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Recommended Citation

Arthur Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L. Rev. 5 (1964)
Available at: <http://scholarship.law.cornell.edu/clr/vol50/iss1/2>

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INTERNATIONAL LAW AND RULES ON INTERNATIONAL JURISDICTION*

Arthur Lenhoff†

I

INTRODUCTORY REMARKS: TERRITORIAL SUPREMACY

It is generally recognized that public international law has not yet developed rules providing for an *exclusive* delimitation of judicial jurisdiction among the members of the community of states.¹ Where we speak of "international jurisdiction," therefore, we are referring merely to the fact that the litigation contains foreign elements, and not to the source of the jurisdiction exercised.²

However, the statement that at present there are no rules of general international law providing for such a delimitation over the same transaction,³ is based on the presupposition that by exercise of jurisdiction in the given case a state does not "overstep the limits which international law places upon its jurisdiction." The words set between quotation marks are taken from the famous decision of the Permanent Court of International Justice in *The Case of the S.S. "Lotus" (France v. Turkey)*.⁴ Said the Court:

[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.⁵

Thus, leaving aside a few narrowly defined "permissions,"⁶ it is clear

* This article constitutes section 1 of chapter 2 of the author's book, *Jurisdiction and Judgments: A Comparative Study*, to be published for the Parker School of Foreign and Comparative Law of Columbia University by Oceana Publications, Inc.

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¹ 1 Niboyet, *Traité de Droit International Privé Français*, No. 53, at 68 (1938-1949) [hereinafter cited as Niboyet]; 1 Sperl, *Lehrbuch der Burgelichen Rechtspflege* 29 (1925-1930) [hereinafter cited as Sperl, *Lehrbuch*]; Wolff, *Private International Law* 53, 251 (2d ed. 1950) [hereinafter cited as Wolff]; Verdross-Drossberg, "Void and Punishable Acts of State in International Law," 2 *Western Polit. Q.* 183, 184 (1949). See also ch. I, § 1(c) of the author's forthcoming book.

² Naturally the same objections which have been raised so often against the term "private international law" have been made against the terms "international procedural law," "international competence," etc. See, e.g., Cheshire, *Private International Law* 16 (6th ed. 1952); Goodrich, *Conflict of Laws* 9 (3d ed. 1949).

³ Restatement, *Foreign Relations Law* § 37, comment a at 106 (1962). See also Fisher, 35 *ALI Proceedings* 453 (1958).

⁴ P.C.I.J., ser. A, No. 10, at 19 (1927). See also Jessup, *Transnational Law* 35 (1956) [hereinafter cited as Jessup].

⁵ *The Case of the S.S. "Lotus,"* supra note 4, at 18; Verdross-Drossberg, supra note 1, at 184.

⁶ A discussion of the exceptions permitted under international law does not fall within the scope of this study. It may suffice to refer to jurisdiction aboard national vessels or aircraft, or jurisdiction over a member of the armed forces in a foreign state consenting to their presence. See Restatement, *Foreign Relations Law* §§ 47-65 (1962).

that a state may not use adjudicatory or compulsory methods within the territory of another state.⁷

The exercise of acts of international judicial assistance in a foreign country calls for attention in this connection. Among such acts, the service of papers and the examination of witnesses in a foreign state have played the most important role.⁸ Where service is made by, or depositions are taken before, private persons, the exercise of judicial powers would appear not to be involved.⁹ However, it is difficult to arrive at the same conclusion where a commissioner is appointed by the court in which an action is pending to make the examination in a foreign country, for example, Italy, or where a consul is requested by a party to the action to serve a summons, notice or subpoena on a witness abroad. Functions of this kind, if carried out by such persons, clearly involve the exercise of official powers in a foreign country. It is true that in *Blackmer v. United States*,¹⁰ the United States Supreme Court denied that the service of subpoenas upon an American citizen in France, requiring his appearance in an American criminal proceeding, constituted an invasion of any right of the foreign government. However, this view was vigorously criticized; no less eminent a legal scholar than Wigmore considered the act as an attempted exercise of state power within the territory of a foreign state.¹¹

However, our concern in this study is not with the exercise of the jurisdiction of a state outside its territory; we are concerned, rather, with the limitations derived from international-law concepts which restrict the intraterritorial exercise of jurisdiction by a state over persons and activities outside its territory. This article will, therefore, deal first with the assertion of jurisdiction against persons regardless of their presence within the state. Next will follow an examination of jurisdictional limitations based on the extraterritorial nature of the subject matter; this examination will deal with both criminal proceedings and civil proceedings. Finally, some general considerations will be given to the concurrence of the jurisdictional claims of different states, leaving the more detailed discussion of the subject to subsequent sections of the study from which this article is adapted.

⁷ *Id.* §§ 32, 47-65; Jessup 35.

⁸ For this question, see particularly Smit, "International Aspects of Federal Civil Procedure," 61 *Colum. L. Rev.* 1031, 1040 (1961).

⁹ Smit, "International Co-operation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity," 9 *Nederlands Tijdschrift voor Internationaal Recht* 137, 146 (1962).

¹⁰ 284 U.S. 421 (1932) (service of subpoenas in Paris by American consul on American citizen living there).

¹¹ 8 Wigmore, *Evidence* § 2195c (3d ed. 1940); See Smit, *supra* note 8, at 146. But see *Restatement, Foreign Relations Law* § 63, comment b (1962).

II

INTRATERRITORIAL EXERCISE OF JURISDICTION OVER PARTIES
ABROAD AND OVER EXTRATERRITORIAL ACTIVITIES1. *Is the Presence of the Defendant an International-Law Requirement?*

Aside from the rule of general international law prescribing immunity of diplomatic representatives of a foreign state from the jurisdiction of the receiving state,¹² there are at present "no rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of a private nature."¹³ It must not be overlooked that the exercise of jurisdiction in civil matters, in contrast to criminal matters, does not compel application of the *lex fori*.

The following illustrations show the degree to which personal jurisdiction in civil matters has been extended by the law of certain important countries: According to Article 14 of the French Civil Code, the French nationality of the plaintiff is sufficient for the exercise of jurisdiction even though the defendant may be an alien, neither domiciled, nor resident, nor present in France. And in several countries, such as Austria, Germany, Japan, and Sweden, and in many Swiss cantons, an action in personam can be brought against a person who merely has property there, even if that property has practically no value.¹⁴

Whether or not judgments based on such jurisdictional rules will be enforceable in other countries is a different question; they may be denied recognition out of considerations of public policy, of natural justice, or of due process.¹⁵ It is noteworthy that these jurisdictional bases are not recognized in the treaties and conventions dealing with the reciprocal recognition and enforcement of foreign judgments, to which the states mentioned above are parties.¹⁶ It is also highly probable that, if the

¹² See ch. 7 text at note 29 of the author's forthcoming book.

¹³ Restatement, Foreign Relations Law § 19, comment d at 63 (1962) (making a reservation for cases of "denial of justice"). See also *id.* § 186.

¹⁴ Procedural Codes of Austria, § 99; Germany, § 23; Japan, § 8; Sweden, ch. 10, § 3. For the pertinent sections of the various Swiss cantonal codes, see I Guldener, *Das Schweizerisches Zivilprozessrecht* 76 (1947). See generally, Wolff 72.

¹⁵ Graupner, "Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe," 12 *Int'l & Comp. L.Q.* 367, 375 (1963) (referring also to the English Rules of the Supreme Court of Judicature, particularly order XI rule 1(e), and to vouching in a foreign third party regardless of the controlling law, under Belgian, Dutch, French, Luxembourg, and Italian law); Nadelmann, "Jurisdictionally Improper Fora," in *Twentieth Century Comparative and Conflicts Law* 321, 327 (1961).

¹⁶ Thus, according to the conventions of Great Britain with France (1934), Western Germany (1961), and Austria (1962), neither the mere nationality of the plaintiff nor the mere fact that defendant has property in the judgment states is recognized as a basis for jurisdiction. It is particularly noteworthy that even under the 1959 convention between Austria and Germany, the domestic law of both of which includes such a forum, the presence of property (with insignificant exceptions) is not regarded as sufficient for the recognition of a judgment. See art. 2(4).

United States should become a party to a treaty or convention of such kind, its traditional basis of personal jurisdiction—namely, physical presence of the defendant in the forum at the time of service of process¹⁷—would be excluded, at least with respect to jurisdiction based upon service on the most casual transient.¹⁸

However, it must be emphasized that the very fact that so many important nations have adopted these bases of personal jurisdiction precludes any assumption that a general rule of international law exists to the contrary. Only a practice accepted as law by general consent can be regarded as a rule of customary, that is, general, international law.¹⁹ The effect of jurisdictional limitations when embodied in treaties or conventions is, of course, limited to the contracting parties, and the application of conventional rules usually falls within the province of national rather than international bodies.²⁰ Since, therefore, there is no supranational authority which limits the jurisdiction of a state to persons residing within its territorial confines,²¹ each state may fashion the content of the law on this subject as it chooses. This law, as an Italian writer puts it, is "national law in international matters" (*diritto interno in materia internazionale*).²²

Aside from limitations imposed by international conventions and treaties, a state is free to determine for itself its policy as to such personal jurisdiction.²³ For this reason, the real question is the extent to which the state has given competence to its courts to exercise such jurisdiction.²⁴

In a few federations, such as the United States and Mexico, each member state has a legal system of its own which, *inter alia*, regulates matters relating to the conflict of laws such as international and interstate jurisdiction. Consequently, the only barriers to a member state's power to prescribe and to enforce rules of personal jurisdiction are

¹⁷ Restatement (Second), Conflict of Laws § 78 (Tent. Draft No. 3, 1956); Schlesinger, "Methods of Progress in Conflict of Laws—Some Comments on Ehrenzweig's Treatment of Transient Jurisdiction," 9 J. Pub. L. 313 (1960).

¹⁸ Ehrenzweig, Conflict of Laws § 30, at 103 (1962); Leflar, Conflict of Laws 44 (1959).

¹⁹ 1 Oppenheim, International Law—A Treatise § 21a (7th ed. Lauterpacht 1948-1952).

²⁰ 12 Aubry & Rau, Cours de droit civil francais § 748 bis, at 30 & n.1 (5th ed. Martin 1922); For recent cases, see 1 Kiss, Repertoire de la pratique en matiere de droit international public 442-43 (1952).

²¹ There still remains the question whether general international law limits the assertion of jurisdiction by a state over conduct outside its borders. This problem will be dealt with in subsequent subsections.

²² Morelli, *Il Diritto Processuale Civile Internazionale* 1 (2d ed. 1954) [hereinafter cited as Morelli]. The expression "external law of the state" ("*diritto statale esterno*") has also been used. *Ibid.*

²³ For a proper distinction between a state's jurisdictional power and its jurisdictional policy, see Brewster, Antitrust and American Business Abroad 286 (1958). See also Reese, Changing Concepts of Jurisdiction (unpublished summary of address given before the American Foreign Law Association 1963).

²⁴ Reese, *supra* note 23.

federal constitutional prohibitions such as the due process clause of the fourteenth amendment of the United States Constitution or of article 14 of the Constitution of Mexico.

Particularly in the United States, decisional and statutory law have given the courts a free hand to exercise jurisdiction over nonresident individuals and foreign corporations. This result has been achieved by a construction of the due process clause which requires, for the assertion of jurisdiction in personam over such defendants, only that they have certain minimum contacts with the territory of the forum.²⁵

It may be recalled that the preceding discussion is restricted to personal jurisdiction in civil actions or proceedings. By the law of most countries the presence of the accused within the territory of the forum state, at least at the trial, is an essential prerequisite for the exercise of criminal jurisdiction.²⁶

2. *Limitations on Criminal Jurisdiction Ex Ratione Materiae*

Let us suppose that there is indisputable jurisdiction over the person of an accused as, for example, by reason of his appearance through regular process.²⁷ Then another question may arise: Will the fact that the subject matter involves his *extraterritorial conduct* clash with rules of general international law? (We are here assuming the absence of any regulation by treaty.) To ask the question is to bring up a subject of great controversy. The authority of the Permanent Court in the *Lotus* case is invoked by writers on both sides in support of their views.²⁸

The legal basis of this decision was a provision of the Treaty of Lausanne entered into on July 24, 1923, between Turkey, on the one hand, and the Allied and Associated Powers, of which France was one, on the other. That provision, Article 15, reads:

Subject to the provisions of Article 16 (dealing with matters of personal

²⁵ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See also *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 366 P.2d 502 (1961); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). See also *Berry v. Pennsylvania R.R.*, 80 N.J. Super. 321, 193 A.2d 569 (Super. Ct. 1963), where jurisdiction was sustained over Southern Railway, a foreign corporation owning no tracks in New Jersey and having no office or business there, which was sued for injuries suffered by plaintiff in an accident in Georgia upon alighting from defendant's train; the only contact with the forum was the fact that plaintiff had purchased a round-trip ticket in New Jersey through co-defendant Pennsylvania Railroad's ticket agent; the statute invoked was N.J. Rules 4:4-4(d), which contains the proviso, "subject to due process of law." See also Ill. Rev. Stat. ch. 110, §§ 16-17 (1961); N.Y. Civ. Prac. Law §§ 301-02.

²⁶ Sarkar, "The Proper Law of Crime in International Law," 11 *Int'l & Comp. L.Q.* 446, 465 (1962).

²⁷ A defendant who has been removed by irregular means from another state can only challenge the jurisdiction of the forum if his seizure was in violation of a treaty. *Jessup* 60; 1 *Dahm, Volkerrecht* 280 (1958); *Attorney-General v. Eichmann*, 56 *Am. J. Int'l L.* 805, 835 *passim* (1962).

²⁸ See, on the one hand, *Cook, The Logical and Legal Bases of the Conflict of Laws* 77 (1942) [hereinafter cited as *Cook*] and, on the other, *Restatement, Foreign Relations Law* § 18, at 59-60 (1962).

status), all questions of jurisdiction (*compétence judiciaire*) shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law.²⁹

The case arose out of a collision on the high seas between the French mail steamer "Lotus" and the Turkish collier "Boz-Kourt," in which the latter sank and several Turkish citizens lost their lives. The arrest and conviction of the French first officer in Turkey raised the question of the jurisdiction of the Turkish authorities, which was strongly contested by France. The Court declared that there is no general rule of international law which:

[P]rohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. . . . But this is certainly not the case under international law as it stands at present. . . . [I]t leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.³⁰

The Court added that the foregoing considerations, which are addressed to international jurisdiction in general, also "apply as regards criminal jurisdiction,"³¹ the case at issue being of a criminal character.

However, to terminate the discussion at this point would make the legal picture incomplete. The French Government had argued in the *Lotus* case that under international law the fact that the victim was a national of the forum would be insufficient to justify its exercise of jurisdiction over a foreigner for his extraterritorial acts.³² The Court stated that it was unnecessary to consider this contention, since it could only be used:

[I]f international law forbade Turkey to take into consideration the fact that the offence produced its *effects* on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged³³

And the Court went on:

No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is

²⁹ P.C.I.J. ser. A, No. 10, at 16.

³⁰ *Id.* at 19.

³¹ *Id.* at 20.

³² *Id.* at 7.

³³ *Id.* at 23. [Emphasis added.]

certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if *one of the constituent elements of the offence, and more especially its effects*, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle . . .³⁴

Thus did the Court broaden the concept of territoriality.

It should be observed that the Court regarded these effects as having taken place within the territory of the state because they were produced on one of its vessels. Would it take the same approach if the collision on the high seas had occurred in 1963 and not in 1926? The answer would probably be in the negative since no fewer than twenty-seven states (not including either France or Turkey) have ratified the Geneva Convention on the High Seas of April 29, 1958.³⁵ Article 11, paragraph 1 of the convention allots jurisdiction in a case involving the penal responsibility of a person in the service of the ship to the flag state or to his national state. But, for the purpose of our discussion of limitations on jurisdiction over extraterritorial conduct, we need not elaborate upon the treatment of the Turkish ship as part of the territory of Turkey, particularly so because the Court had already denied that jurisdictional limitations follow from extraterritoriality *per se*.³⁶ However, the Court stated in this later portion of the opinion that the existence of local effects constituted an alternative criterion for the exercise of criminal jurisdiction over conduct abroad, the localization of constituent elements of the crime being the other criterion.

It will be noted here—but only parenthetically, since jurisdiction over civil matters will be discussed in the following subsection—that the Court restricted its reasoning to criminal jurisdiction. Whether its *effects* test applies also to civil matters presents a nice question. Walter Wheeler Cook, a noted authority in the field of private international law, seems to restrict this test to criminal jurisdiction,³⁷ but this view is not generally accepted.³⁸ In the opinion of the American Law Institute:

The Court makes it clear, after its analysis of the practice of states, that the effect in the territory of conduct occurring outside it provides a state with a valid basis of *jurisdiction under international law*. That part of the opinion of the court is still valid . . .³⁹

³⁴ *Ibid.*

³⁵ 13 UST 2312, TIAS 5200.

³⁶ P.C.I.J. ser. A, No. 10, at 19, quoted in text accompanying note 30 *supra*.

³⁷ Cook 75.

³⁸ See, e.g., Verdross, *Volkerrecht* 142 (1937).

³⁹ Restatement, Foreign Relations Law § 18, at 60 (1962) [emphasis added]; Wengler,

It is not difficult to see the reasons which argue against subjection of an alien to the criminal jurisdiction of one state for his conduct in another.⁴⁰ Hence the firm grip held by the territorial principle in international law. However, international law has gradually come to recognize "exceptions,"⁴¹ one of which is embodied in the "universality principle," as the Austrian Penal Code, the pioneer in this field, shows; jurisdiction is here asserted by a state having custody of a foreigner who has committed a felony in a foreign state which has rejected or failed to request extradition; the law applied is the *lex fori*, subject only to any more lenient provisions in the *lex loci*.⁴²

It is important to bear in mind that it is the *lex fori* which is applied whenever the state has "exceptionally" extended its criminal jurisdiction to aliens for crimes committed abroad.⁴³ At present the "protective principle" constitutes the most important exception to the territoriality principle. It has evolved since the time of the French Revolution under the impact of nationalistic political philosophy. Extraterritorial acts, whether by nationals or by foreigners, which threaten the security or integrity of the forum state, are regarded as justifying the extension of its criminal jurisdiction to them even if the acts are not crimes under the *lex loci*. Where the application of the protective principle is kept within these limits, it is a generally recognized exception to the territorial principle. It was first articulated in 1808 in the French Code of Criminal Procedure, where control by the French penal law is pronounced over extraterritorial activities of an alien constituting a "crime against the security of the State, of counterfeiting the seal of the State, national currency, national documents, or bank notes authorized by law." The French code served as model for more or less similar provisions enacted in most civil-law countries.⁴⁴

"The Significance of the Principle of Equality in the Conflict of Laws," 28 *Law & Contemp. Prob.* 822, 840 (1963).

⁴⁰ For some of the reasons, see Brewster, *supra* note 23, at 289.

⁴¹ See Dickinson, "Introductory Comment to Jurisdiction With Respect to Crime," *Harvard Research in International Law*, 29 *Am. J. Int'l L. Supp.* 443, 445 (1935); H. Donnedieu de Vabres, *Les Principes modernes du droit penal international* 135, 153 et seq. (1928); Stimson, *Conflict of Criminal Laws* 25 (1936).

⁴² Austrian Penal Code §§ 39-40; Argentine Law of August 20, 1885, art. 5; Italian Penal Code art. 10.

⁴³ A court sitting as criminal court cannot apply the penal norms of a foreign state. Chief Justice Marshall, in *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts of no country execute the penal laws of another."); Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* 120 (1962); 4 Niboyet, *Traite No. 1111*, at 29; Wolff 171.

⁴⁴ Code d'instruction criminelle (1808) arts. 5-6 (now Code de procedure penale art. 694). See also Cour de Cassation, chambre criminelle, Jan. 4, 1920, *Urios*, D. 1920. I. 33; Feb. 22, 1923, *Bayot*, D. 1924, I. 136 [hereinafter cited as *Cass. crim.*]. For other countries, see Austrian Penal Code § 38; German Penal Code § 4(3) (going somewhat beyond the original limits of the "exception"); Italian Penal Code art. 7. For more detail, see 29 *Am. J. Int'l L. Supp.* 546-61 (1935); Note, 63 *Colum. L. Rev.* 1441, 1473-80 (1963). For the law of the United States, see *Ford v. United States*, 273 U.S. 593 (1927) (conspiracy to violate the

A third exception, the so-called "nationality principle," is universally recognized;⁴⁵ it permits a state to exercise criminal jurisdiction over its nationals with respect to their extraterritorial conduct. The application of the national criminal law to their conduct abroad is justified as constituting the adequate counterpart of their immunity from extradition, an immunity which is conceded by all except the Anglo-American countries.⁴⁶

Objections against extension of the *lex fori* to conduct abroad which did not fall within the proper bounds of these exceptions were vigorously expressed in Judge Loder's dissenting opinion in the *Lotus* case. He said:

The criminal law of a State may extend to crimes and offences committed abroad by its nationals, since such nationals are subject to the law of their own country; but it *cannot* extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned⁴⁷

Such an extension may well breed resentment, as is illustrated by the objections raised by the French Government to the prosecution of a French national by the Turkish authorities in the *Lotus* affair; and by the protest on the part of the United States, drafted by John Bassett Moore, then Assistant Secretary of State, against Mexico in the famous *Cutting* case.⁴⁸ In both cases the national law, like that of a number of other countries,⁴⁹ envisaged crimes committed anywhere, provided the victims were nationals of the forum state. The justification for such an

prohibition laws); Restatement, Foreign Relations Law § 33, at 92 (1962). The Soviet Law of Dec. 15, 1958 on General Principles of Criminal Legislation, arts. 4-5 restricts the competence of the courts over crimes committed abroad to Soviet nationals and stateless persons residing in the Soviet Union; it extends this competence to foreigners only where international treaties so provide.

⁴⁵ 29 Am. J. Int'l L. Supp. 445 (1935).

⁴⁶ *Id.* at 123.

⁴⁷ P.C.I.J. ser. A, No. 10, at 35. The term "nationals" may also embrace an alien who has held himself out as a subject of the forum state. *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347. The decision of the Special Criminal Court of the Transvaal, *Rex. v. Neumann*, 3 So. Afr. L.R. 1238 (1949) goes even a step further, since the defendant's application for naturalization was still pending when he returned to Germany where he then acted against the security of South Africa. Concerning the principle of non-extradition of nationals as the rationale for criminal jurisdiction over their conduct abroad, see Bundesgericht der Schweiz [hereinafter cited as Swiss Fed. Trib.] Oct. 6, 1950, *Kaiser und Attenhofer v. Basel, Entscheidungen des Schweizerischen Bundesgerichtshofs Amtliche Sammlung* 76 IV 209 (1950). For application of the law of the forum to crimes committed abroad by a national, see French Code of Criminal Procedure, arts. 689-93, 695-96; German Penal Code § 3; Italian Penal Code art. 9; *United States v. Bowman*, 260 U.S. 94 (1922). For criticism of the unconditional application of the nationality principle, see Sarkar, *supra* note 26, at 458.

⁴⁸ *Bravos District Court, Chihuahua, Mexico, The Cutting Case*, Aug. 6, 1886, in Moore, *Report on Extraterritorial Crime and the Cutting Case*, 1887 U.S. For. Rel. 757 (judgment convicting American citizen for publication in Texas of libel against citizen of Mexico).

⁴⁹ According to Turkish Penal Code art. 6 and Mexican Penal Code art. 4, a foreigner is punishable for a penal offense committed in a foreign country against a Turkish or Mexican national, respectively. Similar rules can be found in Brazilian Decree-Law of April 28, 1938, art. 18; Chinese Criminal Code of 1935, art. 8; German Penal Code § 4(2)(2); Italian Penal Code art. 10; and Swiss Penal Code art. 5. For analogous laws of other countries, see 29 Am. J. Int'l L. Supp. 578-79 (1935).

extension of legislative and judicial criminal jurisdiction is based upon a further exception to the territoriality principle called the "passive personality principle." Thus broadly stated, this doctrine has invited severe criticism.⁵⁰

There are two threshold questions. First, must application of this doctrine be limited to conduct which has produced "effects" within the forum state upon a national or nationals? In the *Cutting* case, in similar French cases,⁵¹ and under the legal fiction which equated a Turkish vessel to Turkish territory in the *Lotus* case, the injuries were suffered in the forum state. In none of these cases was the assertion of jurisdiction based solely on the fact that the victim was a national; and, in the total absence of effects upon persons or things within its territory, extension of the criminal jurisdiction of a state to an alien for his extraterritorial conduct must be regarded as internationally impermissible. This is the view of the American Law Institute.⁵²

The second question is addressed to the nature and the degree of the effects. The term "effects" is a verbal symbol calling for semantical adjustment. In the *Lotus* case the Permanent Court referred to "effects," but it failed to furnish any key to the type of effects which are of legal significance. It has been inferred from this omission that the Court did not limit the exercise of jurisdiction to conduct having certain types of effects.⁵³ Where the impact of extraterritorial conduct affects the forum state primarily and directly, the propriety of the effects test can hardly be disputed. But this cannot be said of the extravagant extensions of the control of the *lex fori* under the color of an apparently boundless "protective principle."⁵⁴

Let us illustrate both points. From the standpoint of protecting the efficient and proper functioning of the machinery of justice, the forum may apply its criminal sanctions against a person who has given false testimony in his deposition taken abroad before a foreign court which furnished legal assistance to the forum state under letters rogatory. This

⁵⁰ Thus, Judge Moore's dissent in the *Lotus* case was directed solely to art. 6 of the Turkish Penal Code. P.C.I.J. ser. A, No. 10, at 65. He agreed with the assertion of jurisdiction where the acts done abroad produce effects within the forum state. *Id.* at 69-70. See also Dickinson, *supra* note 41, regarding important safeguards and limitations, and Brierly, *The Law of Nations* 220 (4th ed. 1949).

⁵¹ Cass. crim. July 2, 1932, Milleli, la Tribuna et Davanzati v. Turati, 60 *Journal du droit international* (fonde par Ed. Clunet) 380 (1933) [hereinafter cited as Clunet]; April 30, 1908, Micheli, Martin et Chauvet v. Dide, *Recueil periodique et critique de jurisprudence, de legislation et de doctrine en matiere civile, commerciale, criminelle, administrative, et de droit public* 1909 I. 241.

⁵² Restatement, Foreign Relations Law § 18, comment f at 56, § 30(2) (1962).

⁵³ *Id.* Reporters' Notes No. 4, § 18, at 60-61.

⁵⁴ Jessup 49-50; Sarkar, *supra* note 26, at 463, criticizes the German Penal Code § 4(3) (9) by which extraterritorial traffic in obscene publications committed by foreigners is punishable.

view, taken in an Argentine decision,⁵⁵ was recently shared by an American federal court in a case where the extraterritorial application of a federal statute, to aliens who had made false statements abroad in an immigration application, was upheld because the offenses were "directed at the sovereignty" of the United States.⁵⁶

However, unless offenses affecting fundamental institutions of a state are in question, it is difficult to justify application of the protective principle. Thus, one may ask whether the conviction by a Dutch court of a citizen and domiciliary of Belgium for violation outside of the Netherlands of Dutch currency regulations, is reconcilable with the concepts discussed above.⁵⁷

The interests of the forum state fade into insignificance where the conduct abroad has no connection with the life of the state itself but only with personal interests of one of its nationals. Nevertheless, the French courts have convicted foreign writers of articles published abroad for defamation of French residents, and in France such convictions can even be obtained through private action (*action directe*) of the person injured.⁵⁸ It is indeed startling to see such an extraterritorial extension of the penal laws of the forum, an extension which cannot here be based on the "effects" of the defendant's conduct upon the safety of the state.

The American Law Institute takes a different view, deeming it irrelevant whether the "effects" impinge upon the interest of the state as a whole or the interest of a particular individual, provided that one of two prerequisites is satisfied. According to the first prerequisite, the reach of legislation beyond domestic conduct is justified "if the conduct and its effect are generally recognized as constituent elements of a crime or tort under the laws of states that have reasonably developed legal systems." The second, and alternative, prerequisite is a substantiality test; extensive application of the *lex fori* is allowed if the effect is substantial and is the direct and foreseeable result of the conduct; all this under the assumption that the rule allowing such extensive application "is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."⁵⁹

⁵⁵ Criminal and Correctional Chamber of the Capital, May 15, 1936, Wera Homs, Francisco, 54 *Jurisprudencia Argentina* 573.

⁵⁶ *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd sub noni.* *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

⁵⁷ For the conviction, see Hoge Raad (highest court of the Netherlands) Nov. 13, 1951, *Public Prosecutor v. L.*, *Int'l L. Rep.* 1951 No. 48, at 206.

⁵⁸ *Cass. crim.* July 2, 1932, *supra* note 51; April 30, 1908, *supra* note 51.

⁵⁹ Restatement, Foreign Relations Law, Reporter's Note No. 4, § 18, comment d, illustration 4, at 60-61 (1962).

The prevailing tendency of many states to "punish offenses committed abroad if (their) interests so require," as a leading Swiss decision puts it,⁶⁰ might evince compliance with the second of the two alternative prerequisites, provided the conduct at issue caused direct and foreseeable effects of a substantial nature.

As may be apparent from the preceding discussion, there is considerable divergence in contemporary state practice as to the control of the *lex fori* over the extraterritorial conduct of aliens. The only thing which is indisputable is the conclusion that "there is scarcely any law" which can be invoked against "extravagant new claims to extraterritorial jurisdiction." This leads to jurisdictional competition by several states over the same conduct regardless of their real contacts with it.⁶¹

3. *Jurisdictional Significance of Extraterritorial Subject Matter in Private International Law*

We have seen that in international penal law the question is not what is the applicable law—it is always the *lex fori*—but whether that law can control extraterritorial conduct. By contrast, in private international law the paramount question is which of the laws of the various countries or sister states with which the case has contacts should be applied. It "matters (little) to any state whether its legal system is applied abroad or not,"⁶² and "there are very few instances in which foreign offices have made diplomatic complaints that a rule of the conflict of laws has been violated to the prejudice of their citizens."⁶³ Because of the strongly international character of the present economic order, it is obvious that legal measures cannot be limited to the rule of strict territoriality. Nevertheless, the desire to avoid protests and recriminations by other governments, as will be shown later in section 4, has some bearing on the attitude of the forum in conflict-of-laws situations.

From the standpoint of international law, a state may provide a forum for the settlement of claims even though they arise out of conduct as to which it could not prescribe;⁶⁴ in other words, the state may have judicial jurisdiction over a situation where it would have no legislative jurisdiction. This does not mean that the state may assume control over transactions which are devoid of any adequate contacts with it by an abuse of its conflict-of-laws rules. In the view of the United States

⁶⁰ Swiss Fed. Trib. October 6, 1950, *supra* note 47.

⁶¹ Sarkar, *supra* note 26, at 466.

⁶² Wolff 15.

⁶³ Jessup 63. But he qualifies his statement by referring to a case where the conflicts rule has been embodied in a treaty; in such a case the complaint of a breach would be treated as a matter for intergovernmental protest.

⁶⁴ Restatement, Foreign Relations Law § 19, at 62-63 (1962), especially comments b-c.

Supreme Court, international law does not seek uniformity of conflict rules; "it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own."⁶⁵ Conflict rules which would decline to give any consideration to the relevant foreign law could, under the aspect of "denial of justice," perhaps be regarded as internationally impermissible.⁶⁶

As was discussed in a preceding subsection,⁶⁷ a state may determine for itself the bases for its exercise of judicial jurisdiction over persons with respect to claims of a private nature. Assuming the existence of such a jurisdictional basis, as, for instance, the presence of the defendant within the state, an interesting question arises: Does a legislative enactment of another state to the effect that a cause of action arising there can only be brought in a local court debar the forum from entertaining the suit?

Such a monopolization of personal jurisdiction by a member state of the United States has been rejected.⁶⁸ It might at first be assumed that the freedom of such a state to determine the extent of its judicial jurisdiction is substantially fettered because of restrictions on its sovereignty resulting from our dual system of government. However, the United States Supreme Court has always emphasized that every state of the United States, "subject to the restrictions imposed by the Federal Constitution,"⁶⁹ has the power "to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them."⁷⁰

Thus the fact that one state pronounces its own exclusive jurisdiction over a statutory cause of action—for example, an employer's liability for accidents—has been held to be no bar to the assumption of jurisdiction over such a transitory cause of action by a sister state. Said the Supreme Court: "Jurisdiction is to be determined by the law of the *court's* creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action."⁷¹

⁶⁵ *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

⁶⁶ Baty, "The Private International Law of Japan," 2 *Monumenta Nipponica* No. 2, at 54-55 (1930); see also Restatement, *Foreign Relations Law* § 19, comment d at 62 (1962).

⁶⁷ Part A, subsection 1(a) *supra*.

⁶⁸ Restatement (Second), *Conflict of Laws* § 117-1 (Tent. Draft No. 4, 1958). But see Riezler, *Internationales Zivilprozessrecht* 205 (1949) [hereinafter cited as Riezler].

⁶⁹ Thus the Supreme Court has held that the full faith and credit clause of the Constitution may compel a sister state to extend its judicial jurisdiction beyond the limits set by its own legislation. See *Hughes v. Fetter*, 341 U.S. 609 (1951). For a different justification, see Currie, "The Constitution and the 'Transitory' Cause of Action," 73 *Harv. L. Rev.* 36 (1959).

⁷⁰ *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 233 (1934).

⁷¹ *Tennessee Coal, Iron & R.R. v. George*, 233 U.S. 354, 360 (1914). [Emphasis added.]

If this view holds true for sister states, it does so all the more where independent countries are involved. A proceeding instituted in a court of one country certainly cannot be objected to upon the ground that the courts of another may be able to assert jurisdiction over the same cause of action. Such a position would have no basis in international law. This view has also prevailed in other parts of the world, whether Romanic, Germanic, or Scandinavian. It has also been stated that it would be no more admissible to deny the national character of the law regulating international jurisdiction than to deny that the rules of choice of law which the courts apply are commands of their national law.⁷²

However, there are areas where the courts of one state, in the exercise of their discretion, will defer to the assertion of exclusive jurisdiction by another state. Such an attitude is dictated not by a rule of international law but by respect for the legislative jurisdiction of the other state because of its substantial connection with the subject matter.

Thus, in a recent case,⁷³ a German court declined to entertain jurisdiction over a suit to enjoin a defendant from instituting proceedings in Belgium for violation of Belgian trademarks. The court was following a generally observed policy of forbearance,⁷⁴ but it also went so far as to say that if the German courts entertained such a suit they would encroach upon Belgium's sovereign powers.⁷⁵

To the rule that a merchant vessel subjects itself to the jurisdiction of another country by entering one of its ports, international usage has developed an exception, "generally understood among civilized nations,"

Similarly, the Court of Appeals of Paris, applying art. 24 of the Bolivian Act of April 15, 1932, by which a divorce could be granted only if it would be recognized under the law of the state of celebration of the marriage, denied significance to the statutory words "may be dissolved in the Republic." *Cour d'Appel, Paris, July 1, 1959, Patino v. dame Patino*, 87 *Clunet* 412 (1960).

⁷² 6 *Niboyet, Traite No. 1716*, at 256; *Cour de Cassation, chambre de requetes May 14, 1923, Bourgoin v. Groupement des Sinistres, Gazette du Palais 1923.2.154*; *Morelli 2, 5*; 1 *Sperl 29*; *Guldener, Zivilprozessrecht 1*; *L. von Bar, The Theory and Practice of Private International Law § 407*, at 882 (2d ed., tr. Gillespie, 1892); *Riezler 203*; *Neuhaus, Internationales Zivilprozessrecht, 20 ZAIPR 209, 214 (1955)*. A practical example is also offered by the Geneva Protocol of September 24, 1923 on Arbitration Clauses, ¶ 1. This provision recognizes the validity of certain agreements "between parties subject respectively to the jurisdiction of different Contracting States." It is generally admitted that, because of the non-existence of an international norm on jurisdiction, the test has to be the national law on which the assertion of jurisdiction is based. Compare *Morelli 226* and *Nussbaum, Deutsches Internationales Privatrecht 474 (1932)*.

⁷³ *Bundesgerichtshof, July 13, 1954 [hereinafter cited as B.G.H.]*; 14 *Entscheidungen des Bundesgerichtshofes in Zivilsachen 286 [hereinafter cited as B.G.H.Z.]*.

⁷⁴ For the reasons explaining this attitude, see ch. 8 of the author's forthcoming book. See also *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952), intimating that a valid foreign trademark registration might "affect either the power [of an American court] to enjoin or the propriety of its exercise."

⁷⁵ The position of the lower courts was not disputed by the B.G.H.; it reversed only because the plaintiffs' demand was not, as the lower courts construed it, aimed at prohibition of a proceeding in Belgium, but at enjoining the defendants from alleging that plaintiffs' trademarks infringed upon defendants' rights.

for all matters of discipline and all things done on board which affect only the vessel or those belonging to her, and do not involve the peace or dignity of the country, or the tranquillity of the port.⁷⁶ Jurisdiction over these matters is left to the competent authorities, particularly the consuls, of the state of registry. Controversies between master and crew concerning working conditions and the like are also usually referred by bilateral treaties to the jurisdiction of the authorities of the state of registry,⁷⁷ but a generally accepted customary rule to this effect has not yet emerged. As a result of overlapping governmental regulations, delimitation of legislative jurisdiction in this area would be desirable, but it is hardly possible since a merely territorial test is unsuited to matters of labor law, and particularly to maritime labor relations. The law of the flag has for some time been regarded as an important factor and has almost universally excluded local jurisdiction over matters relating to the internal discipline and order of foreign ships. Can this ancient notion be applied to the field of the most modern labor regulations?

In a recent case, *McCulloch v. Sociedad Nacional de Marineros de Honduras*,⁷⁸ the Supreme Court took the view that it could, thus avoiding a head-on collision with the assertion of jurisdiction by the authorities of Honduras. In this case, the National Labor Relations Board, in compliance with the demand of an American union seeking certification under the Act as the representative of seamen employed upon Honduran-flag vessels, ordered an election. The vessels were owned by a Honduran corporation which, however, was a wholly owned subsidiary of an American corporation. Under the Honduran Labor Code, only a domestic union can represent seamen on Honduran-registered ships. A collective contract had been entered into with such a union and by the law of that country the corporation was compelled to deal exclusively with the Honduran union.

In affirming the decision of the district court which had enjoined the election, the Supreme Court referred to the "well-established rule of

⁷⁶ Wildenhuis's Case, 120 U.S. 1, 12 (1887), quoted in *United States v. Flores*, 289 U.S. 137, 158 (1933), which in turn is quoted in *Lauritzen v. Larsen*, 345 U.S. 571, 585-86 (1953). As early as 1806, the French Conseil d'Etat, in the case of "The Sally," where a personal injury was inflicted on a seaman by an officer while an American ship was in a French port, decided against the jurisdiction of the French courts. For the case, see I Phillimore, *Commentaries Upon International Law* 484 (3d ed. 1879). See also Colombos, *The International Law of the Sea* 222-23 (3d rev. ed. 1954).

⁷⁷ This is no longer true of treaties to which the United States is a party as a result of enactment of the Seamen's Act of 1915. See *Van der Weyde v. Ocean Transport Co.*, 297 U.S. 114 (1936). German law proceeds upon the proposition that a member of the crew cannot bring a suit against the master before a foreign court. See *Wustendorfer*, in 7/2 *Ehrenberg, Handbuch des gesamten Handelsrechts* 678 (1921).

⁷⁸ 372 U.S. 10 (1963). Two companion cases had been consolidated with this case by the Supreme Court.

international law,⁷⁹ that the law of the flag ordinarily governs the internal affairs of the ship,⁸⁰ and noted that, from the standpoint of international law, as evidenced by State Department regulations and by treaty, the foreign character of vessels, regardless of ownership, is determined by the fact of their registration in a foreign state.⁸¹ The Court therefore refused to construe the National Labor Relations Act to have any application to foreign registered vessels employing alien seamen. It quoted from Chief Justice Marshall's opinion in *The Charming Betsy* the famous passage to the effect that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁸²

Concerning other jurisdictional problems we may briefly note that a country may regard foreign judicial directives which have some extranational flavor, such as orders requiring the inspection of documents located within its territory or their removal from there along with the request for their production in the forum, as a violation of its territorial sovereignty. The examination of such cases, very important in antitrust litigation, calls for particular discussion in subsequent sections.

Leaving aside for the moment the discussion on foreign-based barriers, it can be said that the forum in possession of judicial jurisdiction over a person can issue orders directing him to do or to refrain from doing an act within the territory of another state. This matter will be discussed in section 3 of this chapter 2 of the author's forthcoming book.

4. *Competitive Bases of Civil Jurisdiction Over a Particular Matter: Abstinentia Fori*

As the Latin subtitle suggests, the emphasis here is upon abstention by a court from the exercise of international judicial jurisdiction which the state clearly possesses.

If the law of one or more other states is potentially applicable in a particular case, the forum is faced with the problem, puzzling at times, of making a choice: for customary international law has not yet developed imperative tests in this regard.⁸³ In making its choice, it may be guided by its concern with foreign relations, as is well illustrated in the judgment of the United States Supreme Court in *Lauritzen v. Larsen*.⁸⁴ Here three states had major contacts with the situation at

⁷⁹ *Id.* at 21.

⁸⁰ *Ibid.*

⁸¹ *Id.* at 20-21.

⁸² *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁸³ Restatement, Foreign Relations Law § 39, comment b at 114 (1962).

⁸⁴ 345 U.S. 571 (1953).

hand, namely the United States, Denmark, and Cuba. The ship's articles, written in Danish and providing for control by Danish law, were signed in New York aboard the Danish defendant's ship of Danish registration. The seaman, who was of Danish nationality and domicile, was injured in the course of his employment aboard ship in Havana harbor, and sued for damages under the Jones Act. In balancing all these different contacts, and comparing the provisions of the potentially applicable national laws as to coverage and liability, and analyzing all the policy considerations, the Supreme Court held that the case did not fall within the Jones Act. In its view, the forum should forbear from applying its law since the foreign connecting factors were more significant than the American ones. This result was reached "by ascertaining and valuing points of contact."⁸⁵ It has even been suggested that the Court went as far as to hold "the Jones Act inapplicable to avoid a violation of international law."⁸⁶ However, there is nothing in the language of the opinion which lends support to such an interpretation. What the Court did was only to add a warning shaped in these words:

[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.⁸⁷

As the use of the words "foreign transaction" shows, the argument for forbearance obtains persuasive force once the transaction has been found to fall within the legislative jurisdiction of a foreign country.

As was seen in the *Lauritzen* case, where a decision is based on the forum's lack of legislative jurisdiction, this decision presupposes the existence of judicial jurisdiction.⁸⁸ Only exceptionally does judicial jurisdiction depend upon the existence of legislative jurisdiction. The exception is illustrated by a French divorce case where, briefly stated, the situation was as follows: The wife, a British national by birth, but an Italian citizen and domiciliary by her marriage to an Italian citizen in Italy, had been granted permission by an Italian judge to live separately. Thereupon she established a residence (not a domicile) in France where she brought an action for divorce. French jurisdiction was not contested by the defendant, who was still domiciled in Italy; but the French judges held that since Italian law, which does not permit divorce,

⁸⁵ Id. at 582.

⁸⁶ Note, 63 Colum. L. Rev. 1441, 1483 (1963).

⁸⁷ 345 U.S. 571, 582 (1953).

⁸⁸ Compare Louis-Lucas, *Existe-t-il une competence generale du droit francais pour le reglement des conflits de lois?* 48 *Revue critique de droit international prive* 405, 407-08 (1959) [hereinafter cited as *Rev.*]; Ponsard, *infra* note 89, at 805.

must be regarded as controlling, they could not entertain the action. This result compelled dismissal by reason of territorial incompetence, which in a divorce case can be pronounced by the court on its own motion.⁸⁹

We live in an era of constantly increasing legislation of the regulatory type. As a result the forum may be confronted with a demand based on regulatory provisions of its own law although the operative facts of the case show a significant connection with another state whose law lacks any similar legislation. Illustrations may be helpful:

An Austrian was sued before an Austrian court by a German competitor who charged him with acts of unfair competition committed in Yugoslavia. These acts were forbidden under Austrian law but not under the law of Yugoslavia. Accordingly, the forum denied that there was a jurisdictional basis for the enforcement of its legislation.⁹⁰

Again, in a recent case concerning the imitation by the German defendant of a feeding-bottle manufactured by the American plaintiff, the German courts denied the existence of German legislative jurisdiction. While it was true that the defendant had manufactured the imitation in Germany, it was distributed exclusively on foreign markets.⁹¹ On the other hand, German decisions in the last few decades indicate that even where conduct has taken place abroad exclusively, the courts will entertain an action based on the German law against unfair competition, if both plaintiff and defendant are German nationals and, in addition, they have industrial establishments in Germany.⁹²

5. *A Few Words on the International Position of Civil Judgments*

Our analysis of the international laws and rules on international jurisdiction will be concluded with a brief discussion of the related problem of the international position of civil judgments. From the standpoint of international relations, nothing could be more advantageous than the recognition of foreign judgments; but this ideal goal cannot be attained until the various states achieve some agreement on the

⁸⁹ Paris, Nov. 10, 1959, *Dawn Addams v. Massimo*, 87 *Clunet* 792, note Ponsard (1960); 49 *Rev.* 218, note Francescakis (1960), holding that Italian law controls, either as the law of the last common domicile, which operates under the French rule where the spouses are of different nationality, or as the law of the husband's domicile under the British test. While as a rule the parties must, under the sanction of preclusion, raise the "exception" of territorial incompetence ("incompetence *ratione loci*") at the threshold of the proceedings, C. pr. civ. art. 171(3) provides for such a pronouncement *ex officio* by the judge in cases where the parties are not allowed to compromise on their rights.

⁹⁰ O.G.H., June 11, 1930, SZ XII/142.

⁹¹ B.G.H., June 30, 1961, S.P.R.C. & E. v. K., 35 B.G.H.Z. 329.

⁹² B.G.H., July 24, 1957, *Zeiss*, 60 *Gewerblicher Rechtsschutz und Urheberrechtliche Zeitschrift* 189, 197 (1958); RG Feb. 17, 1933, Sch. et al. v. H., 140 *Entscheidungen des Reichsgerichts in Zivilsachen* 25.

principles controlling the distribution of civil jurisdiction. At present each nation is at liberty to determine not only the limits upon the exercise of jurisdiction by its own courts, but also the range of jurisdiction which it is willing to concede to foreign states.

In later chapters of this study the requirements for recognition of foreign judgments will be the subject of a comprehensive discussion. Only this need be said in advance: Every country requires compliance with certain jurisdictional standards as a fundamental condition for its recognition of foreign judgments. This position is intended to furnish the strongest safeguard against any adverse effects which might result from the exercise of jurisdiction by foreign states. By the law of a great many countries, these standards are those which the forum applies to its own judgments.⁹³ On occasion, however, the law of the forum applies a less stringent test to the jurisdiction of its own courts than the test it uses to measure the proper limits of foreign jurisdiction. In his noted opinion in the case of *Schibsby v. Westenholz*, Judge Blackburn admitted "with perfect candour" the use of such a dual standard.⁹⁴ English domestic law has conferred upon the English courts the power to summon a non-resident alien who is a party to an English contract,⁹⁵ but in the *Schibsby* case the court refused to enforce a French judgment based on analogous ground. To be sure, the English court could not, and did not, consider the French rules of competence as being contrary to natural justice.⁹⁶ Obviously the explanation for the discrepancy was the application of different rules to different situations. An English court sitting in an original action exercises its traditional common-law powers plus new powers vested in it by Parliament; but when dealing with the enforcement of a foreign judgment, it applies its conflict-of-laws rules.⁹⁷ Therefore any assumption⁹⁸ that Judge Blackburn refused to enforce the French judgment because he was acting as an enforcement agency of the international community, has no basis in his whole reasoning, and is therefore fallacious.

⁹³ Piggott, *Foreign Judgments* 104 (3d ed. 1908).

⁹⁴ L.R. 6 Q.B. 155, 160 (1870).

⁹⁵ Order XI rule 1(b) of the Rules of the Supreme Court of Judicature.

⁹⁶ See Dicey, *Conflict of Laws* 1012 & n.99a (7th ed., 1958).

⁹⁷ Sunderland, "The Problem of Jurisdiction," 4 *Texas L. Rev.* 429, 444 (1926); see also Harper, Taintor, Carnahan & Brown, *Cases on Conflict of Laws* 680-81 & n.15 (1950).

⁹⁸ Stevenson, "The Relationship of Private International Law to Public International Law," 52 *Colum. L. Rev.* 561, 580 (1952). See Griswold's excellent remarks in his review of Read, "Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth," 16 *Can. B. Rev.* 659 (1938).