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**THE LAW
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NO: 29**

Second Programme Item XVIII

CODIFICATION OF THE CRIMINAL LAW

SUBJECT 3: TERRITORIAL AND EXTRATERRITORIAL
EXTENT OF THE CRIMINAL LAW

12 May 1970

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LAW COMMISSION

WORKING PAPER No. 29

LAW COMMISSION'S SECOND PROGRAMME ITEM XVIII

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OF THE CRIMINAL LAW

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I INTRODUCTION

1. This Paper incorporates the results of the Law Commission's preliminary examination of the law governing the territorial application of the Criminal Law, made under Item XVIII (3) of our Second Programme of Law Reform.¹ As a glance of the Table of Contents will show, the subject is extremely diffuse. Closer examination also reveals that in many respects the relevant law is obscure. The purposes of the present Paper, which is for general consultation, criticism and comment, are:-

- (a) to determine what general principles should govern the territorial and extraterritorial extent of the English criminal law; and
- (b) to formulate proposals for appropriate changes in the law, both substantive and procedural, which should be made in the interests of clarification and certainty, with a view to the ultimate inclusion of such proposals in the projected codification of the criminal law.

2. In this Paper we have not dealt, except marginally, with the problems which arise under the Extradition Acts 1870-1935 and associated legislation or under the Fugitive Offenders Act 1967.² We have arranged the substance of the Paper into three

1. See also the Law Commission's Working Paper No. 17 on "Codification of the Criminal Law - General Principles - The Field of Inquiry", Subject 3, p.7.

2. In our opinion the law relating to extradition, which depends basically on the Acts of 1870 and 1873, is in need of review.

main parts; these are:-

- II The Territorial Principle
- III Exceptions to and Extensions of the Territorial Principle
- IV Other Special Problems affecting Crimes with a Foreign Element

Each of these parts is divided into sections, at the conclusion of which we have, where necessary, stated our provisional proposals relating to the matters dealt with in those sections. We conclude the Paper with Part V which contains a general, comprehensive, summary of the questions which in our view require to be posed and indicates our provisional answers to them. Needless to say, we do not regard the questions we have posed as all-embracing nor do we consider our answers as more than tentative. We, therefore, welcome suggestions as to other points which require consideration, as well as any comment upon or criticism of our own provisional recommendations.

II THE TERRITORIAL PRINCIPLE

A. The General Rule

3. The general rule is that English criminal law is applied on the territorial principle,³ that is to say:-

- (a) no conduct constitutes an offence unless it occurs in the territory of England and Wales; and
- (b) conduct constituting an offence committed by any person within that territory is a crime whatever the actor's nationality or status.

The general rule is, however, subject to numerous exceptions which will be illustrated below.

Rationale of the General Rule

4. The general rule is founded upon the basic principle that every State is entitled by its criminal law to regulate the conduct of persons within its own territory and is not

3. For modern statements of the general rule see Lord Goddard in R. v. Page [1954] 1 Q.B. 170, 175 and Lord Simonds in Cox v. Army Council [1963] A.C. 48, 67.

concerned with the conduct of those within the territory of other States. Criminal law is concerned primarily with the maintenance of public order within the territory to which it applies, and its main purpose is to control the conduct of those who are physically present within the territory.⁴ It is essential, therefore, that anyone in the territory should be subject to the criminal law of that territory and that he should not bring with him the personal law of his nationality or permanent residence.⁵ Moreover, it is impossible to divorce the substance of the criminal law from the machinery of enforcement which is provided by each State. Such machinery is designed to render effective within the territorial area of sovereignty the sanctions which the substantive law has imposed. It is for these reasons, as well as in the interests of the comity of nations, that international law recognises the basic validity of the territorial rule. No doubt further crimes will come to be created or recognised by international law. In such circumstances, the territorial principle may be modified according to the techniques devised to deal with such new international crimes (as has happened in the past in relation to the traffic in drugs and in women for purposes of prostitution, piracy jure gentium, slavery, the Geneva Red Cross Conventions and the Antarctic Treaty). But unless and until the ideal of an international criminal code approaches reality it seems right to adhere to the basic territorial principle.

5. There are also important practical considerations which favour adherence to the territorial principle. Matters affecting the public interest in the administration of criminal justice, such as the ease and speed with which evidence relating to offences can be made available and the desirability of dealing with criminal charges expeditiously and of avoiding investigations into foreign criminal law systems, weigh in favour of the rule. Finally, the whole structure of the law of extradition of persons accused or convicted of crimes

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4. The principle of the application of a State's criminal law to conduct on ships or aircraft which it controls and to its service personnel is also generally accepted.
 5. The position of British Service personnel under the Army, Air Force and Naval Discipline Acts, or of foreign troops under the Visiting Forces Act 1952 is special, and does not affect the general principle.

abroad demonstrates that the States concerned in these arrangements recognise the territorial rule as to the application of the substantive criminal law.⁶

Qualifications to the General Rule

6. "Subject" status or some other ground of substantial connection (e.g. residence) with a particular State⁷ may be a valid criterion to apply in particular cases (e.g. treason and other offences against the State; or offences in Antarctica, under the Antarctic Treaty Act 1967, where there are no local States as such), notwithstanding that it appears to conflict with the basic territorial principle summarised in paragraph 3.

7. In addition to claims based on subject status or other substantial connection with the State concerned, jurisdiction is sometimes claimed in the case of "common law" countries upon the ground that the offender's conduct, though committed abroad, is aimed at the institutions of the State concerned. It is, therefore, impossible to avoid conflicts of jurisdictional claims, although it is believed that their incidence in practice is slight. Where such conflicts arise hardship to individuals is mitigated not only by the principle of "double criminality" which generally applies to extradition,⁸ but also by general acceptance of the rule against double jeopardy.⁹

Provisional Conclusions on the Principle

8. We have reached the conclusion that the English criminal law should adhere basically to the territorial principle as summarised in paragraph 3, so that, where it is desired that

6. Some States, however, reserve the right to decline extradition of their own nationals.

7. An interesting illustration of the "residence" principle is to be found in the Northern and Southern Irish legislation relating to fishery offences in the Foyle Fisheries area, which straddles the border between Northern Ireland and the Republic of Ireland, under which a resident of one territory caught offending in the other territory may be handed over to the police of his country of residence and there dealt with for the offence. But the offences under both laws are precisely the same. The Northern Irish legislation in these matters was made pursuant to a United Kingdom enabling Act, the Northern Ireland (Foyle Fisheries) Act 1952, s.1.

8. i.e. the offence for which extradition is sought must be a crime under the law of both States involved.

9. See para. 104.

conduct outside England and Wales should constitute an offence against our law, the legislation enacting that offence should, as heretofore has been the general practice, make the appropriate specific provision. At the same time we accept that the territorial principle must necessarily be subject to some exceptions and qualifications, the nature of which is discussed in the following sections of this Paper.

B. What is "the Territory" for the purposes of the General Rule?

9. Before considering the question of acceptable qualifications of the territorial principle affecting the criminal law, we think it necessary to discuss what constitutes the territory in English law. This question has, in the past, met with difficulty.

England and Wales, the Foreshore down to Low Water Mark and National Waters

10. By common law the territory of England and Wales includes the shore down to low water mark and national waters. National (or "internal") waters are legally, though not physically, equivalent to land and must be distinguished in this respect from territorial waters which consist of waters in a certain part of the open sea around England commencing at the outward limit of national waters.¹⁰ The latter traditionally included areas of bays, gulfs and the estuaries or mouths of great rivers intra fauces terrae and waters intra fauces terrae were treated as being within the body of the adjacent county or counties.¹¹ The accepted test of whether or not waters lay within the body of a county appeared to be that indicated by Lord Hale in his treatise De Jure Maris:¹²

"The arm or branch of the sea which lies within the fauces terrae where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county."

The uncertainties inherent in this approach were emphasised by the Attorney General's argument on behalf of the Crown in The Fagernes.¹³ There he contended that, whilst there was no

10. See further, as to the definition of and jurisdiction over territorial waters, para. 14.

11. R. v. Keyn (1876) 2 Ex. D. 63.

12. Hargrave's Law Tracts, 1787, I., cap. iv., p.10.

13. [1927] P. 311.

settled law on the matter, at least so much of the high seas as was within a six-mile line drawn from shore to shore was intra fauces terrae; that such waters were national and not territorial; and that, if a country has possessed itself of and effectively maintained dominion over a bay or gulf, the waters of that bay or gulf, even though considerably wider than the normal limit, might become the territory of that country (and so, presumably, although it was not so argued, within the body of the adjacent county or counties). The court accepted as conclusive the statement subsequently made on behalf of the Crown that the location in question, a spot in the Bristol Channel about ten miles from the English coast and nine miles from the Welsh coast, was not within the territorial sovereignty of the Crown.

11. Whether waters were national or not under the aforementioned principles gave rise to questions of difficulty, illustrated by the conflicting views which were expressed as to the extent of the Thames Estuary.¹⁴ But this particular difficulty appears in large measure to have been removed by the Territorial Waters Order in Council 1964.¹⁵ This provides generally for the base line from which territorial waters are to be measured to be the low water line along the coast (including low tide elevations) but makes special provision in relation to bays (as defined by the Order) and certain parts of the Scottish coast line. Areas of water lying behind the line so drawn must, by definition, constitute national waters.¹⁶

The Jurisdiction of the Admiral, as confirmed or extended by the Legislature

Common Law

12. At common law the Admiral had jurisdiction over treasons, felonies, robberies, murders and confederacies¹⁷ committed in or upon the high seas or in rivers "below bridges where the tide ebbs and flows and where great ships generally go".¹⁸

14. See e.g. Leary v. Sheeves, The Times, 15 December 1881.

15. S.I. 1965 III p. 6452A.

16. See Post Office v. Estuary Radio Ltd. [1968] 2 Q.B. 740.

17. See the Offences at Sea Act 1536, s.1 (rep.).

18. R. v. Anderson (1868) L.R. I.C.C.R. 161.

He had no jurisdiction over rivers in the British Isles where the waters were national, except that he had a jurisdiction concurrent with that of the common law courts over estuaries. The Admiral's jurisdiction was apparently confined to indictable offences. Its basis was the picturesque conception that a ship, when on the high seas, is a floating part of the national territory, which carries with it the law of its own nation.¹⁹ On this basis it appears probable that the Admiral had no jurisdiction over offences at sea apart from those committed on board, or by means of, a British ship.²⁰ Some confirmation of this is afforded by R. v. Bates²¹ in which it was alleged that offences under the Firearms Act 1937 had been committed on a disused anti-aircraft tower standing off the Essex coast about three miles outside territorial waters. Chapman J. held that the jurisdiction of the Admiral was limited to offences on ships, that the British Parliament had not legislated with regard to the site in question, and that accordingly no English Court had jurisdiction over it.

Confirmation or Extension by the Legislature

13. There are certain surviving statutory provisions which appear to do no more than provide legislative confirmation of ancient Admiralty jurisdiction. These are section 1 of the Offences at Sea Act 1799 under which offences committed on the high seas were made punishable as if they had been committed on land²² and provisions, contained mainly in the 1861 consolidating legislation, assimilating indictable offences under those Acts and committed within the Admiralty jurisdiction to offences committed on land.²³

14. The most important legislative extension of Admiralty jurisdiction was made by the Territorial Waters Jurisdiction

19. cf. R. v. Gordon Finlayson [1941] 1 K.B. 171. See further para. 20.

20. See further para. 14.

21. Essex Assizes. See "The Times", 22 October 1968.

22. The other Offences at Sea Acts 1536 and 1806 were repealed by the Criminal Law Act 1967.

23. Malicious Damage Act 1861, s.72: Forgery Act 1861, s.50: Offences against the Person Act 1861, s.68: Perjury Act 1911, s.8. Corresponding sections are not, however, to be found in the Theft Act 1968, the Forgery Act 1913 or the Coinage Offences Act 1936. The Unlawful Oaths Acts 1797 and 1812 contain provisions similar in effect to those of the 1861 Acts.

Act 1878. Although expressed in general terms, the substantive change made was that indictable offences (only) committed within territorial waters²⁴ on board or by means of foreign ships could be tried in England whether the offender was a British subject or a foreigner. The Act, therefore, appears to extend the kind of ship on board which, or by means of which, an offence falling within British territorial jurisdiction can be committed. In the case of non-British subjects, however, proceedings require the consent of the Secretary of State. Further, this Act does not affect the immunity of foreign public vessels²⁵ within English territorial waters.²⁶ Legislation implementing International Conventions has further extended the operation of English law over certain areas of the high seas to which the Conventions relate.²⁷

Extension of Territory under the Prerogative

15. The Territorial Waters Order in Council 1964, which gave effect to the International Convention on the Territorial Sea and the Contiguous Zone 1958,²⁸ is an important example of the extension of territory under the Prerogative. Recently, the majority of the Court in R. v. Kent Justices: ex parte Lye²⁹ (Salmon L.J. dissenting), held that an extension of the territory of England and Wales can be made by the exercise of the Prerogative and that the Territorial Waters Jurisdiction Act 1878 did not exclude such an extension.³⁰ It was pointed out by both Salmon L.J. and Blain J. in Lye's Case³¹ that the existence of this uncontrolled Prerogative power introduces into the criminal law an element of uncertainty which might be regarded as unsatisfactory.

24. Defined in s.7 of that Act as "any part of the open sea within one marine league of the coast measured from low water mark".

25. i.e. ships publicly owned, including warships, unarmed ships reserved for governmental functions and State trading vessels.

26. Chung Chi Cheung v. The King [1939] A.C. 160.

27. See further paras. 18 and 19.

28. See (1958) Cmnd. 584.

29. [1967] 2 Q.B. 153.

30. Statutory recognition was given to the decision of the majority by the Wireless Telegraphy Act 1967, see para. 18 (vii).

31. At pp. 178-180, 192.

Provisional Conclusions as to the Definition of
Territory

16. It will be seen from the preceding paragraphs that the existing state of the law with regard to both national and territorial waters is in some respects unsatisfactory. An additional difficulty has sometimes arisen from the failure of statutes relating to this branch of law to make it clear whether the intention was to create offences or to deal only with the conferment of jurisdiction upon the courts to deal with existing offences. The jurisdiction of the Admiral was based on conditions both on sea and land wholly different from those of the present day. The extent of territorial waters was based on what was then believed to be the maximum range of artillery fire. In our opinion, there are strong grounds for abolishing the whole conception of Admiralty jurisdiction, repealing the Territorial Waters Jurisdiction Act and defining the power to extend territorial waters. We would favour a general statutory provision defining the area of water adjacent to England and Wales within which the criminal law of England applies and rendering any offence committed in such an area triable by any English court within whose jurisdiction the offender may be found. We would propose that this defined area should consist of two parts, national waters and territorial waters. This would necessitate determination of the base line from which territorial waters should be measured and which, at the same time, would form the outward limit of national waters. For this purpose, we think that the statute should provide for the base line to be determined, as a general rule, either by reference to the low water line along the coast or by reference to straight lines across bays, estuaries and other inlets.³² It would be necessary for the statute to make provision by schedule for two types of exceptional cases. The first exception to the general rule is where the base line would be identified by reference to specified co-ordinates of latitude and longitude.³³ The second would cover other instances (if any) which form an

32. As to the meaning of "bay" and the location of base lines across bays, see Article 7 of the Geneva Convention on the Territorial Sea (1958) Cmnd. 584 and the Territorial Waters Order in Council 1964, Articles 4 and 5. See also Post Office v. Estuary Radio Ltd. [1968] 2 Q.B. 740.

33. See e.g. Article 3 of the Territorial Waters Order in Council 1964.

exception to the general rule noted above, where, for example, jurisdiction has been claimed over any particular area of water. Large scale Admiralty charts, which are prepared and published under authority, should provide conclusive evidence of the data shown therein for the purpose of determining in any particular case where the low water line is situated. Variations of the base line may from time to time be required to conform to alterations in physical conditions and it seems to us that the use of Orders in Council is the only means whereby the need for certainty as to the boundaries of territorial waters can be reconciled with the need for flexibility in delimiting such boundaries and with the desirability that the limits of territorial waters should be a matter of public knowledge. Statutory provision should, therefore, be made for the alteration by Order in Council from time to time of the base line and of the outward limit of territorial waters. It would appear to be desirable to insert a provision requiring the consent of the Attorney General or the Director of Public Prosecutions to the institution of proceedings arising out of offences committed in territorial waters (but not in national waters) where it is alleged that the offence has been committed by an alien or by means of a foreign ship.³⁴ These proposals would not, of course, alter the status of territorial waters for other purposes.

17. It will be apparent from the preceding paragraph that, under our proposals, the jurisdiction of the English courts will, subject to the qualifications referred to at the end of that paragraph, extend over the whole of the land area of England together with the area of water described above. Elsewhere in this Paper we refer to this as the "normal domestic jurisdiction" of the English courts.

C. Extension of Jurisdiction under statutory provisions

18. Apart from extension of territory by legislation already referred to, there are a number of statutes, some very recent, extending the area of operation of English criminal law, either for the purpose of implementing International Conventions or for the purpose of protecting or safeguarding some particular

34. We would not introduce a provision of this kind into specific legislation of the type referred to in para. 18.

domestic interest. These may be summarised as follows:-

(i) Sea Fisheries Act 1833; Fishery Limits Act 1964; Sea Fisheries Act 1968

These give effect either to Fisheries Conventions or inter-State agreements relating to fishing areas and provide for certain offences within "exclusive limits" (the first six miles outwards from the "base line") and "outer limits" (within six to twelve miles from the "base line"). Such offences may be committed by foreign vessels and their crews as well as by British subjects.

(ii) Submarine Telegraph Act 1885

This Act, as amended by the Continental Shelf Act 1964 gives effect to the Submarine Telegraphs Convention 1884 for the protection of cables against wilful or culpably negligent damage.

(iii) North Sea Fisheries Act 1893

This Act was passed to carry into effect an international convention respecting liquor traffic in the North Sea. It extends to "North Sea Limits" (defined in the Act) outside territorial waters as defined by the Territorial Waters Jurisdiction Act 1878. Offences under the Act can be committed by any person on or belonging to a British sea fishing boat.

(iv) Public Health Act 1961, section 76

This enables local authorities to make bye-laws operating up to 1000 yards from low water mark.

(v) Oil in Navigable Waters Acts 1955 and 1963

These give effect to the 1954 Convention for the Prevention of Pollution of the Sea by Oil, as amended to accord with the recommendations of the International Conference of 1962. The Acts provide for offences by the owners or masters of all vessels in the territorial waters of the United Kingdom and by owners or masters of British ships registered in the United Kingdom in "prohibited sea areas".

(vi) Continental Shelf Act 1964

This provides for offences on, under or above installations in "designated areas of the sea" or within 500 metres of such installations outside territorial waters. Such offences are treated as if the conduct had occurred in such part of the United Kingdom as may be specified in an Order in Council.³⁵ This Act contains appropriate procedural provisions.³⁶

(vii) Wireless Telegraphy Act 1949, section 6(d), as extended and amended by section 9 of the Wireless Telegraphy Act 1967

The Act of 1967 gave effect to the decision of the majority of the Court in Lye's Case³⁷ as to the limits of territorial waters under the Territorial Waters Order in Council 1964; but it appears that the Act deals with the limits of territorial waters only for the purposes of wireless telegraphy offences. The Act contains a procedural provision comparable with section 11(1) of the Continental Shelf Act 1964.³⁸

(viii) Marine etc. Broadcasting (Offences) Act 1967

This was designed to deal with "pirate" broadcasting within the seaward limits of the territorial waters of the United Kingdom as defined by the 1964 Order in Council. The Act also contains a procedural provision similar to that of the Continental Shelf Act 1964.

35. The Continental Shelf (Jurisdiction) Order 1968 S.I. 1968 No.892 divides areas designated as parts of the United Kingdom Continental Shelf by the Continental Shelf (Description of Areas) Orders 1964, 1965 and 1968 into English, Scottish and Northern Irish parts to which English, Scottish and Northern Irish law are applied respectively.

36. s.11(1) provides that "Proceedings for any offence under this Act ... may be taken and the offence may for all incidental purposes be treated as having been committed in any place in the United Kingdom."

37. See para. 15.

38. See above, n. 36.

Provisional Conclusions as to Specific Legislation
extending Jurisdiction

19. Since all the legislation referred to in the preceding paragraph was passed not for general purposes, but with a specific object (whether international or national) in view, we would propose its retention, subject (where necessary) to the replacement in appropriate cases of references to "territorial waters" by references to the area of water adjacent to England and Wales defined in paragraph 16.

D. British Ships³⁹

20. British ships (i.e. ships owned by British subjects) have been described as "floating islands"⁴⁰ and as such notionally to be regarded as extensions of the territory of England. This picturesque metaphor is not well founded in principle.⁴¹ The true reason for the application of our criminal law to offences committed on British ships afloat⁴² is that they fall under the protection of Her Majesty, so that all persons aboard, whatever their national status, are subject to her laws. This common law principle, which also corresponds with the now accepted rule of international law that the law of the ship's flag applies to it, is, therefore, a true exception to the territorial rule.

Specific Offences under the Merchant Shipping Acts

21. Apart from the statutes to which reference has been made in paragraph 18, there is an important body of legislation dealing with the substantive criminal law relating to offences on British ships. This is to be found in the Merchant Shipping Acts 1894-1967. These Acts create a large number of specific

39. As to the present definition of what is a "British ship", see the Merchant Shipping Act 1894, s.1. The law relating to ships, aircraft or motor vehicles may be applied to hovercraft by Order in Council but this has not as yet been done (see the Hovercraft Act 1968 s.1(1)(h)).

40. See e.g. Blackburn and Byles JJ. in R. v. Anderson (1868) L.R. 1 C.C.R. 161, 163 and 168.

41. R. v. Gordon Finlayson [1941] 1 K.B. 171.

42. "Afloat" i.e. on the high seas or in foreign rivers at a place below bridges where the tide ebbs and flows and where great ships generally go (R. v. Anderson (above) and R. v. Devon Justices; ex parte D.P.P. [1924] 1 K.B. 503). This jurisdiction may, of course, be subject to the concurrent jurisdiction of the local state, exercise of which may be withheld in the interests of comity.

offences which may be committed aboard British ships or within foreign countries as well as in the United Kingdom.⁴³ The former offences are mainly of a disciplinary nature, ranging from minor acts of misconduct to serious offences endangering life or property; the latter offences, where conduct ashore is involved, relate generally to offences of desertion by or abandonment of seamen. Offences under the Merchant Shipping Acts have recently been considered by the Court of Inquiry into certain matters concerning the Shipping Industry under the Chairmanship of Lord Pearson.⁴⁴ Since the Merchant Shipping Bill, which passed through its report stage in the House of Commons on 26 February 1970, takes account of the Court of Inquiry's Findings, we make no proposals as to specific offences under this legislation.

General Provisions as to Offences under Merchant Shipping Acts

22. Sections 686(1) and 687 of the Merchant Shipping Act 1894 contain general provisions relating to offences at sea and both present factors of unusual difficulty. Their very language is, indeed, confusing and uncertain. Section 686(1) provides for the trial of offences charged as having been committed out of England:-

- (a) by British subjects on board a British ship on the high seas or in any foreign port or harbour;
- (b) by a British subject on board a foreign ship to which he does not belong; and
- (c) by non-British subjects on board a British ship on the high seas,

and gives jurisdiction to any court in Her Majesty's dominions in whose domestic jurisdiction an offender is found. So far as indictable offences committed on British ships on the high seas are concerned, these are covered by section 1 of the Offences at Sea Act 1799 and are in any case punishable at common law apart from the section.⁴⁵ In relation to summary offences it is uncertain whether the section is merely

43. These provisions are mainly to be found in ss. 220-238 of the 1894 Act and ss. 30 and 43 of the 1906 Act.

44. (1967) Cmnd. 3211.

45. See R. v. Anderson (1868) L.R. 1 C.C.R. 161.

procedural or whether it extends the ambit, in the territorial sense, of the summary offences created by other sections of the Act of 1894. The Divisional Court in Robey v. Vladinier⁴⁶ treated it as having the latter effect in the case of an alien who had stowed away in a British ship in a foreign harbour and gone to sea in her (contrary to section 237(1) of the Act of 1894). The court held that this was a "continuing" offence - that is, the offence was committed as soon as the alien stowed away, but continued to be committed up to the time of his arrest after the vessel docked in London - and, accordingly, the view taken as to the effect of section 686 was not necessary for the decision. Offences of class (c) above do not, in general, raise any problems since, by the accepted principles of international law, aliens aboard a British ship on the high seas are governed by the law of the flag. But it is uncertain whether offences of class (a) committed in foreign ports or harbours are limited to offences against the Merchant Shipping Acts or extend to any offence contrary to English law by any British subject. Similarly, in the case of offences of class (b), it is uncertain whether the section refers to those few specific offences which, by statute, can be committed outside England or whether it applies the whole of English criminal law to British passengers on foreign ships. It is, however, suggested that the better view is that the section does not extend the ambit of the criminal law and that its purpose is purely to provide a machinery for the disposal of charges for offences against the Merchant Shipping Act, since its language does not invite the alternative conclusion.⁴⁷ Moreover, it appears in that part of the Act dealing with procedure and is grouped with other sections under the heading of "Jurisdiction".

23. Leaving aside the points on section 686(1) raised in the preceding paragraph, there remains the question of policy as to whether a British subject on a foreign ship should be subject to English criminal law other than in the special cases where he is made criminally liable by English law for acts committed outside England.⁴⁸ British passengers on

46. (1936) 154 L.T. 87.

47. There are further practical difficulties in the operation of the section in modern conditions: "Her Majesty's dominions" now include most independent Commonwealth countries, whilst a Commonwealth port or harbour is probably not "foreign" within the meaning of the section.

48. See para. 40 et seq.

foreign ships are by the accepted principles of international law governed by the law of the flag. In our view, therefore, such British subjects should not, in principle, be governed also by the general criminal law of England and it makes no difference, in our view, whether they are passengers or crew on such a ship.

24. Whilst the preceding paragraph sets out our general view on the position of British subjects on board foreign ships, there is undoubtedly a special problem arising from acts done by British subjects on board foreign ships outside territorial waters on journeys between different parts of the United Kingdom and between the United Kingdom and other neighbouring countries. There would clearly be practical advantages in extending jurisdiction to cover this class of persons as an exception to the general rule.⁴⁹ But it would seem anomalous to create such an extension of jurisdiction without extending it to cover acts by British subjects on board foreign aircraft on journeys between the United Kingdom and neighbouring countries. We, therefore, invite comment upon the acceptability of this suggested exception to the general rule.

25. Section 687 of the Act deals with the rules to be applied to offences against property or persons committed ashore or afloat out of Her Majesty's dominions by persons who at the time of the offence are, or have been during the previous three months, employed on a British ship. Besides making procedural rules for such cases, the section "deems" the offences to be of the same nature as if committed in the Admiralty jurisdiction. The statutory precursor of this section (section 267 of the Merchant Shipping Act 1854) was held in R. v. Dudley and Stephens⁵⁰ to be an "offence-creating" section (in the territorial sense),⁵¹ although in R. v. Anderson⁵² the question

49. An instance of jurisdiction being extended on similar lines is provided by clause 50 of the Merchant Shipping Bill which applies certain of the Bill's provisions to foreign ships carrying passengers between places in the United Kingdom or on voyages beginning and ending at the same place in the United Kingdom in which the ship calls at no place outside the United Kingdom.

50. (1884) 14 Q.B.D. 273, 281.

51. This section was the jurisdictional basis of the decision, but the Offences at Sea Acts 1536 and 1799 (not referred to) would have provided an alternative ground.

52. (1868) L.R. 1 C.C.R. 161.

of its construction had been left open. It must, therefore, be regarded as at least doubtful whether this section can be treated as a provision merely relating to jurisdiction. A further open question is whether it applies to aliens. The marginal note suggests that it does not, but the language of the section, especially if it is read together with section 686, suggests that it does. The fact of having been employed on a British ship at any time within three months of an offence against persons or property committed out of Her Majesty's dominions is, in our view, an unsatisfactory ground for the exercise of English criminal jurisdiction and we think that this basis should be excised from the law. Employment existing at the time the offence is committed does, however, offer practical advantages as a basis of English jurisdiction, despite theoretical objections, and we, therefore, provisionally propose to retain provisions on the lines of section 687 of the 1894 Act, the operation of which would be dependent on the continuing existence of an employment relationship with a British ship at the time when the offence abroad is committed. It may be convenient to mention that section 684 of the Act confers jurisdiction upon any Commonwealth court to deal with any offence against the Act, wherever committed, provided that the offender is within the domestic jurisdiction of that court.

Provisional Conclusions as to Offences on British ships

26. We consider the present law relating to offences on British ships to be unsatisfactory in many respects. We propose that what remains of the old common law and statutory enactments with regard to Admiralty jurisdiction should cease to have effect, and, in particular, we propose the repeal of the Offences at Sea Act 1799 and the surviving sections of the consolidating Acts of 1861 (as amended in 1967) in so far as they relate to offences on ships and Admiralty jurisdiction⁵³ together with similar sections in other legislation.⁵⁴ Also we would propose the repeal of section 686 of the Merchant Shipping Act 1894 as being out-of-date, unnecessary in view of other statutory enactments and uncertain in its effect. We would favour all these common law and statutory provisions being replaced by one composite enactment. This would provide that a person on

53. See para. 13.

54. e.g. the Unlawful Oaths Acts 1787, s.6 and 1812, s.7 and the Perjury Act 1911, s.8.

board a British ship⁵⁵ outside the normal domestic jurisdiction⁵⁶ of the United Kingdom courts who commits what would be an offence under the law of any part of the United Kingdom, if committed in that part, would be liable as if he had so committed it in that part. An "English" offence committed by that person would be justiciable by any court in England within whose jurisdiction he is found. We think it desirable, however, to include a provision for the consent of the Attorney General or the Director of Public Prosecutions to be required for the institution of proceedings under the proposed enactment against anyone other than a citizen of the United Kingdom and Colonies, at any rate in the case of indictable offences. But we would not alter the provisions of specific legislation of the kind referred to in paragraph 18 by introducing any provision for consent. Section 687 we propose should be retained in the form outlined in paragraph 25. Apart from the sections of the Merchant Shipping Act 1894, to which we have referred above, we do not propose any alteration in Merchant Shipping legislation beyond such as may arise out of our other proposals. We do not propose the alteration of any special provisions relating to criminal offences applying specifically to merchant seamen.⁵⁷

E. British Controlled Aircraft

27. In the case of British-controlled aircraft,⁵⁸ the law is now to be found in section 1 of the Tokyo Convention Act 1967 (following the 1963 Convention of that name)⁵⁹ which repeals, inter alia, section 62(1) of the Civil Aviation Act 1949. Section 1(1) of the 1967 Act reads:-

"Any act or omission taking place on board a British-controlled aircraft whilst in flight elsewhere than in or over the United Kingdom which, if taking place in or in a part of the United Kingdom, would constitute an offence under the law in force in, or in that part of, the United Kingdom shall constitute that offence."

This is clearly an offence-creating provision and takes effect

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55. It is for later consideration whether the expression "British ship" should be given a more restricted definition for this purpose than that which it possesses at present within the meaning of the Merchant Shipping Act 1894.
56. As to the meaning of this term, see para. 17.
57. e.g. s.2 of the Sexual Offences Act 1967 (see further para. 71).
58. As defined in s.7 of the Tokyo Convention Act 1967.
59. (1964) Cmnd. 2261.

by extending the United Kingdom criminal law to conduct occurring on British-controlled aircraft whilst in flight.⁶⁰ But it is subject to the following proviso, to which we return later:-

"... this sub-section shall not apply to any act or omission which is expressly or impliedly authorised by or under [U.K.] law when taking place outside the United Kingdom."

Section 1(2) imposes an important restriction by requiring the consent of the Director of Public Prosecutions before the institution of proceedings for offences committed on British aircraft whilst in flight outside the United Kingdom.⁶¹

Section 1(3) contains a provision for the purpose of conferring jurisdiction whereby any offence which it covers is deemed to have been committed in any place in the United Kingdom in which the offender may for the time being be.

28. Our view that section 1(1) is an offence-creating provision is supported by reference to the history of the application of the English criminal law to conduct occurring on aircraft. Section 14(1) of the Air Navigation Act 1920 which was substantially re-enacted by sections 60 and 62(1) of the Civil Aviation Act 1949 reads as follows:-

"any offence under this Act ... and any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may be found".

In R. v. Martin,⁶² Devlin J. held that section 62 was not an offence-creating provision, but possessed a merely jurisdictional character so far as statutory offences were concerned;⁶³ as to "common law offences" (situations where a crime is to be regarded as an offence wherever it is committed, which are mostly "offences against the moral law")

60. In force from 1st April 1968 (except s.2 (provisions as to extradition)).

61. cf. s.3 of the Territorial Waters Jurisdiction Act 1878 requiring the Secretary of State's consent to the prosecution of an alien committing an offence in territorial waters.

62. [1956] 2 Q.B. 272.

63. The offences charged were (a) unlawful possession of drugs and (b) conspiring to contravene the Dangerous Drugs Act 1951, on board a British aircraft.

he thought that the position might be different. We do not think that this line of reasoning provides a satisfactory test, because of the formidable difficulties inherent in distinctions based on the concept of the "moral law".⁶⁴ The point was again considered by Lord Parker C.J. in R. v. Naylor⁶⁵ where the accused was charged with larceny of rings on a British aircraft in flight over the high seas. Lord Parker held that section 62(1) of the 1949 Act was an offence-creating section, having effect so as to make any conduct which would be an offence, if committed in England, an offence if committed on a British aircraft unless the offence in question was clearly one of domestic application. In Cox v. Army Council,⁶⁶ Lord Simonds reserved consideration of Lord Parker's distinction between "domestic" and other offences, while Lord Reid expressed no opinion on the question whether Martin or Naylor had been correctly decided. In Cox's Case itself, the House of Lords was concerned with section 70 of the Army Act 1955 and was unanimous in agreeing that it was an offence-creating section.⁶⁷ The difficulties arising from the Martin and Naylor decisions have now, it seems, been solved as to offences committed on British aircraft, since, on the analogy of section 70 of the Army Act, section 1(1) of the Tokyo Convention Act 1967 is clearly an offence-creating section.

29. It remains to consider the effect of the proviso to section 1(1) of the 1967 Act. It is rare in United Kingdom legislation to find a provision which authorises acts or omissions taking place outside the United Kingdom which would otherwise be offences, since, in principle, unless the contrary appears expressly or by necessary implication, Acts of Parliament relating to criminal offences do not extend beyond United Kingdom territorial limits.⁶⁸ One apparent instance of a statute which impliedly authorises an act to be done upon a ship or aircraft, which would otherwise be an offence, is

64. See Lord Tucker in Board of Trade v. Owen [1957] A.C. 602, 633-634.

65. [1962] 2 Q.B. 527.

66. [1963] A.C. 48.

67. See further upon Cox's Case, para. 42.

68. See Lord Halsbury, L.C. in Macleod v. Attorney General for New South Wales [1891] A.C. 455, 458-9.

found in section 70 of the Customs and Excise Act 1952 which deals with breaking customs seals. There may be other illustrations of the express or implied authorisation of conduct otherwise criminal.⁶⁹ It may be, therefore, that the proviso serves a useful purpose and we would welcome the views of recipients of the Paper on this point.

F. Jurisdictional and Procedural Proposals with regard to Heads A to E above

30. In order to render effective the recommendations made under Heads A to E above, a number of new provisions relating to jurisdiction and procedure will be necessary. These we indicate in the following paragraphs.

Venue

31. Many difficulties as to the ascertainment of the court in which proceedings may be taken will be avoided and uncertainties will disappear if new legislation contains a "deemed place" provision, an example of which is to be found in section 684 of the Merchant Shipping Act 1894. There are provisions serving the same function in section 1(2) of the Geneva Conventions Act 1957, section 3(1) of the Continental Shelf Act 1964, section 1(3) of the Tokyo Convention Act 1967⁷⁰ and, in a more concise form, in section 14 of the Sea Fisheries Act 1968. The absence of any corresponding provision in the recent Genocide Act 1969 may appear at first sight to be a casus omissus, but a closer examination of the Act leads to the conclusion that it is only conduct in a place where English law applies in the ordinary way that the Act makes an offence, and that accordingly no provision with regard to jurisdiction is required.⁷¹

Issue of Process

32. This undoubtedly presents some difficulty. The position at present is governed mainly by section 1(2)(c) and (4) of the

69. Such as the Air Navigation Order 1966, S.I. 1966 No.1184 para. 34(2).

70. This sub-section reads:-

"For the purpose of conferring jurisdiction, any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft in flight shall be deemed to have been committed in any part of the United Kingdom (or, as the case may be, in that part thereof) where the offender may for the time being be; ..."

71. See language of s.2(2).

Magistrates' Courts Act 1952, the effect of which is to empower a magistrate to issue a warrant for the arrest of any person who, it is alleged, has committed an extraterritorial indictable offence and who resides or is, or is believed to reside or be, within the local jurisdiction of the magistrate.⁷² It has been suggested that there is a lacuna in the legislation relating to the issue of process for arrest in respect of extraterritorial offences because the statute makes no provision for the arrest of an offender who is physically outside the geographical limits of normal magisterial jurisdiction. The Magistrates' Courts Act does not, however, appear to be exclusive in dealing with the problem of issue of process for extraterritorial offences. In Lye's Case⁷³ the view was expressed that the Wireless Telegraphy Act 1949, in creating a summary offence, had impliedly created a jurisdiction in magistrates to try it and therefore (presumably) to issue process in respect of it. Further, the Extradition Acts 1870-1935 contain no provisions for securing the arrest of offenders abroad, though the treaties between the Crown and foreign States appear without exception to contain the requirement that the request from the Crown to the foreign State for the return of the offender must be accompanied by a warrant of arrest issued in England. The Fugitive Offenders Act 1967 (which replaced the earlier Act of 1881) provides for return of offenders within the Commonwealth. There is an accepted practice for securing the return of an offender to England from an independent Commonwealth country on the basis of a warrant issued in the requesting country. Return of offenders from a colony or other dependency is governed by the Act of 1967 as applied to the dependency by Order in Council. The Act makes a warrant issued in the requesting country an essential requirement where the return of a person accused of an offence is requested. The effect of the legislation to which we have referred seems to be that magistrates have no express statutory jurisdiction to issue process against offenders who are and who reside abroad.⁷⁴ We propose, therefore,

72. Usually the county or borough for which the magistrate acts although there are special cases where the jurisdiction of the magistrate extends beyond these limits.

73. [1967] 2 Q.B. 153, at 177, 178, 182, 193 and 192.

74. But see Stone's Justices' Manual, 1969 ed. Vol.1. p.40 note (e) as to issue of a provisional warrant; this can be supported on a similar basis to the reasoning in Lye's Case (i.e. creation of a summary offence impliedly creates a jurisdiction in the magistrates to try it - see para. 33).

that consideration should be given to amending section 1 of the Act of 1952 to provide specifically for machinery for the issue of process for arrest of persons abroad who are alleged to have committed extraterritorial offences or, whether or not the offence is extraterritorial, where surrender is to be requested under the provisions of the Extradition and Fugitive Offenders Acts.

Trial

33. It is convenient to consider separately indictable and summary offences. If anything done outside England and Wales is made an indictable offence under present law, it is triable in any of the places referred to in section 11(1) of the Criminal Justice Act 1925, that is to say, almost anywhere. Under section 2(3) of the Magistrates' Courts Act 1952 any magistrates' court can inquire into the case as examining justices, and, if the normal requirements are met, can, by virtue of section 2(4), deal with the case summarily, provided that it is an indictable offence which can be tried summarily. In reliance on section 11(1) of the Act of 1925, the Criminal Law Act 1967 repealed a number of enactments which specifically provided for jurisdiction of English courts to try indictable offences committed outside England and Wales, but inserted the saving provision in Schedule 2, paragraph 15(2) to prevent the defence from objecting to the place of trial under section 9(2) of the Act of 1952. The special powers given to the Central Criminal Court by section 22 of the Central Criminal Court Act 1834 to try offences committed on the high seas and within the jurisdiction of the Admiralty have been preserved by section 1 and Schedule 1, paragraph 5, of the Administration of Justice Act 1964. The more modern trend is to insert in the statute creating the offence a "deemed place" provision (see paragraph 31) which will render it possible for the offence to be dealt with anywhere in the United Kingdom. We believe that, if this practice continues to be followed, no difficulty is likely to arise with regard to the trial of indictable offences. With regard to summary offences the position is far less clear, because there is nothing corresponding to section 11(1) of the Act of 1925 and the jurisdiction of the Admiralty and the provisions of the Territorial Waters Jurisdiction Act appear not to apply to them. In Lye's Case⁷⁵ the court held that the

75. [1967] 2 Q.B. 153.

creation of the offence implied jurisdiction in the appropriate court to try it, but the question may be posed whether the court would have come to a similar conclusion had the offence been committed not in territorial waters, but on the high seas or in a foreign country. It seems, therefore, eminently desirable that there should be specific legislation to deal with the trial of extraterritorial summary offences.

Costs

34. An anomaly at present exists because, by virtue of section 7(2) and (3) of the Costs in Criminal Cases Act 1952, the costs of proceedings in respect of offences committed within the Admiralty jurisdiction are paid out of moneys provided by Parliament, and in practice are borne by the Director of Public Prosecutions, whereas the costs of proceedings under section 686(1) of the Merchant Shipping Act 1894 are payable out of local funds. We consider that this anomaly should cease to exist and propose that there should be a uniform source for the payment of costs in respect of all proceedings for extraterritorial offences.

Evidence

35. There are already very useful provisions in sections 689 and 691 of the Merchant Shipping Act 1894 for the taking of depositions abroad by consular officers and their admissibility in evidence in subsequent criminal proceedings. Similar, but extended, provisions have been inserted in section 5 of the Tokyo Convention Act 1967. We consider that there is a strong case for generalising provisions of this kind, but we understand that the Criminal Law Revision Committee is considering the question of taking evidence abroad for the purpose of criminal proceedings in England. We, therefore, make no specific proposal on this matter.⁷⁶

Summary of Proposals for Legislation dealing with Jurisdictional and Procedural Matters

36. Our provisional proposals for the matters dealt with in paragraphs 31 to 35 are as follows:-

- (1) Venue Ascertainment of the court in which proceedings for extraterritorial offences may

76. The Sea Fisheries Act 1968, s.11 contains special provisions as to the admissibility in evidence of sea fishery officers' reports; but this would be inappropriate as a precedent for general legislation.

be taken should be by means of a "deemed place" provision (paragraph 31).

- (2) Issue of process Section 1 of the Magistrates' Courts Act 1952 should be amended to provide specifically for the issue of process for arrest of persons abroad who are alleged to have committed extraterritorial offences or, whether or not the offence is extraterritorial, where surrender is to be requested under the provisions of the Extradition and Fugitive Offenders Acts (paragraph 32).
- (3) Trial There should be specific legislation providing for the place of trial of extra-territorial summary offences (paragraph 33).
- (4) Costs Provision should be made for a uniform source for the payment of costs in respect of all proceedings for extraterritorial offences (paragraph 34).
- (5) Evidence We make no specific proposals, since the Criminal Law Revision Committee is considering the question of taking evidence abroad for the purpose of criminal proceedings in England (paragraph 35).

Whilst provisions dealing with our proposals must ultimately find their place in the completed codification of the criminal law, we consider that, as an immediate measure, there should be legislation covering the matters summarised above, although we would not suggest that recent legislation dealing adequately with these matters should be touched.⁷⁷

III EXCEPTIONS TO AND EXTENSIONS OF THE TERRITORIAL PRINCIPLE

A. Persons Immune from Jurisdiction

37. The territorial rule is subject to personal immunity from the jurisdiction of the English courts in certain cases, viz.:-

- (a) Heads of foreign States or the government or

77. We refer to such Acts as the Continental Shelf Act 1964 and the Tokyo Convention Act 1967.

any department of the government of a foreign State.

- (b) Persons covered by the immunity of foreign public vessels.⁷⁸
- (c) Persons entitled to immunity under the Diplomatic Privileges Act 1964.
- (d) Persons entitled to immunity under the Consular Relations Act 1968.
- (e) International organisations and persons connected with them.⁷⁹ The most recent statutes dealing with this branch of immunity are the Commonwealth Secretariat Act 1966 and the International Organisations Act 1968.
- (f) Persons protected from United Kingdom jurisdiction under the Visiting Forces Act 1952.

38. The Consular Relations Act 1968, section 5, gives power to make provision by Order in Council with regard to offences by the master or a member of the crew of any ship belonging to a State specified in the Order committed on board such ship. Proceedings for such offences are generally not to be entertained in the United Kingdom except at the request or with the consent of the consular officer of the State concerned. This restriction does not apply to a "grave crime" as defined in section 1(2) of the Act (i.e. one attracting a maximum sentence of five years or a more severe sentence) and to certain other specified offences.

39. Since we consider that the important practical problems arising from immunity from jurisdiction constitute a subject requiring separate examination, we do not propose to discuss them further in this Paper.

B. & C. Subjection to English criminal law by reason of personal circumstances - General Remarks

40. Running parallel with the territorial rule, and in contrast with it, there are cases where, by their personal circumstances, individuals may be subject to English criminal law or to some specified part of it in respect of conduct

78. See e.g. Chung Chi Cheung v. The King [1939] A.C. 160.

79. This aspect of immunity is dealt with at length in Dicey & Morris, Conflict of Laws, 8th ed., pp. 123 et seq.

abroad. Apart from offences on British ships afloat (see paragraphs 21, 22 and 25) these cases fall into two groups. The first is where the individual is a member of a defined class of persons; the second is where the individual possesses a defined status and there is a specific statutory provision relating to particular offences. It is not always possible to allocate a particular case exclusively to either group. "English" offences committed abroad by servants of the Crown and made punishable by section 31 of the Criminal Justice Act 1948 form an example.

B. Jurisdiction based on Membership of a special class

41. The classes include:-

- (1) Members of Her Majesty's Forces under Service discipline.⁸⁰
- (2) Civilians accompanying Her Majesty's Forces and subject to Service discipline.⁸¹
- (3) British subjects committing offences in foreign ports or harbours or on board foreign ships to which they do not belong.⁸²
- (4) Persons employed or recently employed on British ships who commit offences against persons or property in or at any place ashore or afloat out of Her Majesty's dominions.⁸³
- (5) Persons subject to Convention jurisdiction or to the Antarctic Treaty Act 1967.
- (6) Crown servants serving abroad.

(1) Service Personnel

42. It is clear that the relevant sections of the Army and Air Force Acts 1955 (section 70 in each case) are offence-creating sections. Their effect is to make conduct abroad by

80. Army Act 1955, s.70; Air Force Act 1955, s.70; Naval Discipline Act 1957, s.42.

81. Army Act 1955, s.209(2); Air Force Act 1955, s.209(2); Naval Discipline Act 1957, s.118.

82. Merchant Shipping Act 1894, s.686.

83. Merchant Shipping Act 1894, s.687.

a member of H.M. Forces punishable under English law, if that conduct would have been an offence had it taken place in England.⁸⁴ But, as pointed out by the House of Lords in Cox's Case,⁸⁵ these offence-creating sections do not apply the whole body of the English criminal law to serving men, since there are categories of conduct which cannot be reproduced by an equivalent occurrence abroad and other categories of conduct occurring outside England which are so much identified with their locality that they cannot be translated into any English offence.⁸⁶ The position under section 42 of the Naval Discipline Act 1957 is far less clear, though it was assumed by the Courts-Martial Appeal Court in R. v. Warn⁸⁷ that the section was an offence-creating section. Having regard, however, to sections 48(2), 68(2) and 129(1) and (2) of the Act, there is a substantial argument for the proposition that section 42 is a section merely conferring power on a court-martial to deal with a civil offence which otherwise would be justiciable only in the civil courts and so giving a court-martial a special kind of extraterritorial jurisdiction. Although there are historical reasons for the different treatment of naval personnel, we believe that these are no longer valid and we think that the doubts as to the character of section 42 of the 1957 Act should be resolved and that a common policy should be applied to extraterritorial offences by all Service personnel. A further problem was raised in Warn's Case when it reached the House of Lords,⁸⁸ namely, where by statute the consent of the Attorney General or of the Director of Public Prosecutions is required to proceedings, such consent is a pre-requisite to a court-martial held abroad. The position at present appears not to be free from doubt, and the question whether such consent should be required should be resolved definitely one way or the other when the question of extra-territorial jurisdiction is reviewed.

84. R. v. Page [1954] 1 Q.B. 170, a decision on s.41 of the Army Act 1881, which was re-enacted by s.70 of the Act of 1955; Cox v. Army Council [1963] A.C. 48.

85. [1963] A.C. 48.

86. See particularly per Lord Radcliffe in Cox's Case at 71.

87. [1968] 1 Q.B. 718.

88. [1968] 3 W.L.R. 609.

(2) Civilians Accompanying Her Majesty's Forces

43. Under this head are included: wives and members of families of serving soldiers; relatives staying on holiday with a Service family; authorised Press correspondents; members of concert parties; civilians employed in almost any capacity (administrative, executive, judicial, clerical etc.) by a member of the Forces or by a civilian subject to military control. Until 1957 civilian dependants and employees accompanying the Forces were subject to military law only when troops were on active service, i.e. engaged in operations against an enemy elsewhere than in the United Kingdom or in operations for the protection of life and property, or were in military occupation of a foreign country. But this limited application of military law to civilians was substantially widened by the Army and Air Force Acts 1955, section 209(2) (which came into force in 1957).⁸⁹ Such persons can now be tried by a court-martial (or summarily) for any "civil offence", i.e. for any non-military offence punishable by the law of England or which, if committed in England, would be punishable by that law.⁹⁰

44. In January 1966 the wife of a British soldier stationed in Germany was tried by court-martial for the murder of her husband and sentenced to life imprisonment (subsequently commuted to five years' imprisonment). It is at least arguable that, except in time of war or under active service conditions, civilians accompanying H.M. Forces and falling within the aforementioned categories should, subject to any local jurisdictional claim, in the case of indictable offences be entitled to demand trial by jury by a criminal court in England.⁹¹

Merchant Shipping Act Offences ((3) & (4))

(3) Offences by British subjects committed abroad

(4) Offences abroad by Persons employed on British ships

45. We have provisionally proposed the repeal or amendment of the sections of the Merchant Shipping Act 1894 which at present cover these two classes (see paragraph 26).

89. The Naval Discipline Act 1957, s.118(2) which came into force on 1st January 1959 effected similar changes with regard to Naval personnel.

90. We understand, however, that, in practice, jurisdiction is not claimed under these provisions in relation to offences by aliens abroad.

91. See further on this subject "Courts-Martial, Civilians and Civil Liberties" by Gordon Borrie, (1969) 32 M.L.R. 35.

(5) Convention Jurisdiction

46. Reference has already been made in paragraph 18 to extension of the territorial operation of English law by legislation for the purpose of implementing certain International Conventions mentioned therein. Another example of such an extension is to be found in the Antarctic Treaty Act 1967, by section 5 of which certain persons are made criminally liable for their conduct whilst in Antarctica for the purpose of exercising their functions. Any such person who commits what would be an offence under the law of any part of the United Kingdom, if committed in that part, is made liable as if he had so committed it in that part. The persons so liable are those to whom section 1 of the Act applies⁹² who are designated by the United Kingdom Government as observers or who are "exchanged scientists", together with members of their staff. But in addition, in the interests of the conservation of the local flora and fauna, section 1(1) creates a number of specific offences (e.g. wilfully killing or molesting mammals or birds or gathering native plants or driving vehicles in protected areas) which may be committed by any of the categories of persons specified in section 1(3). The 1967 Act establishes an important precedent which might be followed in the regulation of conduct outside existing State territories, such as the Arctic or Outer Space. Whilst international agreement is not a precondition of this kind of general treatment, it would, of course, be necessary if jurisdiction were to be sought over persons other than those for whom, by international law, the United Kingdom Government is responsible.

(6) Crown Servants

47. Certain statutes make provision for the application of domestic criminal law to indictable offences committed by British Crown servants serving abroad.⁹³ The first of these Acts, the Governors of Plantations Act 1698, is of constitutional significance because it makes special provisions

92. Under s.1(3), these are specified categories of United Kingdom nationals and any person who owns or is the master or crew member of a British ship registered in the United Kingdom. There may be further extension by Order in Council of the persons to whom s.1 applies - see s.7.

93. Governors of Plantations Act 1698; Criminal Jurisdiction Act 1802; Sale of Offices Act 1809; and the Criminal Justice Act 1948, s.31, as now amended by the Criminal Law Act 1967, s.10(2).

for the trial in England of offences contrary to "the laws of this realm", as well as local laws, committed by governors and commanders-in-chief in colonial territories under their jurisdiction. A similar provision is made in respect of offences against the Sale of Offices Act 1809 by section 14 of that Act. The Criminal Jurisdiction Act 1802 makes provision for the prosecution in England for offences "in the execution, or under colour, or in the exercise of" their duty committed out of Great Britain by persons employed in the service of the Crown in any civil or military station, office or capacity or employment out of Great Britain. The Criminal Justice Act 1948, section 31 (as amended) makes jurisdictional and procedural provisions with regard to the trial of offences committed by British subjects "employed under Her Majesty's Government in the United Kingdom in the service of the Crown" who, when acting or purporting to act in the course of their employment, commit offences in foreign countries which, if committed in England, would be punishable upon indictment. This appears to apply the whole of English law relating to indictable offences. The main difference, therefore, between the Act of 1802 and the Act of 1948 is that under the former a procedure is available to deal with offences committed outside Great Britain, whereas the provisions of the latter are only available to deal with offences which are committed in a foreign country. There is, further, a minor difficulty arising from the fact that the Act of 1948 and the British Nationality Act 1948 received the Royal Assent upon the same day. This raises the question as to whether and to what extent the provisions of section 3 of the British Nationality Act⁹⁴ operate to exclude British subjects other than citizens of the United Kingdom and Colonies from the ambit of section 31 of the Criminal Justice Act 1948.

48. We think that the old Acts dealing with the criminal liability of Crown servants for conduct abroad (i.e. the Acts of 1698, 1802 and section 14 of the Act of 1809) should be repealed and replaced with new provisions on the lines of section 31 of the Criminal Justice Act 1948. The same provisions should apply to all offences committed out of the United Kingdom by persons employed in the service of the Crown under Her

94. Limiting the criminal liability of British subjects who are not citizens of the United Kingdom and Colonies.

Majesty's Government in the United Kingdom or in a dependency, when acting or purporting to act in the course of such employment. New provisions on these lines would, of course, eliminate the minor difficulty mentioned at the end of the preceding paragraph.

Summary of Proposals concerning Jurisdiction based on Membership of a Specified Class

49. On the points discussed in paragraphs 42 to 48 we make the following provisional proposals:-

- (1) Section 42 of the Naval Discipline Act 1957 should be brought into line with section 70 of the Army and Air Force Acts 1955 so that the doubts as to its effect should be resolved (paragraph 42).
- (2) Specific statutory provision should be made as to the need for obtaining the consent of the Attorney General or the Director of Public Prosecutions to the institution of proceedings under military and naval law, eliminating by this means existing doubts on this point (paragraph 42).
- (3) Civilians subject to military or naval discipline should be entitled to claim trial by the civil courts for indictable offences committed abroad otherwise than in active service conditions (paragraph 44).
- (4) Section 686 of the Merchant Shipping Act 1894 should be repealed and section 687 should be amended (paragraph 45). Offences on British ships would under our proposals be the subject of new legislation (see paragraph 26).
- (5) Subject to the possible exception noted in paragraph 24, the new legislation referred to in (4) should not contain any general provision relating to offences committed by British subjects on board foreign ships.
- (6) Offences by Crown servants committed abroad should be dealt with by an extension of section 31 of the 1948 Act. The Acts of 1698 and 1802 and section 14 of the Act of 1809 should be repealed (paragraph 48).

C. Jurisdiction Based on Status - Specific Offences
Abroad

Status

50. Before considering the specific statutory provisions under which individual personal status attracts English criminal law to conduct abroad, it is necessary to define what, for this purpose, constitutes status. The underlying concept of most of these statutory provisions is that the qualifying status is that of a "British subject". This is not, however, always the test. Persons owing allegiance to the Crown may be included for the crime of treason (as in Joyce v. D.P.P.),⁹⁵ even though that allegiance may have arisen through the temporary acceptance of the protection of the Crown, and British residents may also be specifically included (as by the provisions of the Slave Trade Act 1824, section 9). On the other hand persons who possess British subject status by virtue of citizenship of a Commonwealth country do not attract English criminal law (otherwise than in respect of Merchant Shipping Acts offences) to conduct in a Commonwealth country or foreign country merely because they are British subjects.⁹⁶ In the case of the Exchange Control Act 1947 the test is residence in the United Kingdom.⁹⁷

Specific Offences Possessing an English Element

51. In the case of every relevant specific offence of this class it is necessary to look at the language of the statute which operates to extend English criminal law to conduct abroad and also to remember the special position of British subjects who are Commonwealth citizens. Subject to these general considerations the specific offences may be listed under four general heads, namely:-

- (1) Offences affecting Public Order, Institutions or Security.
- (2) Offences against the Revenue.
- (3) Certain offences under the Offences against the Person Act 1861.
- (4) Miscellaneous Legislation.

95. [1946] A.C. 347.

96. See s.3 of the British Nationality Act 1948.

97. See s.1(1).

In the following paragraphs, we mention briefly the main offences which fall into each of these groups.⁹⁸

(1) Offences affecting Public Order, Institutions or Security

Treason

52. Under the Treason Act 1351 any person owing allegiance to the Crown who engages in or supports treasonable activities, whether within the realm or elsewhere, is guilty of treason.⁹⁹ A recent illustration of the extraterritorial operation of the law relating to treason is provided by the consideration given in the course of litigation in Rhodesia¹ to the Act of 1495² under which service in war under the de facto King for the time being is deemed not to be treason against the de jure King. Despite the archaic terms in which it is drafted, this Act may, therefore, be of importance in special situations and it is for consideration whether, on a review of the law of treason, obedience to a de facto Sovereign should constitute a defence. A provision on these lines is included in the Criminal Code of Canada.³

Burning the Queen's Ships, Dockyards and Naval Stores

53. Under the Dockyards Protection Act 1772 this still remains a capital offence whether committed in the realm or in any place belonging to it and an alien is under the same liability as a British subject. The scope of this Act has been extended by

98. We have noticed that a number of other statutes (for example, the Salmon and Freshwater Fisheries Act 1923, s.75(1) and the Protection of Birds Act 1954, s.12(5)) contain provisions conferring jurisdiction on the courts of the place where an offender is found or first brought after committing an offence under such Acts. We regard such provisions as concerned purely with procedural matters and not as offence-creating in the sense that conduct outside the territory constitutes a criminal offence.

99. See Archbold, 37th ed., para. 3027 which gives historical illustrations of such treasons: and, as to treason abroad, see, in particular, R. v. Casement [1917] 1 K.B. 98.

1. See Madzimbamuto v. Lardner-Burke 1968 (2) S.A.L.R. 284. The Privy Council, when considering the appeal, did not find it necessary to deal with the 1495 Act (see [1969] 1 A.C. 645, 726). See also "Treason in Rhodesia" by Alan Wharam and "Allegiance and the Usurper" by A.M. Honoré in (1967) C.L.J. 189 and 214.

2. 11 Hen. 7 c.1.

3. See s.15.

subordinate legislation and it now also covers military aircraft factories and materials, and buildings and stores under the control of the Minister of Technology. Despite these extensions we have formed the view that the Act is obsolete and unnecessary and, subject to consultation, we have proposed its repeal in our Working Paper No. 23 on Malicious Damage.

Offences relating to Explosive Substances

54. Under section 3 of the Explosive Substances Act 1883 it is an offence for a person outside H.M.'s dominions who is a British subject (which in this context now means a citizen of the United Kingdom and Colonies)⁴ to do any act with intention to cause an explosion, or to conspire to cause an explosion, in the United Kingdom or to make or to have explosives with the like intent.

Official Secrets

55. Section 10(1) of the Official Secrets Act 1911 provides that conduct abroad by British officers or British subjects in breach of the Act shall be an offence. Whilst it seems clear that the expression "British subjects" is now limited by section 3 of the British Nationality Act 1948 to citizens of the United Kingdom and Colonies, the expression "British officers", which is not defined, must presumably include some additional category of persons. We think it would be helpful if a clear definition were provided for this expression. We have no further proposal to make regarding the Official Secrets Acts in this context and at this stage of our work on the criminal law.

Administering or Taking Unlawful Oaths

56. These offences are created by the Unlawful Oaths Acts 1797 and 1812 and are punishable in England wherever and by whomsoever committed. Since these offences have a close relationship with treason it is our view that, with the possible exception of aliens owing allegiance to the Crown, no one who is not a citizen of the United Kingdom and Colonies can be charged with an offence under these Acts committed abroad. Whilst we believe that these Acts are obsolete, we have no proposal for their amendment in the present context.

4. See s. 3 of the British Nationality Act 1948.

Perjury

57. By virtue of section 1(5) of the Perjury Act 1911, false statements sworn abroad before British officials made for the purpose of judicial proceedings in England are indictable offences under English law. The nationality of the offender is irrelevant. By section 8 (as amended by the Criminal Law Act 1967) "Where an offence against this Act or any offence punishable as perjury or as subornation of perjury under any other Act of Parliament⁵ is committed in any place either on sea or land outside the United Kingdom, the offender may be proceeded against, indicted, tried and punished ... in England". We are in the course of a preliminary study of the law of perjury, in which we shall consider to what substantive offences section 8 applies. We, therefore, make no proposal at this stage for any change in these provisions.

Representation of the People Act 1949

58. Section 80 of this Act creates the offence of using wireless stations abroad to influence voters at Parliamentary elections. It is open to question whether acts contrary to the other offence-creating sections of this Act (e.g. corrupt or illegal practices) when committed abroad constitute a criminal offence.⁶ Section 155(1) of the Act provides machinery for determining the court in the United Kingdom before which proceedings may be taken against a British subject or citizen of the Republic of Ireland for an offence committed abroad. On a strict construction of these sections (the latter of which is jurisdictional in character) we think that the only offence on which section 155 can operate is that created by section 80 of the Act. But section 155(1) is no longer limited to conduct related to Parliamentary elections since section 21(1) of the Representation of the People Act 1969 removed those words from section 155(1) which referred to such elections. The present position is, therefore, obscure. It has been stated that "section 155(1) extends to any offence

5. See Piracy Act 1850, s.6.

6. s.38 of the Representation of the People Act 1915, which was in its turn replaced by s.73 of the Representation of the People Act 1948, made specific provision for the punishment of certain election offences committed outside the United Kingdom. But the latter provision was repealed by the Representation of the People Act 1949, s.155(1) of which (referred to in the text) contains no such specific provision.

under the Act and is apparently intended to meet the case of an offence committed abroad by an absent voter".⁷ There are many activities prohibited by the Act which are equally damaging wherever committed. If policy dictates that election offences committed abroad should be punishable in the United Kingdom, we consider that the appropriate specific provision should be enacted.

(2) Offences against the Revenue

Customs and Excise

59. The Customs and Excise Act 1952 contains various provisions relating to offences which may be committed outside national waters and within territorial waters off the coast of the United Kingdom by foreign vessels and their masters.

Income Tax

60. Section 482(5) of the Income and Corporation Taxes Act 1970 makes it an offence for a person to do or be party to the doing of any act which involves any unlawful activity of specified kinds in derogation of the Revenue law, "whether within or outside the United Kingdom", but there appears to have been no prosecution under this subsection or the corresponding subsection of the Income Tax Act 1952.

Exchange Control

61. Section 1(1)(c) of the Exchange Control Act 1947 makes it an offence for a British resident without proper authorisation to deal in gold or currency outside the United Kingdom.

62. We have no recommendations to make within the scope of this Paper in relation to the legislation discussed under the head "Offences against Revenue".

(3) Offences under the Offences against the Person Act 1861

Generally

63. The Criminal Law Revision Committee is the body to which is assigned the examination of the Offences against the Person Act 1861 (other than bigamy).⁸ We, therefore, refrain from

7. Parkin's Election Agent and Returning Officer, 6th ed., 1959, p. 323.

8. Law Commission's Second Programme of Law Reform, LAW COM. No.14, Item XVIII (2).

formulating any proposals for changes in sections 4, 9 and 10 of the 1861 Act. Our observations as to their extraterritorial operation are designed to draw attention to some of the problems which these sections raise. Since, however, homicide is now governed by national laws which, in general, leave no part of the globe uncovered, we pose first the general question as to how far it is desirable to retain provisions in English law which enable our courts to try homicide committed abroad by citizens of the United Kingdom and Colonies.

Conspiracy to Murder

64. By section 4 of the Offences against the Person Act 1861 conspiracy or incitement or solicitation in England to murder any person anywhere is an offence, but no one can be prosecuted under this section unless the conspiracy is entered into or some overt act is done in England or within the Admiralty jurisdiction.⁹

Homicide

65. By section 9 of the Act it is made a crime for a subject of Her Majesty (in this context a citizen of the United Kingdom and Colonies), to commit or to be accessory to homicide on land abroad, whatever the nationality of the victim.¹⁰ This may be regarded as an anomaly, since it takes no account of the territorial principle. It raises the question posed, but not answered, by Cresswell J. in R. v. Azzopardi¹¹ as to whether the killing of a person in a foreign country which does not constitute homicide by the laws of that country (for example, in the course of a duel) amounts to an offence under this section.

66. Section 10 of the Act¹² deals with homicide where the conduct causing death occurs in one country and the death results in another. The interpretation of the section presents

9. See Russell on Crime 12th ed., Vol. 1, p.613, and see further para. 92 as to conspiracy generally.

10. For the earlier history of this subject see the observations of Lord Goddard C.J. in R. v. Page [1954] 1 Q.B. 170, 174-176; and Professor Glanville Williams, (1965) 81 L.Q.R. at 399-402.

11. (1843) 2 Mood. C.C. 288, 291; 169 E.R. 115, 116, a decision under the Murders Abroad Act 1817, the precursor of s.9 of the Act of 1861.

12. As now amended by s.10(2) of the Criminal Law Act 1967.

considerable difficulties, since its precursor (the Offences against the Person Act 1828) was interpreted in R. v. Lewis¹³ as not being operative where a foreigner committed the act causing death out of England and only the death of the victim took place in England; but the court indicated that its decision would have been different had the offender been a British subject.¹⁴ It seems that section 10 does not have the effect of making a homicide cognizable in the courts of this country solely by reason of the death occurring here.

Bigamy

67. Section 57 of the Offences against the Person Act 1861 makes it an offence for any person, being married, to marry again anywhere,¹⁵ provided that a second marriage by a person "other than a subject of Her Majesty", contracted outside England or Ireland shall not be an offence. It is for the defence to show that an accused falls within this proviso.¹⁶ The extraterritorial application of the English law of bigamy to British subjects (other than those excluded by section 3 of the British Nationality Act 1948) raises a number of extremely difficult problems, which have been discussed by Professor Glanville Williams.¹⁷ We are in the course of examining the law of bigamy with a view to its reform;¹⁸ pending the completion of this study, which will cover the problems of extraterritorial operation, we make no proposals in this Paper.

(4) Miscellaneous Legislation

False Trade Descriptions

68. By section 21 of the Trade Descriptions Act 1968 accessories in England to false representations made abroad are guilty of an offence if the false trade description:-

13. (1857) Dears & B. 182.

14. But see now s.9 of the 1861 Act.

15. It was held in Earl Russell's Case [1901] A.C. 446 that the expression in s.57 "in England or Ireland or elsewhere" meant anywhere at all.

16. R. v. Audley [1907] 1 K.B. 383.

17. (1965) 81 L.Q.R. at 402-408.

18. See Law Commission's Second Programme of Law Reform, LAW COM. No. 14, Item XVIII (2) (a).

- (a) is an indication, or anything likely to be taken as an indication, that the goods or any part thereof were manufactured, produced etc., in the United Kingdom; or
- (b) consists of or comprises an expression (or anything likely to be taken as an expression) to which a meaning is assigned by an order made by virtue of section 7(b) of the Act.

Such persons are, however, punishable only if the relevant false representation would itself have constituted an offence if made in England.

69. There are two types of offences requiring mention which, although, strictly speaking, they need not involve a breach of the territorial principle of jurisdiction, in different ways possess a foreign element.

Procuration

70. Offences of procuration contrary to sections 2, 3, 9, 22, 23 and 29 of the Sexual Offences Act 1956 are committed where the conduct intended to be procured occurs "in any part of the world".

Homosexual Offences

71. These offences, even though committed by consenting adults, are, by virtue of section 2 of the Sexual Offences Act 1967, still punishable when committed by merchant seamen on board a United Kingdom merchant ship, wherever such ship may be.

72. We make no proposals in the present context for changes in the above Statutes.

D. International Crimes and Crimes analogous thereto

73. We now turn to those substantive offences, at common law and by statute, which may be regarded as offences against the law of nations and, upon this account, justiciable in England wherever committed.

(1) International Crimes

Piracy

74. Under English law piracy jure gentium committed by anyone anywhere on the high seas is an indictable offence. It was remarkable that, until the passing of the Tokyo

Convention Act 1967, English law provided no clear definition of this crime.¹⁹ Nevertheless the authorities and statutes dealing with piracy are sufficient to show that it could take two main forms, covering:-

- (a) masters and crews of vessels who engage in unlawful acts of violence at sea directed against other vessels, their masters, crews and cargoes;
- (b) crews and passengers who engage in unlawful acts of violence at sea directed against the vessel to which they belong, its masters or officers or its cargo.

A common element in both these forms of piracy was intent to rob. According, however, to the Report by the International Law Commission commenting on the Law of the Sea (8th Session, 1956),²⁰ intention to rob ("animus furandi") was not necessarily an element of piracy jure gentium, and acts of piracy might be prompted by feelings of hatred or revenge and not merely by the desire of gain. Further, acts of violence committed under the authority of a foreign State did not constitute piracy.²¹

75. Section 4 of the Tokyo Convention Act 1967 provides that:-

"For the avoidance of doubt, it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions set out in this Act of the Convention on the High Seas signed at Geneva on 29th April 1958 shall be treated as constituting part of the law of nations; and any such court having jurisdiction in respect of piracy committed on the high seas shall have jurisdiction in respect of piracy committed by or against an aircraft wherever the piracy is committed."

The Schedule to the Act sets out the following provisions of the 1958 Convention:-

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19. In the case of In re Piracy Jure Gentium [1934] A.C. 586, the Privy Council examined and criticised suggested definitions, but did not hazard one of their own. Earlier authority is to the effect that piracy is merely robbery on the high seas (see Attorney General for Hong Kong v. Kwok-a-Sing (1873) L.R. 5 P.C. 179, 199).
 20. Year Book of the I.L.C. 1956 p.282.
 21. But British subjects committing acts of robbery or hostility on the high seas against other British subjects under colour of authority from a foreign State are liable for piracy. See the Piracy Act 1698, s.7.

Article 15

"Piracy consists of any of the following acts:-

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act."

Paragraph (a) of Article 15 is distinguished from paragraph (b) essentially by the fact that the acts of violence etc. in (a) must occur "on the high seas" whilst those in (b) may occur "in a place outside the jurisdiction of any state", which would include the airspace above the high seas. But it seems to be accepted²² that in both cases the acts in question must be directed against another ship or aircraft or persons or property on board.

76. We think that section 4 of the 1967 Act has the effect of providing a comprehensive definition of piracy jure gentium for the purposes of English law. If this be so, two consequences follow: first, the type of conduct described in paragraph 74(b) is no longer piracy jure gentium and is only

22. See e.g. Brownlie, Principles of Public International Law p.214.

an offence against English law so far as it constitutes piracy by statute²³ or when other substantive indictable offences are committed in the course of the operation. Secondly, on the same view, the "hijacking" of aircraft by crew members or, more commonly, passengers cannot constitute piracy jure gentium²⁴ and, since there are no statutory provisions covering this type of piracy of aircraft, it can only constitute an offence under English law if and in so far as other offences are committed in the course of a hijacking operation. In this context, the common law misdemeanour of false imprisonment may be relevant as well as certain statutory offences against the person.

77. In view of the meaning of piracy jure gentium now established in English law by the Tokyo Convention Act 1967, and of the problems to which this gives rise, we consider that there should be special legislation dealing with violence on the part of the complement (including passengers) of a British vessel or aircraft directed against that vessel or aircraft or against its officers or cargo, or revolt or conspiracy to revolt against its officers. So far as violent taking of things is concerned, the matter would presumably be covered by the provisions of the Theft Act 1968, including the provision in section 12 relating to taking without authority, which applies to vessels and aircraft. So far as violence against persons is concerned, offences of wounding, assault, aggravated assault etc., are already covered by the Offences against the Person Act; but there are some forms of violence which might well arise on ships or aircraft which remain common law offences, as, for example, false imprisonment.

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23. The surviving statutes creating offences of piracy are:-
- (a) the Piracy Act 1698, s.8 of which covers, inter alia, revolt by the crew against their own master, and
 - (b) the Piracy Act 1721, s.1 of which covers trading with pirates.

The other old statutes dealing with piracy, except the Piracy Act 1837, have been repealed; the Piracy Act 1670 by the Statute Law Revision Act 1966; and the Piracy Acts 1717 and 1744 by the Criminal Law Act 1967. The surviving Act of 1837 merely renders capital certain offences against the person ancillary to piracy; we doubt whether this now serves any useful purpose.

24. The question of the return of hijackers to the aircraft's country of registration for trial is outside the scope of this Paper and we do not, therefore, discuss it.

These would not come within the Offences against the Person Act.²⁵ Accordingly, such legislation, whilst leaving the 1967 Act and its Schedule untouched, would supersede the surviving ancient statutes of 1698, 1721 and 1837, and would cover, as effectively as any national legislation could, hijacking at sea or in the air.

Geneva Conventions Act 1957

78. Section 1 of this Act provides that "grave breaches" (as defined in section 6) of specified articles of the Scheduled Conventions by whomsoever and wheresoever committed constitute offences against English law. The Act contains provisions which confer jurisdiction on the United Kingdom courts and which also require the consent of the Director of Public Prosecutions to proceedings. We do not recommend any change in this legislation.

Dangerous Drugs

79. The provisions of the International Conventions relating to dangerous drugs, to which the United Kingdom is a party, are operative here under the Dangerous Drugs Act 1965.²⁶ Offences in relation to dangerous drugs have been extradition offences since 1932, under the provisions of the Extradition Act of that year, and offences "against the law relating to dangerous drugs or narcotics" appear in Schedule I to the Fugitive Offenders Act 1967. Because of the international character of dangerous drug offences, section 13(d) of the 1965 Act provides that:-

"A person -

- (d) who in the United Kingdom aids, abets, counsels or procures the commission in a place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place, or does an act preparatory to, or in furtherance of, an act which if committed in the United Kingdom would constitute an offence against this Act;

shall be guilty of an offence against this Act."²⁷

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25. We observe that the Schedule to the Extradition Act 1870 includes "revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master" amongst extradition offences. Schedule I to the Fugitive Offenders Act 1967 contains a similar offence, extended also to aircraft as well as "acts done with the intention of endangering vehicles, vessels or aircraft".
26. These are the Hague Convention of 1912 and the Geneva Conventions No.1 of 1925 and No.2 of 1931. The 1965 Act replaces earlier legislation.
27. On indictment 1965 Act offences attract fines not exceeding £1,000 and/or imprisonment not exceeding ten years; on summary conviction the maximum fine is £250 and the maximum term of imprisonment twelve months.

This provision forms an exception to the general rule that attempting, inciting and abetting in England the commission of an offence abroad against foreign law does not constitute an offence against English law, but we consider that the special reason for its inclusion justifies its existence and retention in the law.

Genocide

80. This offence, proceedings for which require the consent of the Attorney General, was created by the Genocide Act 1969. The Schedule to the Act sets out Article II of the Genocide Convention, approved by the General Assembly of the United Nations on 9th December 1948, listing five different kinds of acts commission of which, with the intent prescribed by the Article, constitutes the offence. Unlike the Geneva Conventions, the Genocide Convention did not require States to punish genocide committed outside their territorial limits, and the Act of 1969 contains no provision indicating extra-territorial operation or providing for the appropriate jurisdiction of the United Kingdom Courts if it had had such operation. It seems clear, therefore, that acts of genocide committed abroad by a British subject are not offences against English law.²⁸ This may be regarded as anomalous.

(2) Analogous Offences

Slave Trade Acts²⁹

81. By section 9 of the Slave Trade Act 1824 British residents who engage in slaving on the high seas commit offences under that Act. Section 26 of the Slave Trade Act 1873 contains the appropriate jurisdictional provisions and section 11(3) of the Criminal Justice Act 1925 deals with forgery offences wherever committed which are related to the slave trade. These offences are closely akin to "international crimes" and suppression of slaving is the subject of many treaties to which the United Kingdom is a party.³⁰ It has also to be observed that the

28. But see s.1(6) and (7) of the Act (amending the Army and Air Force Acts 1955 (s.70) and the Naval Discipline Act 1957 (ss. 42 and 48)) as to genocide abroad committed by members of the armed forces.

29. A number of old Acts dealing with the Slave Trade were repealed by the Statute Law Revision Act 1964.

30. For a list of such treaties see Halsbury's Laws of England 3rd ed. Vol.38, p. 221(g).

Slave Trade Act 1873 (incorporating for this purpose the Act of 1824) has been added to the Schedule to the Extradition Act 1870. The Slave Trade Acts will clearly fall under review in due course since they remain virtually as enacted between 1824 and 1879. In the present context we make no proposals for their amendment.

Foreign Enlistment Offences

82. The Foreign Enlistment Act 1870 creates two kinds of offences, namely:-

- (i) offences committed by any person "within Her Majesty's dominions";
- (ii) offences committed by citizens of the United Kingdom and Colonies within or without Her Majesty's dominions.

The provisions of this Act relating to jurisdiction have been described as "a model of draftsmanship"³¹ and it is certainly made clear which of them operate territorially and which extra-territorially. But the Act requires consideration with regard to its application to modern conflicts. For example, it is uncertain whether "war" in section 4 includes international police action and whether "military or naval service" includes service in an air force. On the other hand, it seems clear that the Act has no application to enlistment in forces engaged in a war within or between Commonwealth countries. Just as the Slave Trade Acts are in need of review, so the Foreign Enlistment Act 1870 should be considered in the context of today. This examination will involve policy questions which are outside the scope of the present Paper, and we, therefore, have no proposals to advance for the amendment of this legislation.

Killing Seals

83. By Orders made under the Behring Sea Award Act 1894 it is an offence for a citizen of the United Kingdom and Colonies to kill, capture or pursue seals in the area to which the Act applies. The Act was passed to give effect to an arbitral award between the United Kingdom and the United States.

31. Professor Glanville Williams, (1965) 81 L.Q.R. at 408.

IV OTHER SPECIAL PROBLEMS CONCERNING CRIMES
WITH A FOREIGN ELEMENT

84. Before summarising the questions which arise in the preceding parts of this Paper and the proposals which we make with regard to them, it is necessary to discuss certain special problems. These are:-

- A. The Determination of the Place of Commission of a Crime.
- B. Inchoate Crimes with a Foreign Element.
- C. Secondary Parties to Crimes with a Foreign Element.
- D. Double Jeopardy in Crimes with a Foreign Element.

A. The Determination of the Place of Commission of a Crime

(1) The Present Law

85. The problem is how to determine where a crime with a foreign element is to be regarded as having been committed. This is of a different nature from the question of how to determine which court has jurisdiction to issue process or to entertain proceedings against an offender who has committed an offence in a particular place. As to the latter, existing statutory provisions cover the jurisdictional competence of the English courts;³² and our proposals made earlier in this Paper are designed to deal with the same question in relation to offences which are committed outside the territory of England and Wales but within extensions of that territory or which have extraterritorial operation.³³ The following paragraphs of this section of the Paper are concerned with determining the place where a crime is committed for the purposes of the application of the substantive criminal law.

86. There are many cases where the prescribed elements of an offence³⁴ are such that no difficulty is experienced in

32. For example, the Criminal Law Act 1826, ss. 12 and 13 and the Magistrates' Courts Act 1952, s.3, dealing with jurisdiction in the case of offences committed in England and Wales on or near county boundaries or upon journeys.

33. See paras. 30-36.

34. The prescribed elements consist of those acts or omissions together with any consequence or effect of conduct which are included in the definition of a crime as constituting its ingredients.

deciding where it is committed (e.g. rape). But the prescribed elements in other offences are more complex, particularly in the case of offences of deception. The present weight of English authority generally supports the proposition that the place where a crime is committed is determined by deciding where the last constituent element of the offence occurred.³⁵ The most recent illustrations of this are to be found in R. v. Harden³⁶ and R. v. Governor of Brixton Prison; ex parte Rush and Others.³⁷ In the former case it was held that the English court had no jurisdiction to try charges of obtaining property (cheques) by false pretences in Jersey, notwithstanding that the obtaining was initiated by fraudulent letters posted in England.³⁸ In the latter case extradition to Canada under the Fugitive Offenders Act 1967 was refused in the case of persons accused of conspiring in Canada to defraud persons outside Canada of money where the means used were letters, circulars and telephone calls emanating from Canada to persons abroad. These decisions give effect to what has been described as the "terminatory theory" of the place of a crime³⁹ which we think is unsatisfactory, if only because of the arbitrary way in which it may operate. The courts have sometimes been able to avoid the difficulties of the theory by using the concept of "continuing offences".⁴⁰

(2) Possible Changes

87. The Criminal Law Commissioners, in their Report of 1879, posed the question "Where is an offence committed? A shot is fired in one place, which wounds a man in another place, who dies in a third place. In which of these places is the crime committed?". Section 4 of their draft Code furnished the

35. This seems to accord also with Scottish authority. (See Gordon, Criminal Law, 1967, pp. 83-91).

36. [1963] 1 Q.B. 8.

37. [1969] 1 W.L.R. 165.

38. These decisions are in line with other authority - such as R. v. Oliphant [1905] 2 Q.B. 67 - but contrary to earlier decisions such as R. v. Peters (1886) 16 Q.B.D. 636. Harden's Case may be compared with R. v. Ellis [1899] 1 Q.B. 230 where goods were obtained in England by means of fraudulent representations made in Scotland.

39. See Glanville Williams, (1965) 81 L.Q.R. at 518 et seq.

40. See Fulwood's Case (1637) Cro. Car. 488; R. v. Rogers (1877) 3 Q.B.D. 28, 34; R. v. MacKenzie & Higginson (1911) 6 Cr. App. Rep. 64; Robey v. Vladinier (1936) 154 L.T. 87 and see para. 22.

answer - "in each of the three places".⁴¹ The New Zealand Crimes Act 1961, section 7, adopts a similar solution by providing:-

"For the purpose of jurisdiction, where any act or omission forming part of any offence or any event necessary to the completion of the offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand whether the person charged with the offence was in New Zealand or not at the time of the act, omission or event."⁴²

88. The adoption of the New Zealand approach for determining the place of the crime would involve rejecting the "terminatory theory"⁴³ and would make unnecessary the special provisions of section 10 of the Offences against the Person Act 1861.⁴⁴ Subject to special consideration of conspiracy,⁴⁵ the advantage of this solution would be that those who are amenable to English criminal law because their conduct possesses an "English element" could be dealt with according to English law. There would, we think, be little risk of an extradition to England in the case of a person who has done something in England resulting in a consequence abroad, which, although criminal in England, is lacking in criminal character according to the local law. This is because, broadly speaking, the test of "double criminality" has to be satisfied before the processes of extradition and surrender can be operated.⁴⁶

89. To adopt the New Zealand test does not, however, remove all the difficulties. It might, for example, be thought unfair to subject a person to our criminal jurisdiction in accordance with the New Zealand test, if the physical act forming an element of the offence was committed in a country where even the completed act would not have been criminal. One possible solution which would go some way to meet this difficulty is

41. B.P.P. 1878-79 [c.2345] xx.169 at 183, 231. This conclusion was contrary to the well-known case of R. v. Coombes and Others (1786) 1 Leach 388, where A was killed on a boat off-shore by shots fired from the land and it was held that the murder took place at sea.

42. Similar provisions appear in certain of the United States State Codes and in the American Law Institute's draft Model Penal Code (s.1.03(1)) - see para. 89.

43. See para. 86.

44. See para. 66 as to the difficulties in interpreting this section.

45. See para. 92.

46. See p. 4, n. 8.

provided by section 1.03 of the American Law Institute's draft Model Penal Code, the relevant parts of which read:-

"(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offence committed by his own conduct or the conduct of another for which he is legally accountable if:

(a) either the conduct which is an element of the offence or the result which is such an element occurs within this State;

.....

(3) Subsection (1)(a) does not apply when causing a particular result is an element of the offence and the result is caused by conduct occurring outside the State which would not constitute an offence if the result had occurred there, unless the actor purposely or knowingly caused the result within the State."

90. It is necessary to emphasize that the preceding paragraphs proceed upon the assumption that the definition of any specific offence will indicate the conduct and the results of conduct (if any) which constitute the ingredients or elements of that offence. We are aware that there is a theory that the courts of a country are entitled to entertain proceedings in respect of conduct which occurs outside the country's territory where the results of that conduct may occur within its territory. If these results are, by definition, elements in the relevant offence, there is no theoretical difficulty over the assumption of jurisdiction in such cases. English law provides many illustrations of such assumption,⁴⁷ although as a rule its operation, save in special contexts,⁴⁸ is limited to the conduct of British subjects abroad. But where the results of conduct do not, by definition, form part of the elements of an offence but can aptly be described only as the indirect effects of activity, we see no case for the assumption of jurisdiction.⁴⁹

47. e.g. the Explosive Substances Act 1883, s.3.

48. e.g. the Dockyards Protection Act 1772 and the Perjury Act 1911, s.1(5).

49. For a discussion of this problem see Professor R.Y. Jennings, "Extraterritorial Jurisdiction and the United States Anti-Trust Laws" (1957) B.Y.I.L. p.146. In this context the provisions of the Shipping Contracts and Commercial Documents Act 1964 are of interest as legislation designed to resist exorbitant claims to criminal jurisdiction on the "effects of conduct" theory.

(3) Provisional Proposals for the Determination of the Place of Commission of a Crime

91. On the assumption that the ingredients of crimes, whether these consist of conduct and its surrounding circumstances or the results of such conduct, are to be found within the definition of each specific offence, our provisional proposals for the determination of the place of commission of a crime are that:-

- (a) it should be enacted that where any act or omission or any event, constituting an element of an offence, occurs in England or Wales⁵⁰ that offence shall be deemed to have been committed in England or Wales even if other elements of the offence take place outside England or Wales; but
- (b) (a) shall not apply when causing the event is not an offence under the local law (i.e. the law of the place where conduct causing the event occurs) and such event is caused in England or Wales by conduct occurring outside England or Wales, unless the person charged intended to cause the event in England or Wales.
- (c) our earlier recommendations as to venue, process and other procedural matters⁵¹ should apply in the cases covered by (a) and (b).

B. Inchoate Crimes with a Foreign Element Conspiracy

(1) The Present Law

92. Except in the case of conspiracy here to murder abroad, which is a specific statutory offence (see section 4 of the Offences against the Person Act 1861), conspiracies with a foreign element have proved very troublesome. In his speech in Board of Trade v. Owen,⁵² Lord Tucker held that "a conspiracy

50. This includes the extended territory under our proposal in para. 16.

51. See para. 30 et seq.

52. [1957] A.C. 602, 634.

[here] to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here".⁵³ He reserved, however, the question whether such a conspiracy might not be indictable here on proof that its performance would produce a public mischief here or injure a person here by causing him damage abroad. Subject to these open questions, therefore, it may be said with confidence that a conspiracy here to commit a crime abroad is indictable only if that crime when so committed would be an offence against a provision of English law, i.e. one of the specific offences of the types listed in paragraphs 52 to 71.

93. In Cox's Case⁵⁴ the Court of Appeal quashed a conviction for conspiracy in England to obtain goods by false representations in France and sell them in England on the ground that these facts did not disclose an indictable offence according to English law.⁵⁵ In the light of Winn L.J.'s observations it is necessary to reconsider the general treatment of conspiracies with a foreign element.⁵⁶

94. Under a reference by the Home Secretary pursuant to Item XIV of the Law Commission's First Programme, the Criminal

53. This principle was accepted and followed in the cases of R. v. Cox [1968] 1 W.L.R. 88 (see further para. 93) and R. v. Governor of Brixton Prison; ex parte Rush and Others [1969] 1 W.L.R. 165 (see para. 86).

54. Winn L.J. in R. v. Cox [1968] 1 W.L.R. 88, 91 said:
"... it is the law of this country as it now stands ... that there cannot be an indictment laid in this country for the commission of criminal offences abroad with the exception of murder and, I think, probably treason".
But this is clearly too limited.

55. Winn L.J. at p.93 observed:
"There is no doubt at all ... that even as the law stands it might be possible to indict persons here for conspiracy, if the conspiracy consisted of committing crimes abroad provided it could be shown that the performance of the conspiracy would cause a public mischief in this country or injure a person here by causing him damage abroad. Neither of the possibilities referred to in the speech of Lord Tucker comprises the situation with which this court has to deal today. Improvement, let us hope, there will be. Let us hope that this loophole will be stopped before [others] see fit to risk using it."

56. Although, in our view, since the coming into operation of the Theft Act 1968 an indictment would lie for conspiracy to handle in England goods obtained by deception abroad (see ss. 15, 22 and 24).

Law Revision Committee is presently engaged in an examination of the law relating to conspiracy and common law misdemeanours. The latter subject clearly includes the offence of public mischief and should that Committee reach the conclusion that public mischief should be abolished, one of the points left open in Lord Tucker's speech in Owen's Case⁵⁷ will be disposed of. The remaining point is, whether a conspiracy in England to injure a person in this country by causing him damage abroad should be an offence against English law. How this question should be answered again depends primarily upon the decision which the Committee will reach on the definition of the crime of conspiracy. It is generally accepted that, at the present time, criminal conspiracy at common law may take either of two forms:-

- (a) an agreement to do any unlawful act, which may be a crime, a tort other than a purely civil trespass, a breach of contract, an interference with the due administration of justice or an act against public morals; or
- (b) an agreement to do a lawful act by unlawful means.⁵⁸

Should the Criminal Law Revision Committee propose the curtailment of the present wide scope of criminal conspiracy, e.g. by recommending its limitation to agreements to commit crimes, the second point left open by Lord Tucker would also be disposed of.

95. It is also necessary to consider the law regarding conspiracies abroad to commit offences in England. Although decisive authority on this problem is wholly lacking,⁵⁹ we believe the present law to be that a conspiracy abroad to commit a criminal offence in England is not indictable here unless and until some overt act is performed here pursuant to the conspiracy. Conspiracy is an offence of a continuing character and once an overt act pursuant to a foreign conspiracy

57. [1957] A.C. 602, 634 and see para. 92.

58. As to criminal conspiracies, see generally Archbold 37th ed. paras. 4051-4082. There is little guidance in the authorities on the extent of the expression "unlawful means", apart from violence or threats of violence, torts and breaches of contract.

59. But see Halsbury's Laws of England 3rd ed. Vol.10, p.329(h).

is committed in England, it can be said that the conspiracy is active and is being committed here. In this context, it should be borne in mind that the crime of conspiracy as such is generally unknown to civil law systems so that in countries with such systems a mere conspiracy would not normally be a criminal offence.

(2) Possible Statement of the Law

96. Pending the completion of the Criminal Law Revision Committee's examination of the crime of conspiracy, we are unable at the present time to formulate comprehensive proposals as to what provisions the law should make regarding conspiracies with a foreign element. As to conspiracies in England to commit offences abroad we are, however, disposed to take the view that, subject to the points left open in Owen's Case,⁶⁰ the law should follow the lines laid down by Lord Tucker in that case, that is, that a conspiracy here to commit a crime abroad should not be indictable here unless that crime, although committed abroad, is one for which an indictment would lie in this country.⁶¹ We think that the proper method to be employed when conduct abroad is to be made a crime under English law is that the legislation dealing with that crime should specifically so provide, with any limitations (for example, as to the status of the offender) as may be appropriate to a particular offence. There will then be no problem in determining whether conduct abroad does constitute a crime under English law and no further problem in deciding whether a conspiracy here to commit such a crime is also contrary to English law. As to conspiracies abroad to commit offences in England, we take the view that such conspiracies should not constitute offences in English Law unless overt acts pursuant thereto take place in England.

Attempts and Incitement

(1) The Present Law

97. Attempts and incitement to commit crimes may also possess a foreign element where the conduct constituting the attempt or incitement occurs, in whole or part, in a country other than that in which it is intended that the crime shall be committed. Apart from section 4 of the Offences against the Person Act 1861,

60. [1957] A.C. 602, 634.

61. We would include the "extended territory" under our proposal set out in para. 16 within "this country".

there is an almost complete absence of authority upon this matter, but questions very similar to those affecting the place of commission of a crime and conspiracies with a foreign element may arise in this context. Again, the criminal law of the two countries may differ as to the constituent elements of the crime or as to grounds of justification and excuse.

(2) Proposed Clarification of the Law⁶²

98. We think that our observations as to the place of commission of a crime are relevant in considering attempts and incitement but there are, in addition, certain further problems to be considered. The first of these is whether an attempt or incitement abroad to commit an offence in England which, if committed abroad, would not constitute an offence against the local law, should be triable in England. We think that it should not and that a safeguard to ensure this result could be provided by enacting that, if the "completed" crime is not an offence where the attempt or incitement takes place, such an attempt or incitement shall not be an offence. Secondly, there are, as this Paper has earlier demonstrated, a number of offences in relation to which English law operates extra-territorially. The problem is whether attempts or incitements abroad to commit such offences abroad should be offences by English law. We think that they should be offences only in a limited number of cases which can be described broadly as those in which the crimes attempted or incited have so close a connection with English institutions or policy as to justify special treatment. For example, we think it right that attempts or incitements abroad to commit offences against the Foreign Enlistment Act 1870 should be treated as a special case justifying the application of the English criminal law. Similarly, attempts or incitements abroad to commit an offence which, by virtue of section 1(5) of the Perjury Act 1911, is an offence of perjury should be dealt with by English law, whether or not the person attempting or inciting is a British subject. The third problem lies in the treatment of attempts or incitements in England to commit offences abroad. We think

62. Questions concerning the definition of attempts and incitements will be considered by the Law Commission's Working Party on the General Principles of the Criminal Law (see Law Commission's Second Programme LAW COM. No.14, Item XVIII (1)) and are, therefore, treated as outside the scope of this Paper.

that the general principle should be that such conduct should not be triable in England unless the law has made a specific provision to that effect. Such provisions are at present to be found in section 13(d) of the Dangerous Drugs Act 1965⁶³ and, so far as incitement to murder is concerned, section 4 of the Offences against the Person Act 1861.⁶⁴

99. In the light of the foregoing observations, we propose that:-

- (a) Subject to the safeguard mentioned in the preceding paragraph (that is, in cases where the "completed" crime is not an offence by the local law), an attempt or incitement abroad to commit a crime in England should constitute an offence against English law.
- (b) An attempt or incitement abroad to do an act abroad which, by reason of the extraterritorial operation of English law, is an offence under English law, should be an offence by English law in cases only where the crime attempted or incited has so close a connection with English institutions or policy as to justify this treatment. These exceptional cases should be specified in the relevant legislation.
- (c) An attempt or incitement here to commit an offence of the type referred to in (b) should constitute an offence in all cases.
- (d) In the case of offences other than those referred to in (b), an attempt or incitement here to do an act abroad which, if done here, would be an offence, should not constitute an offence unless specifically so provided.

C. Secondary Parties to Crimes with a Foreign Element

(1) The Present Law

100. In the present context **aiders** and abettors give rise to no problem since a person is **liable** as such only if he is present at the place of commission of a crime or at least sufficiently near to give assistance to the principal offender,

63. See para. 79 above.

64. See para. 64 above.

a situation unlikely to arise where the secondary parties are situated in a country other than that in which the substantive offence occurs. The following paragraphs refer, therefore, only to the position of counsellors and procurers. The few relevant decided cases appear to establish the following principles:-

(a) A person who by conduct abroad counsels or procures the commission of a crime in England, is triable in England; but this rule seems only to apply if he is a citizen of the United Kingdom and Colonies,⁶⁵ or otherwise under the protection of the Crown.

(b) A person who by conduct in England counsels or procures the commission of a crime abroad, not being a crime by English law because it is committed abroad, is not triable in England.⁶⁶ There are certain statutory exceptions to this rule, the chief of which are found in sections 4 and 9 of the Offences against the Person Act 1861 as affected by section 8 of the Accessories and Abettors Act 1861.⁶⁷

101. The recent decision in R. v. Hart, Millar & Robert Millar Ltd.⁶⁸ is helpful in providing modern authority for the suggested principle (a) set out in the preceding paragraph. In that case the Court of Appeal upheld the decision of Fisher J. overruling a preliminary plea that the English court had no jurisdiction to entertain an indictment charging the second defendant, a director of the third defendant (a company) and the third defendant with aiding, abetting, counselling and procuring the first defendant (a lorry driver) to cause death

65. R. v. Johnson (1805) 7 East 65; R. v. Jameson (1896) 2 Q.B. 425; these authorities must now be read in the light of the British Nationality Act 1948 but the limitation of criminal liability to United Kingdom citizens under s.3 does not apply in the case of offences against s.1(1)(c) of the Exchange Control Act 1947 or s.482(5) of the Income and Corporation Taxes Act 1970 (see paras. 60 and 61).

66. R. v. Godfrey [1923] 1 K.B. 24; but such a person is eligible for extradition (see Extradition Act 1873, s.3).

67. See para. 63 et seq and also para. 79 (Dangerous Drugs Act 1965, s.13(d)).

68. [1970] 2 W.L.R. 541 and 552 (C.A.).

by dangerous driving, an event which was alleged to have occurred in England. The allegations against the other defendants were that their conduct in Scotland (i.e. causing the driver to go on a journey into England with a vehicle which they knew to be defective) made them secondary parties to the driver's offence. Clearly the case raises other difficult problems, but the ruling on jurisdiction supports our view of the law.

102. It remains to consider the soundness of the rule that the counselling and procuring abroad of the commission of a crime in England constitutes a crime in England only if the secondary party is a citizen of the United Kingdom and Colonies or otherwise under the protection of the Crown. A counsellor or procurer is a party to the crime⁶⁹ because he knowingly assists in the commission of what he knows to be a crime which he intends and foresees will be committed. In principle, therefore, it would be logical for the English courts to exercise jurisdiction over counsellors and procurers of crimes committed in England whatever their nationality, even though the conduct of those parties occurred abroad.⁷⁰ But the distinction between inciting the commission of a crime and counselling and procuring the commission of a crime is so fine that it seems right that the qualification which we suggest in relation to an incitement to commit an offence in England, where the "completed" crime does not constitute an offence against the local law,⁷¹ should also apply in the case of counselling and procuring such an offence, notwithstanding that the counsellor or procurer must, ex hypothesi, know that the conduct which he is assisting constitutes an offence under English law. Even with this qualification, however, acceptance of the general principle put forward above would probably involve an extension of the criminal law and we would, therefore, welcome the views of recipients of this Paper as to its acceptability.

69. Accessories and Abettors Act 1861, s.8; Magistrates' Courts Act 1952 s.35.

70. The policy of the Extradition Act 1873 (see s.3) and the Fugitive Offenders Act 1967 (s.3) makes no distinction between principal offenders and secondary parties to offences.

71. See para. 99(a).

(2) Proposed Changes and Clarification of the Law

103. We propose that it should be enacted that:-

- (a) save where the substantive offence is not an offence by the local law, conduct abroad which amounts to counselling and procuring the commission of a crime in England should be an offence against English law; but
- (b) subject to any justifiable statutory exceptions, conduct in England which amounts to counselling and procuring the commission of a crime abroad, which, because it is committed abroad, is not an offence against English law, should not be an offence.

D. Double Jeopardy in Crimes with a Foreign Element

(1) The Present Law

104. In this section we use the expression "double jeopardy" to cover all cases in which a plea of autrefois convict or autrefois acquit or a defence of res judicata or estoppel would or might be sustained.⁷² We are not, however, concerned in this Paper to examine the law relating to the substance of such pleas or defences. This falls within the work which is being undertaken by the Law Commission's Working Party on the General Principles of the Criminal Law.⁷³ The present discussion will, therefore, be limited to the application of principles concerning double jeopardy (however these may be defined) to crimes with a foreign element.⁷⁴

105. Such scanty English authority as exists supports the view that the plea of double jeopardy is open to an accused person upon his trial in England in any case in which he has been previously tried and acquitted or convicted for the same or a corresponding offence by a foreign court of competent jurisdiction.⁷⁵ It appears to be established that an English

72. On all these matters see R. v. Connelly [1964] A.C. 1254; and the recent case of U.S. Government v. Atkinson [1969] 3 W.L.R. 1074; [1969] 3 All E.R. 1317, D.C. and H.L.

73. Law Commission's Second Programme Item XVIII (1) LAW COM. No. 14 and see Law Commission's Working Paper No.17 "Codification of the Criminal Law - General Principles - The Field of Inquiry", p.10, Subject 6.

74. For a comprehensive recent examination of double jeopardy see Prof. Friedland's volume so entitled, (1969) O.U.P.

75. See R. v. Roche (1775) 1 Leach 134 and the editorial note in the English Reports thereon, referring to the earlier view expressed in R. v. Hutchinson (1677) 3 Keb. 785.

court will accept as a basis for a plea of autrefois acquit an acquittal by a foreign court having territorial jurisdiction over the offence. There appears to be no direct authority upon the effect of a plea of autrefois convict, but it is submitted that the same principle would apply. In Stephen's Digest of Criminal Law⁷⁶ it is stated "A plea of autrefois convict or autrefois acquit is sustained by proof of a previous conviction or acquittal in a foreign court" and the same view is expressed by Kenny.⁷⁷

106. The only recent authority on the matter is R. v. Aughet,⁷⁸ a case in which the facts were unusual. The defendant was a Belgian soldier who had come to England on a special mission. There was a Convention between England and Belgium giving each country exclusive jurisdiction over its armies in the field, although it did not by the letter of its terms cover the situation which arose in this case. In London the defendant wounded a Belgian fellow-soldier and was handed over to the Belgian authorities to be tried by court-martial out of England. He was there tried and acquitted on grounds of a defence which would not have been recognised in England. On return to England he was indicted on four counts of wounding and was convicted on one count of unlawful wounding and sentenced to imprisonment. The conviction was quashed on appeal, on the ground that it was unjust to try the appellant again in England. But it may be that the ratio decidendi was that the British authorities had waived their primary right to try the appellant and that, accordingly, it would be unfair to re-assert jurisdiction.

107. Apart from legislation relating to the Armed Forces referred to in paragraph 108 there are two statutory references to this matter. The first is in section 4(1) of the Visiting Forces Act 1952, which provides that:-

"... where a person has been tried by a service court of a country to which this section applies in the exercise of the powers referred to in subsection (1) of section two of this Act, he shall not be tried for the same crime by a United Kingdom court."

The second is in section 4(2) of the Fugitive Offenders Act 1967

76. (1883) p.94, Article 25.

77. Outline of the Criminal Law, 19th ed. (1966) p.605.

78. (1919) 13 Crim. App. Rep. 101.

which provides that a person accused of an offence shall not be returned under the Act if it is shown that, if charged with that offence in the United Kingdom, he would be entitled to be discharged "under any rule of law relating to previous conviction or acquittal".

108. The legislation upon this question relating to the Armed Forces of the Crown was revised as recently as 1966 when, by the Armed Forces Act of that year, significant changes were made. The resulting statute law on double jeopardy, as it operates between military and civil courts in respect of service personnel, appears to restate what we believe to be the position at common law. Accordingly, it may be helpful to consider briefly the relevant provisions of the Army and Air Force Acts 1955 and the Naval Discipline Act 1957, all as amended by the Armed Forces Act 1966.

109. We examine first the legislation to consider to what extent it protects service personnel against proceedings under military law after they have been the subject of proceedings before the civil courts. Section 134(1) of the Army Act 1955, as amended by section 26(3) of the Armed Forces Act 1966, provides:-

"Where a person subject to military law

- (a) has been tried for an offence by a competent civil court, wherever situated ...; or
- (aa) has had an offence committed by him taken into consideration when being sentenced by a competent civil court in the United Kingdom ...; or
- (b) ...; or
- (c) ...;

he shall not be liable in respect of that offence to be tried by court martial or to have the case dealt with summarily by his commanding officer or the appropriate superior authority." 79

For the purposes of this section (as amended) "civil court" means "a court of ordinary criminal jurisdiction"⁸⁰ and in the present context extends to such courts outside Her Majesty's dominions. The provisions of section 134(1) of the Air Force Act 1955, also amended by section 26 of the Act of 1966, are

79. s.134(1) also covers previous proceedings under military law and the parts omitted in the quotation relate to these.

80. See ss. 225 of the Army Act 1955 and the Air Force Act 1955.

precisely the same as those of the Army Act, but those of the Naval Discipline Act 1957, section 129(2), as amended by section 35 of the Armed Forces Act 1966, are somewhat different. They read:-

"Where a person subject to this Act is acquitted or convicted of an offence on trial by a civil court, wherever situated, he shall not subsequently be tried under this Act for the same, or substantially the same, offence."

"A civil court" has the same meaning as under section 134(1) (as amended) of the Army and Air Force Acts 1955.⁸¹ For present purposes we do not think that any significance attaches to the fact that the 1955 Acts (as amended) refer to "a competent civil court" while the 1957 Act (as amended) refers only to "a civil court" or that the former Acts do not use the words of the latter Act, "the same, or substantially the same offence".

110. The legislation contains other provisions which are designed to protect service personnel against trial in the civil courts - of the United Kingdom - after they have been dealt with under service discipline.⁸² For the purposes of this Paper, however, we do not consider it necessary to undertake an analysis of these provisions.

(2) Proposed Clarification of the Law

111. In our opinion, this recent legislation provides an appropriate pattern which may be applied generally for the avoidance of double jeopardy in the case of persons charged with offences containing a foreign element. We propose that provisions should be made to the effect that a person who has been convicted or acquitted on trial⁸³ by a competent court, wherever situated, should not be tried subsequently by any court in England for the same, or substantially the same, offence.

81. s.135(1) of the Naval Discipline Act 1957.

82. See the Armed Forces Act 1966 s.25 and the Naval Discipline Act 1957 s.129(1) (as amended by s.35 of the Armed Forces Act 1966).

83. Leaving for consideration by the Law Commission's Working Party on the Criminal Law the question whether the conditions for operation of the double jeopardy principle can be satisfied by tests other than acquittal or conviction on trial.

V SUMMARY OF QUESTIONS AND PROVISIONAL PROPOSALS

112. We now come to a comprehensive summary, in general terms, of the questions arising from our examination of this branch of the law which we think need to be posed; and, in relation to each of them, we indicate our provisional answer which we would emphasise again⁸⁴ is only tentative in character and designed mainly to focus discussion on the points raised. We welcome suggestions as to other points which are felt, in the context of this subject, to require consideration as well as any comment or criticisms upon our provisional proposals.

	<u>Paras.</u>
1. Q. Is it right to retain the general rule that application of English criminal law is territorial?	3- 7
A. In our opinion, yes; but the general rule must be subject to some exceptions and qualifications. The present exceptions and qualifications are set out in the second Part of this Paper. Our proposals involve some changes which are indicated in the Questions and Answers below.	8
2. Q. How should territory and, in particular, national and territorial waters be defined?	9-15
A. We favour the entire abolition of Admiralty jurisdiction, the repeal of the few surviving statutes relating generally to offences at sea and of the Territorial Waters Jurisdiction Act 1878. We propose their replacement by a general statutory provision extending to any offence committed in a defined area of water adjacent to England and Wales, that area to be divided into two parts, national and territorial waters. This will necessitate determination of the base line from which territorial waters are to be measured and which, at the same time, will form the outward limit of national waters. For this purpose, the statute should	16

84. See para. 2.

provide for the base line to be determined, as a general rule, either by reference to the low water line along the coast or by reference to straight lines across bays, estuaries and other inlets. A schedule to the statute should provide for -

- (a) any exceptions to the general rule which would require identification by specified co-ordinates of latitude and longitude and
- (b) other instances, if any, which form an exception to the general rule where jurisdiction is claimed over a particular area of water.

Admiralty charts, which are prepared and published under authority, should provide conclusive evidence of the data therein for the purpose of determining in any particular case where the low water line is situated. The statute should contain an enabling provision for alteration of the base line and of the outward limit of territorial waters by Order in Council.

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| 3. | Q. Should recent legislation referred to in paragraph 18 extending the area of operation of English criminal law with a specific object (international or national) be retained? | 18 |
| | A. In our view yes, subject to replacement in appropriate cases of references to territorial waters by references to the area of water adjacent to England and Wales described in 2A. | 19 |
| 4. | Q. Should there be new legislation relating to offences on British ships? | 20-25 |
| | A. We think that there should be a general enactment repealing previous legislation | 26 |

other than specific offences under the Merchant Shipping Acts (save those mentioned below) and applying English criminal law to any offence committed by any person on a British ship outside the normal domestic jurisdiction of the United Kingdom courts, and making such an offence triable in England. We propose the repeal of section 686 of the Merchant Shipping Act 1894 (see paragraph 22) and the amendment of section 687 (see paragraph 25) to limit its application to those employed on a British ship at the time of the offence (see 7A(d)).

5. Q. Does section 1(1) of the Tokyo Convention Act 1967 adequately cover the law relating to extraterritorial offences on British aircraft? 27-28
- A. We think it does, but would welcome views on the utility of retaining the proviso to the sub-section. 29
6. Q. Should there be new jurisdictional and procedural provisions relating to offences on British ships and aircraft and other extraterritorial offences? 30-35
- A. In our view, yes, to the extent indicated. 36
7. Q. Should there be new legislation with regard to persons who are rendered subject to extraterritorial jurisdiction by reason of their personal circumstances? 40
- A. We propose that:
- (a) section 42 of the Naval Discipline Act, 1957 should be brought into line with section 70 of the Army Act 1955 and section 70 of the Air Force Act 1955; 42
- (b) there should be specific statutory provision with regard to the requirement or non-requirement of the consent of the 42

Paras.

Attorney General or the Director of Public Prosecutions to the institution of proceedings under naval and military law for offences which cannot be proceeded against before the civil courts without such consent;

- (c) civilians subject to naval or military discipline should be entitled to claim trial by the civil courts in the United Kingdom for indictable offences committed abroad otherwise than in war or under active service conditions; 44
- (d) section 686 of the Merchant Shipping Act, 1894 should be repealed and section 687 amended; and offences on British ships should be the subject of new legislation (see 4A); 45
26
- (e) subject to the possible exception indicated in paragraph 24, the new legislation referred to in (d) should not contain any provisions relating to offences committed by British subjects on foreign ships; 23
- (f) offences by Crown servants committed abroad should be dealt with by new provisions on the lines of section 31 of the Criminal Justice Act 1948. The Governors of Plantations Act 1698, the Criminal Jurisdiction Act 1802 and section 14 of the Sale of Offices Act 1809 should be repealed; 48
- (g) the precise classes of persons liable to prosecution under section 10(1) of the Official Secrets Act 1911 should be more clearly defined; 55
- (h) consideration should be given to the desirability of making specific provision for election offences committed abroad. 58

8. Q. Does the law relating to piracy and kindred offences require alteration or extension? 74-76
- A. In our opinion, there is a comprehensive definition of piracy jure gentium in section 4 of the Tokyo Convention Act 1967, which should not be altered. We think, however, that there is an urgent need for modern legislation dealing with violence on the part of the complement (including passengers) of a British vessel or aircraft directed against the vessel or aircraft or cargo and with revolt or conspiracy to revolt, and violence against the officers of a ship or aircraft. We propose that this legislation should replace all the surviving statutes concerning piracy (other than the Act of 1967). 77
9. Q. Does the law relating to the determination of the place of the commission of a crime require revision? 85-90
- A. We have made provisional proposals for its reform on the following broad lines: 91
- (a) where any act or omission or any event which constitutes a prescribed element of an offence occurs in England or Wales, that offence shall be deemed to have been committed there, even if other elements of the offence take place outside England and Wales;
 - (b) (a) shall not apply when causing the event is not an offence under the local law (i.e. the law of the place where conduct causing the event occurs) and such event is caused in England or Wales by conduct elsewhere, unless the person charged intended to cause the event in England or Wales;
 - (c) our proposals as to venue, process and other procedural matters made in

paragraph 36 should apply to cases covered by (a) and (b).

10. Q. Should the law relating to conspiracy with a foreign element be altered? 92-95

A. We have refrained from expressing any definite view on this matter, pending proposals relating to criminal conspiracy now being considered by the Criminal Law Revision Committee, but we have given an indication of what we regard as a suitable approach to this question. 96

11. Q. Should the law relating to other inchoate crimes with a foreign element be altered? 97-98

A. We propose that: 98

(a) except in cases where the "completed" crime is not an offence by the local law, an attempt or incitement, wherever it occurs, to commit a crime in England or Wales should constitute an offence against English law; but

(b) an attempt or incitement abroad to do an act abroad which, by reason of the extraterritorial operation of English law, is an offence under English law, should constitute an offence in cases only where the crime attempted or incited has so close a connection with English institutions or policy as to justify this course. These exceptional cases should be specified in the relevant legislation;

(c) an attempt or incitement here to commit an offence of the type referred to in (b) should constitute an offence in all cases; but

(d) in other cases an attempt or incitement here to do an act abroad which, if done

in England, would be an offence should not constitute an offence unless specifically so provided.

12. Q. What should be the law relating to secondary parties to crimes with a foreign element? 100-102
- A. We propose that:- 103
- (a) save where the substantive offence is not an offence by the local law, conduct abroad which amounts to counselling and procuring the commission of a crime in England should be an offence against English law; but
- (b) subject to any justifiable statutory exceptions, conduct in England which amounts to counselling and procuring the commission of a crime abroad which, because it is committed abroad, is not an offence against English law, should not be an offence in England.
13. Q. Does the present law relating to double jeopardy in crimes with a foreign element require amendment? 104-110
- A. In our opinion, recent legislation relating to the Armed Forces on this question provides a useful pattern, and we propose that legislation should be introduced to provide that a person who has been convicted or acquitted on trial by a competent court, wherever situated, should not be tried subsequently by any court in England for the same, or substantially the same, offence. 111