South Carolina shore, but missed the complaining witness who was boating in the Georgia portion of the river. The "ball" embedded itself in Georgia soil. Concluding that the locus of the attempted murder was in Georgia, the Georgia court reasoned that "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 so-called "effects" doctrine was rationalized as an "objective" application of the territorial rule. And, in *Strassheim v. Dailey,* no less a jurist than Mr. Justice Holmes added his authority to the disfiguration by finding that although the defendant perpetrated his fraud on a Michigan penal agency from Chicago, the locus of the crime was Michigan, where the harmful "effects" were felt, and not Illinois, where the act was committed.

Additionally, an exception to the territorial rule was provided by the second jurisdictional referent mentioned above, the *nationality* principle. Several American courts have employed this doctrine, but have typically qualified it by requiring that the act must have produced deleterious "effects" in the United States. And, of course, this exception left open the question of aliens who had committed crimes against the United States abroad.

Continental jurists, meanwhile, were expanding extraterritorial criminal jurisdiction to include offenses committed abroad, even by aliens, if the crime threatened the "security, integrity or independence" of the state seeking to prosecute. The protective theory, based on self-defense, assumed that "the legislation of the State where the crime is committed will be inadequate." From an examination of Continental Codes, it is clear that the theory was designed primarily to punish crimes in which the locus of

6. *92 Ga. 41, 17 S.E. 984 (1893).*
7. *Id. at 42, 17 S.E. at 985.*
8. *221 U.S. 280 (1911).*
9. *Cf. text following note 2 supra.*
10. *Notably United States v. Bowman, 260 U.S. 94, 98 (1922), in which there can also be found evidence of the protective principle. Jurisdiction over three United States nationals who defrauded this country, partially on the high seas and partially in the port of Rio de Janeiro, was upheld "because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents." (Emphasis added.) Other cases utilizing the nationality referent are: *Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Skiriotes v. Florida, 313 U.S. 69 (1941); Blackmer v. United States, 284 U.S. 421 (1932).*
11. Of the cases cited in note 10 supra, only the *Blackmer* decision displayed no concern with the territorial locus of the crime.
12. *Harvard Research in International Law, supra note 2, at 546: "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."*
13. *Id. at 553.*
the crime would likely have little interest, typically political crimes and offenses against national currency or documents.\textsuperscript{14}

The instant case, and the decision from which it was appealed, are significant because they are the first explicit assertions of the protective principle in the United States. However, bits and pieces of the doctrine are evident from prior cases. In an early Texas case,\textsuperscript{15} the court found constitutional a local statute authorizing the conviction of persons forging Texas land titles in Louisiana. With obvious good sense, which many subsequent decisions seem to have ignored, the court said:

Such acts are offenses against the State of Texas and her citizens only, and can properly be tried 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.\textsuperscript{16}

The Seventh Circuit, in United States ex rel. Majka v. Palmer,\textsuperscript{17} upheld the deportation of an alien who had made false statements to a United States consul in Poland in order to obtain a passport. The rationale depended in the main on the questionable\textsuperscript{18} conclusion that the consulate was United States territory and that the United States was therefore the locus of the crime. But the court also indicated that the crime was against the United States and not Poland, so that whether the perjury was indictable in Poland was immaterial.\textsuperscript{19}

In United States v. Archer,\textsuperscript{20} a federal district court in California convicted a defendant-alien of perjury for making false statements before the United States consul in Mexico while applying for a non-immigrant visa. The court again relied on the theory that the consulate was United States territory, and to a lesser extent on the protective principle (unwittingly, as had the Palmer court). Interestingly, the court became enmeshed in the “effects” doctrine by likening the “effect” of actually entering the United States by means of an illegally obtained visa to the “effect” of a mail fraud which is begun abroad but which causes harmful results within the United States.\textsuperscript{21}

An abrupt turnabout to this line of immigration cases came with

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14. Id. at 546-47. For example, Article 7 of the French Code d'Instruction Criminelle authorizes prosecution of aliens who, outside of French territory, are guilty of “un crime attentatoire a la surete de l'Etat, ou de contrefacon du sceau de l'Etat, de monnaies nationales ayant cours, de papiers nationaux...” See de Vabres, Les Principes Modernes Du Droit Penal International 86, 87, (1928).
16. Id. at 308-09.
17. 67 F.2d 146 (7th Cir. 1933).
18. 2 Hackworth, Digest of International Law 622-23 (1941).
19. 67 F.2d 146, 147 (7th Cir. 1933).
21. Id. at 710.
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United States v. Baker.22 Confronted with similar facts,23 a New York District Court found that "the crime must be committed within the territorial jurisdiction of the sovereignty . . . in order to give that sovereign jurisdiction."24 Moreover, since the defendant was an alien, the exception to this general rule, wherein "jurisdiction . . . is predicated upon the citizenship of the offender rather than the locus of the crime . . ."25 was inapplicable. Finally, the "effects" doctrine, or "objective" application of the territorial rule, could not be employed since there were no "effects" within the territorial limits of the United States: "Here the defendant's crime was complete the moment she made the false statement; no further acts within the United States were necessary to complete the offense."26

The instant case was commenced in the Southern District Court of California.27 In a remarkably thorough exposition, the court swept aside as untenable the notion that United States consulates were pieces of United States territory for the purpose of determining the locus of a crime,28 gave short shrift to the Baker court's preoccupation with the "effects" doctrine,29 and stood unequivocally on the protective principle, determining jurisdiction by reference to the national interest injured by the offense.30 Recognizing the conflict between the territorial principle of jurisdiction and the protective

23. Proceeding was on a motion to dismiss an indictment charging an alien with falsifying and concealing a material fact while abroad in reference to immigration.
24. 136 F. Supp. 546, 547 (S.D.N.Y. 1955), quoting from Yenkichi Ito v. United States, 64 F.2d 73, 75 (9th Cir. 1933).
26. Id. at 548-49. (Emphasis added.) For a student note criticizing the Baker decision, not because the protective principle was not applied, but because the "objective" application of the territorial principle was misapplied, see Note, 45 CALIF. L. REV. 199 (1957).
28. Id. at 492, court's footnote 13.
29. After stating that the court in United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955) had concluded "that some further act would have to be done within the United States in order to have some effect within the United States," the Rodriguez court, 182 F. Supp. 479, 493-94 (S.D. Cal. 1960), argued against the historical Anglo-American search for objective effects within the prosecuting state: "When a crime coming within the scope of the protective theory of jurisdiction is involved, that detrimental effect takes place through the effect upon the sovereignty of the state." (Emphasis added.) But the court further found, mistakenly it is believed, that the "effects" doctrine in Anglo-American precedent has been applied only to extraterritorial offenses against citizens, rather than the government. Where the government is affected, the court maintained that the protective theory has always been the historical answer. As its only authority for this latter proposition, the court relies in footnote 8 on dicta from Church v. Hubbard, 12 U.S. (2 Cranch) 187 (1804). United States v. Bowman, 260 U.S. 94 (1922), seems ample evidence to the contrary. There, although the offense was fraud on the federal government, the United States Supreme Court still struggled to find "effects" within this country to justify an objective application of the territorial rule, in addition to the nationality referent. Although some phrasing in the opinion points obliquely to the protective principle, main reliance was clearly on the territorial and nationality rules.
30. "From the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation . . . . Thus, having found that the protective principle exists as a recognized doctrine of international law . . . it becomes a principle that Congress can rightfully incorporate into its legislation . . . ." United States v. Rodríguez, 182 F. Supp. 479, 491 (S.D. Cal. 1960).
theory of extraterritorial jurisdiction, the court argued that the typical crime reached by the protective principle is offensive, not to the nation in which it was committed, but to the integrity of the state seeking to prosecute. Therefore, the locus of the crime would normally have little or no interest in punishing the offender. Moreover, certain safeguards should be imposed: the act complained of may not have been "committed in the exercise of a liberty guaranteed the alien by the law of the place where it was committed."31 In addition, the country seeking jurisdiction must presently have the defendant within its territorial limits.32

On appeal, the Ninth Circuit affirmed,33 but through an unfortunate misinterpretation of the district court decision wriggled back into the territorial principle—a much safer ground in Anglo-American law:

Obviously the decision below herein rested not only on the act abroad, but also on the effect it produced within the boundaries of the United States, namely, the aliens' subsequent successful entrance at the border based on a document allegedly procured by fraud.34

This is a needless anachronism. In effect the court is reverting to such ponderous considerations as whether a "ball" shot across the Savannah River from South Carolina into Georgia constitutes attempted murder in the former state, locus of the "act," or the latter state, locus of the "effect."

Not only did the Ninth Circuit implant the territorial principle in the decision below while in fact the district court did not rely on it,35 but it also garbled the two theories:

The acts . . . were all done outside the state, but they were intended (at least at the point of time when the fraudulent document was used to gain entry) to produce, and did produce, a detrimental affect on the sovereignty of the United States. Thus under the "protective principle," less well known than "the territorial principle," . . . there is, and should be, jurisdiction.36

There is good reason to make criminal jurisdiction extraterritorial with reference to aliens. "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."37 On the other hand, reasonable grounds of objection have been found: one critic has argued from common venue concepts, such as the relative ease of gathering evidence, that "the social order of a

31. Id. at 489, citing Harvard Research in International Law, note 2 supra, at 543.
34. Ibid. (Emphasis added.)
35. See note 29 supra.
37. Harvard Research in International Law, supra note 2, at 552.
community should be restored where it has been upset.”\textsuperscript{38} Another critic has expressed fear of varying and vague standards for “political” crimes which are most often the subject of alleged extraterritorial jurisdiction.\textsuperscript{39} The solution, which seems at once the most obvious and yet the most difficult to achieve, would be to “develop a high degree of political integration of the international community” in order to “impose upon the territorial State the duty to punish those who within its jurisdiction commit harmful acts against other States.”\textsuperscript{40} Oddly enough, the Anglo-American bloc, which has shown itself least willing to adopt the protective principle of extraterritorial jurisdiction, has also evinced the least initiative in punishing persons within its borders who have committed crimes against other states.\textsuperscript{41}

If appropriate safeguards are employed,\textsuperscript{42} a flexible protective principle seems indispensable to criminal law, at least until the hoped for “political integration” of nations is attained. It is especially appropriate for immigration problems of the type presented by the instant case, as well as related areas, such as extraterritorial counterfeiting of United States currency.\textsuperscript{43} Other states are not likely to consider these prosecutions as infringements on their territorial sovereignties, and what is more, would probably be disinclined to spend their energies punishing these offenses. In any event, if the punishment of aliens for crimes committed abroad is determined to be a desirable end, it makes sense to adopt the protective principle straightforwardly as a means, instead of torturing the territorial doctrine out of shape to save the face of precedent.

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\textsuperscript{40} Id. at 590.
\textsuperscript{41} Harvard Research in International Law, supra note 2, at 552: “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.”
\textsuperscript{42} In the Harvard Research in International Law article, note 2 supra, at 557-61, the following safeguards are suggested “with respect to the acts of aliens which may be denounced as criminal”: (1) although the offense need not be denounced by the locus of the crime, still it may not be an act or omission committed in the exercise of a liberty guaranteed by the locus of the crime; (2) the alien must have been taken into custody by the State seeking to prosecute; (3) the alien must not have been previously prosecuted by the territorial state, and (4) the alien shall be given a “fair trial before an impartial tribunal.”
\textsuperscript{43} Harvard Research in International Law, supra note 2, at 561.