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PART THREE:

OFFENCES COMMITTED PARTLY

IN CANADA

AND PARTLY OUTSIDE CANADA —

TRANSNATIONAL OFFENCES

CHAPTER NINE

Criminality of a Person's Acts under Canadian Law

Normally we speak of an offence being *committed* in a particular state. However, where one or more constituent elements of an offence occur in one state, and one or more of them occur in another state, there is no state to which one can point as *the* state in which the offence was *committed*; such an offence is often referred to as a "cross-border offence" or, as we shall call it, a "transnational offence." A classical example of a transnational offence would be "A" in Ontario firing a gun across the United States - Canada border, killing "B" in New York. The constituent elements are things that the statute says the offender must do, or that the statute says must occur or result, in order for the offence to have been committed by the accused; in other words, the facts as to the accused's conduct and (depending on the offence) the mental state of the accused and the result of the accused's conduct that the prosecutor must prove if there is to be a conviction. In this connection let us analyse the facts in the following case. An American citizen residing in New York City telephones police in Montréal and, with intent to mislead, makes a false statement accusing some other person of having committed an offence; the false statement causes a peace officer in Montréal to enter on an investigation; the American citizen subsequently comes to Canada and he is charged with an offence under paragraph 128(*a*) (Public Mischief) of the *Criminal Code* which reads:

> **128.** Every one who, with intent to mislead, causes a peace officer to enter upon an investigation by
>
> (*a*) making a false statement that accuses some other person of having committed an offence,
>
> ...
>
> is guilty of

(*e*) an indictable offence and is liable to imprisonment for five years, or

(*f*) an offence punishable on summary conviction.

What are the constituent elements of the offence? Where did they occur? The answers to these questions seem to be:

Constituent Element	Place where constituent element occurred
1. Making a false statement	Statement was made in New York
2. Intent to mislead	Intention was formed in New York
3. Caused a peace officer to investigate	Investigation in Montréal

However there remain two essential questions for our purposes, namely: Would a prosecution of the American citizen in Canada for an offence under paragraph 128(*a*) of the *Criminal Code* be justifiable under international law? Under Canadian law? Let us look first at international law.

Where an offence is wholly committed in the territory of one state, and the direct, harmful results occur there only, the territorial principle of international law clearly recognizes the applicability of the criminal law of that state and the trial jurisdiction of the courts of that state in respect of the offence.

The international law relating to transnational offences is not as clear. However, it would appear that where constituent elements of an offence occur in different states, the *subjective* territorial principle of international law recognizes that the criminal law of each of those states in which a substantial constituent element occurred may concurrently be applicable, and that the courts of those states may have concurrent trial jurisdiction over the offence. Where no substantial constituent element of the offence occurs in the territory of a given state, but substantial, direct harmful effects of the offence are felt in the territory of that state, the *objective* territorial principle of international law recognizes that that state may apply its criminal law, and that its courts may exercise trial jurisdiction over the offence.[155]

To what extent has Canada implemented these principles of international law? How does a person know whether Canadian criminal law, particularly the *Criminal Code*, is applicable to a transnational offence? What does the *Criminal Code* say about this? The answers are that it is difficult to ascertain whether or not Canadian criminal law is applicable, and that, apart from bigamy offences, the *Criminal Code* is silent on the matter.

Subsection 5(2) of the *Criminal Code* reads:

> Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.

It should be noted that nothing is said in subsection 5(2) about offences committed "partly" outside Canada; and unfortunately, the *Criminal Code* is also silent as to what constitutes "committing" an offence *in* Canada. And so the question arises: Need all elements of an offence occur in Canada to constitute *under Canadian law* the commission of the offence here?

In an 1895 Canadian case (*R.* v. *Blythe*,[156] B.C. Court of Appeal), a person who used Canadian mails to entice an unmarried female under sixteen was held not to have committed an offence in Canada. The accused had written letters in Victoria, British Columbia to the girl in Washington State urging her to join him; she left her father in Washington to join the accused in Victoria. It was held, that as the persuasion to leave and remain away operated wholly in the United States, there was no jurisdiction to convict in Canada. Mr. Justice Walkem went so far as to say that:

> [E]very act which serves in whole *or in part* to constitute an offence under our criminal law must occur or be committed within the territorial limits over which that law extends, or in other words, within the Dominion; otherwise we have no authority to adjudicate upon it. [Emphasis added]

In the 1965 case of *R.* v. *Selkirk*[157] the Court of Appeal of Ontario ruled that the accused did not commit *in Canada* an offence under subsection 323(1) of the *Criminal Code* when he mailed a fraudulent application in Toronto to the Diner's Club in Los Angeles, in response to which a Diner's Club credit card was mailed in Los Angeles to the accused in Toronto. The court said:

> [W]hen the Club placed the card ... in the post office in Los Angeles, delivery of the card had been made to the accused. The whole of the offence, therefore took place in the United States.

However, in a somewhat similar case, (*Re Chapman*) the Ontario Court of Appeal later (1970) ruled that an offence under subsection 323(1) of the *Criminal Code* was committed in Canada when the accused mailed fraudulent letters in Canada to persons in the United States in response to which money was sent by mail from those persons in the United States to the accused in Canada.[158]

English case-law on the subject has also been somewhat inconsistent at times, and legal scholars have different views as to what the law is, and also as to what the law should be. Thus, Lynden Hall, in 1972 wrote:

> In solving the problem of the locus of the crime two views are prevalent: first, that the offence is committed within the country in which it is commenced; secondly, that it is committed in the country where it is consummated. These are commonly called the "subjective" and "objective" territorial theories of jurisdiction respectively, though Glanville Williams prefers the terms "initiatory" and "terminatory."[159] Clearly the English Law Commission has been influenced by Professor Williams' views. Both are of the opinion that English law has adopted the "terminatory" theory, apparently to the exclusion of the "initiatory" theory. Both make the assertion that the courts determine the locus of the offence by deciding where the "last constituent element" of the crime occurs. The constituent elements of an offence may be said to consist of those acts or omissions together with any consequences or effect of conduct which are included in the definition of the offence. Both Professor Williams and the Law Commission consider the "terminatory" theory unsatisfactory. Professor Williams advocates the "initiatory" theory, while the Law Commission suggests: "It should be *enacted* that where any act or omission or any event constituting an element of an offence occurs in England or Wales, 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."[160] Such a proposal has far-reaching implications. Suppose "A" is travelling to China by train. While in Paris "B" puts arsenic in "A"'s brandy flask. "A" drinks the brandy in Bulgaria as a result of which he dies in Tashkent (Russia). Suppose also the Law Commission's proposal to be universally adopted. The "initiatory" and "terminatory" theories would establish the jurisdiction of France and Russia respectively as the countries in which the crime was begun and consummated. Legislation of the Law Commission type would admit these jurisdictions, but would also deem the crime committed in Bulgaria and, it seems, every country through which "A" travels before dying.

Professor Hall does not go along with Professor Williams' view that the initiatory theory should prevail, or with the English Law Commission's 1972 view (withdrawn in 1978)[161] that the "any element deeming committed" theory should be enacted into law. Rather, he is favourably impressed by what he considers to be a novel approach taken in 1971 by Lord Diplock in *Treacy* v. *D.P.P.*[162] According to Professor Hall:

> From the negative statement (that) an English court may not exercise jurisdiction unless the crime was committed, or may be deemed committed, in England, Lord Diplock has shifted the emphasis to the positive averment (that) an English court may exercise jurisdiction where an element of the offence occurs in England unless Parliament has enacted otherwise.

Professor Hall approves of Lord Diplock's reasoning, but adds that "some restraint (on Lord Diplock's approach) would seem to be required." Hall goes on to say that:

> An English court should be able to assume jurisdiction ... where *a single element* of the offence has occurred in England *provided that it establishes a real and substantial link between the offence and England.* Such a test is not unfamiliar to international lawyers in the sphere of diplomatic protection and the exhaustion of local remedies. It is not unknown in private international law. In fact, in no English case has the Court assumed jurisdiction where the link between the offence and England has been tenuous .... [Emphasis added]

Although it tends to go somewhat against the grain of certainty that we wish to see in criminal law, we are inclined to agree with Professor Hall's modified Lord Diplock approach. However, given the provisions of subsections 5(2) and 7(1) of the *Criminal Code*, it is far from certain that offence sections of the *Criminal Code* — at least insofar as their applicability to transnational situations is concerned — would be construed by courts in Canada to provide the same result as Lord Diplock arrived at under English law. Hence, legislation to amend the *Criminal Code* will probably be required in Canada to achieve that result. In any event, legislation could provide certainty in the law.

In this connection, it is necessary to recognize the difference between *result* crimes and *conduct* crimes. If a result crime, such as an offence against subsection 387(2) of the *Criminal Code*, occurs in the United States, that is if all constituent elements except the danger to life occur in the United States, and the proscribed *result* — namely, the actual danger to life, occurs in Canada, that is not an offence that has been committed wholly outside Canada because an important constituent element of the offence, namely the result, has occurred in Canada. Canadian courts could therefore exercise criminal jurisdiction based on the subjective territorial principle.

On the other hand, if a *conduct* crime, such as an offence against subsection 341(1) of the *Criminal Code*, occurs in the United States, and all constituent elements of it occur in the United States, a harmful result affecting stock exchanges in Canada would provide a basis under international law for Canadian courts to exercise criminal jurisdiction on the objective territorial principle. Similarly an offence under paragraph 361(*c*) of the *Criminal Code* committed outside Canada that caused "disadvantage" to an intended person in Canada, could, as far as international law is concerned, be tried in Canada under the objective territorial principle. Such offences, although wholly committed in the United States, nonetheless have direct and substantial harmful effects in Canada. Hence Parliament could amend the *Criminal Code* to authorize Canadian courts to exercise such criminal jurisdiction based on the objective territorial principle, even though no constituent element of the offence occurs in Canada.

We believe that there is room in, and reason for, Canadian law to utilize both the constituent element doctrine and the effects doctrine, or to put it another way, to implement both the subjective territorial principle and the objective territorial principle in Canadian criminal law. An offence would then be triable in Canada if it were committed in whole or in part in Canada, or wholly outside Canada where the offender knowingly caused direct and substantial harmful effects to occur in Canada.

RECOMMENDATION

49. That the General Part of the *Criminal Code* provide:

(a) that an offence is committed in Canada when it is committed in whole or in part in Canada; and

(b) that it is committed "in part in Canada" when

(i) some of its constituent elements occurred outside Canada and at least one of them occurred in Canada, and a constituent element that occurred in Canada established a real and substantial link between the offence and Canada, or

(ii) all of its constituent elements occurred outside Canada, but direct substantial harmful effects were intentionally or knowingly caused in Canada.

Our basic concern is that, subject to our comments that follow concerning the juridical nature of the conduct under the law of the other country concerned, no person should escape the application of *the criminal law* (for acts punishable in Canada) simply because part of the conduct in question occurred outside Canada or because, in a case where direct harmful effects were felt in Canada, all the conduct of the offender occurred outside Canada. A further example of what we have in mind is *a threat made outside Canada* to do violence to a person in Canada in the circumstances mentioned in paragraph 381(1)(*a*) or (*b*) of the *Criminal Code*. At the present time it is doubtful that such a threat made outside Canada to a person in Canada would constitute an offence under either of those paragraphs. We also have in mind the fact that various fraudulent schemes of international dimensions are facilitated by modern technology such as computers[163] and space satellite means of communication.

That the "any constituent element" approach should be adopted to deal with transnational criminal situations is supported by the fact that it has, with variations, been recommended by other law reform groups. In particular, it has been recommended in the American Law Institute's *Model Penal Code*,[164] supported to some extent by the English Law Commission,[165] included in draft Congressional Bills in the United States[166] and legislatively adopted in New Zealand. The most straightforward approach is that enacted in the New Zealand legislation which reads:

> 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.[167] [Emphasis added]

CHAPTER TEN

Criminality of a Person's Acts under the Applicable Foreign Law

The New Zealand legislation mentioned in the last chapter, besides employing the "deeming" device that we would prefer to avoid, may lead to unfairness in certain situations because it does not take into account the law of the country in which the act occurred outside New Zealand. What if an act is performed in Canada, the result of which is designed or is likely *only* to be felt in another state that does not prohibit the act? That state may even encourage or require such acts. The *Model Penal Code* excepts such situation from prosecution under it,[168] but the English Law Commission, which otherwise generally adopted the same approach as the *Model Penal Code*, passed over this situation in silence.[169]

In essence the question at hand is whether a prosecution in Canada of a transnational offence should be conditional on the conduct abroad or harmful effects felt abroad being a crime under the laws of both Canada and the other country concerned. (There is the further question whether, and under what circumstances, the pleas of *autrefois acquit* and *autrefois convict* should be available to the accused before a court in Canada on a charge of a transnational offence for which he has been acquitted or convicted in another country. However, since the second question relates equally to offences committed completely outside Canada, we propose to deal with it in Chapter Fifteen under the separate heading entitled "Double Jeopardy." We will examine the question at hand under the following headings:

I. Acts in Canada with sole effects outside Canada;

II. Acts outside Canada with effects in Canada; and

III. Criminality of a person's omissions.

I. Acts in Canada with Sole Effects outside Canada

We prefer the *Model Penal Code*'s approach. We think that an act in Canada that has no harmful effects in Canada should not be punishable in Canada if the result of that act was designed, or was likely to occur, only in another state which does not prohibit that act or result and may even encourage them. This would avoid Canada's purporting to prohibit action in other countries which is permissible there, and would accord with our view that criminal law should concern itself with the prevention by a society of harm to *that* society. If the action is permissible in a foreign country, presumably there is no harm (at least no criminal harm) in the eyes of the society of that country.

But the question is by no means without difficulty. This Commission has accepted that the primary purpose of criminal law is to underline basic social values, and some people might argue that those values are equally affected whether the results (of an act in Canada) occur outside Canada or in Canada; it may seem strange to the layman that an act in Canada, that is intended to achieve certain results thought blameworthy, indeed criminal, in the eyes of Canadian law, should be excusable merely because those results are felt outside Canada only. Others may argue that, in justice, Canadian law should at least excuse a non-Canadian citizen or a person not ordinarily resident in Canada from being prosecuted in Canada for an act in Canada whose consequences were felt only in a state where the consequences were not unlawful. We are inclined to the view that citizenship or nationality would not be a justifiable criterion on moral or legal grounds for differentiating between prosecuting, or not prosecuting, a person in Canada for an act committed in Canada that had harmful results only in a state whose law did not make the act or its harmful results an offence.

RECOMMENDATION

50. That the General Part of the *Criminal Code* provide that where a criminal act occurs *in* Canada, the harmful consequences of which are designed to occur or are likely to occur or do, in fact, occur *only* in another state or states which does/do not prohibit the act by its/their criminal law, the act *in* Canada that causes such consequences, even though it constituted a criminal offence in Canada, shall not, under our law, be subject to prosecution in Canada.

ALTERNATIVE RECOMMENDATION

50. Alternatively we would recommend that where a criminal act occurs *in* Canada, the harmful effects of which are designed to occur or are likely to occur or do in fact occur in another state and no substantial harmful effects are felt in Canada, the offence *may be prosecuted in Canada but* that an accused shall *not be*

***convicted* of that offence *if* he proves that his conduct did not amount to an offence under the criminal law of the state in which the harmful effects were designed to occur, or were likely to occur, or did in fact occur.**

If our Recommendation 50 were adopted, the foreign law could prevent a prosecution in Canada; in other words it would go to jurisdiction; whereas if our alternative Recommendation 50 were adopted, the accused could be prosecuted but he could plead foreign law as a matter of defence. While we recognize the important procedural and practical differences between the two recommendations, we are not at this time prepared to prefer one over the other.

II. Acts outside Canada with Effects in Canada

What of an act performed *outside* Canada, in a state whose law does not prohibit it, which leads to a result in Canada that is prohibited by criminal law in Canada, for example, an attempted extortion under subsection 305(1) of the *Criminal Code* by sending threats from a foreign state to a person in Canada? The constituent elements of the offence are completed outside Canada. It may be that the state concerned may not have criminalized "attempts." The *Model Penal Code* and the English Law Commission would exclude such acts from criminal prosecution in Canada unless the producing of the result in Canada was done *intentionally*. We agree with this. We feel that in these situations it is not unreasonable to adopt the attitude that a person should have inquired as to what the law in Canada was before acting with such purpose or intention, and therefore that it is not unreasonable to deem that the offender knew it to be a crime to cause the intended results in Canada. In other words, even though this is a transnational situation, once it is proved that the offender knew that he would cause direct, substantial harm in Canada, it is not unreasonable to presume that he knew the criminal law of Canada so that ignorance of the law would be no excuse.

RECOMMENDATION

51. That the General Part of the *Criminal Code* provide that no person shall be [convicted by a Canadian court of][prosecuted in a Canadian court for] an offence for having performed an act in a state other than Canada that was *not* an offence under the law of that other state, and whose harmful consequences are felt or occur in Canada, unless that person intentionally or knowingly caused the harmful consequences to occur or to be felt in Canada.

III. Criminality of a Person's Omissions

So far in this discussion on transnational offences we have referred only to *acts* of persons. But what of *omissions*?

We are, of course, speaking only of omissions or failures that constitute offences under Canadian law such as offences under many sections of the *Criminal Code* including sections: 50 (omitting to prevent treason), 197(2) (failure to provide necessaries to spouse, etc.), 202 (criminal negligence by omission), 207 (death which may have been prevented), 285 (theft by a bailee), 355 (omitting a book entry with intent to defraud). Omitting to take the required action in one country could cause the proscribed result to occur in another country. Although it may be reasonable to fix a person with responsibility for certain results in Canada of his acts outside Canada, a question arises as to how far the law should go in fixing a person outside Canada with responsibility for results in Canada of his *non-action*; that is, his omissions outside Canada? And what of omissions *in* Canada that have consequences outside Canada? The English Law Commission made no distinction between acts and omissions in this connection. We are inclined to agree.

RECOMMENDATION

52. That the *Criminal Code* General Part provide for "omissions" in Canada and outside Canada in the same way as we have recommended in respect of "acts" in Recommendations 50 and 51.

PART FOUR:

INCHOATE OFFENCES

CHAPTER ELEVEN

Extraterritorial Inchoate Offences

I. General Comments

Inchoate offences such as conspiring or attempting to commit a substantive offence may be completely committed in one country although the intended substantive offence was to have been committed in another country. For example, if two people conspired in Toronto to commit theft in New York, the offence of *conspiracy* would have been wholly committed in Canada, and jurisdiction of Canadian courts would be based on the territorial principle. If they had conspired in New York to commit theft in Toronto, the offence of *conspiracy* would have been wholly committed in New York and jurisdiction of Canadian courts could not be based on the territorial principle. Similarly, if a person tried to murder someone in Canada by attempting, but failing, to fire a rifle in New York State pointing at the intended victim across the border in Ontario, it would represent the inchoate offence of "attempt" wholly committed outside Canada. These, then, are not examples of cross-border or transnational offences. However, some inchoate offences could be committed in such a way that they are both inchoate and transnational. For example: "A" in New York City and "B" in Ottawa conspire in a telephone conversation to commit an offence (in any country).

II. Conspiracies

Subsection 423(2) of the *Criminal Code* generally defines conspiracy as conspiring with anyone to effect an unlawful purpose, or to effect a lawful

purpose by unlawful means. In addition, subsection 423(1) makes provision for conspiracies to commit murder, knowingly to prosecute an innocent person for an alleged offence punishable by imprisonment, and conspiracies to commit any indictable offence.

A. Conspiracy in Canada to Do Something outside Canada

Until the amendments to section 423 of the *Criminal Code* in 1975, it had never been completely settled whether a conspiracy *in Canada* to commit a crime abroad constituted an offence here.[170] The probability was that apart from any explicit statutory exception, it did not. That probability is supported by strong English authority[171] and the fact that it was previously felt necessary to provide explicitly in paragraph 423(1)(*a*) of the *Criminal Code* that conspiring in Canada to murder someone abroad was a crime in Canada. However that may be, subsection 423(3) was added in 1975, making it clear that a conspiracy in Canada to commit any offence abroad could constitute an offence of conspiracy in Canada. That subsection reads as follows:

> (3) Every one who, while in Canada, conspires with anyone to do anything referred to in subsection (1) or (2) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.

In examining this provision several questions come to mind. (a) In principle, should conspiring in Canada to do something outside Canada (which is unlawful in Canada) constitute an offence under Canadian criminal law? (b) If so, under what conditions? In particular: (i) need the doing of that something in the foreign state be unlawful according to the law of that state, and (ii) need it be not only unlawful but criminal? That is, need it constitute an "offence" under the foreign law?

As to question (b) and its sub-questions, we are here really asking the more difficult questions: How should the net be cast, and how widely? One could argue that a conspiracy to do something abroad, which would be punishable under Canadian law if done in Canada, should be subject to prosecution in Canada whether or not it would be unlawful in a foreign country. However, we think the approach now taken in subsection 423(3) of the *Criminal Code* is generally right, namely, that the thing conspired to be

done abroad must not simply be unlawful in Canada, but must be *an offence* in the country where it is intended to take place.

In feeling that the test of the foreign law should be "offence" rather than simply "unlawful" we are concerned that the definition of the offence of conspiracy under subsection 423(2) of the *Criminal Code* includes conspiring to effect any *unlawful purpose or* conspiring to effect any *lawful purpose by unlawful means*. These unlawful purposes or means need not be criminal in themselves. We will not comment here on the reasonableness or otherwise of that aspect of conspiracy law in the context of conspiring *in Canada* to do something *in Canada*; however, although it is not unreasonable to expect someone who in Canada, plans with others to effect some purpose *in a foreign country*, to be aware of the relevant criminal laws of that country, it may be unreasonable to expect him to know its voluminous multi-level non-criminal law and to hold him *criminally responsible* in Canada *for* having agreed in Canada to do something in a foreign country that is merely a *contravention of a non-criminal law* (for example, municipal by-law) in that country. That is substantially the approach of the *Model Penal Code*.[172] We therefore are of the view that the crime of a conspiracy in Canada to do something abroad is properly limited to conspiracies to do things which constitute "offences" where they are intended to take place.

In England, there has been support for what may be called a *malum in se* approach: that conspiracies in England to do something in another state which would be a serious crime under English law, should be punishable as a conspiracy in England whether or not the thing to be done is prohibited by the law of the other state.[173] We agree with that approach. However, it would be inconsistent with the basis of our *Criminal Code* to leave to the courts the decision as to whether a crime is *malum in se*. Since our law rightly emphasizes that crimes should be clearly defined by statute, Parliament should prescribe what conspiracies in Canada (to commit certain crimes abroad) are criminal and merit punishment regardless of where the result is intended to occur and regardless whether the thing to be done is an offence or even unlawful according to the law of any state other than Canada, for example, treason. Indeed, paragraph 423(1)(*a*) of the *Criminal Code* already so provides in respect of the offence of conspiracy to murder. The reasons for such extensions may vary. It may be because it is thought that persons who plan in Canada to engage in that type of criminal conduct outside Canada evince a threat that they will engage in similar conduct in Canada. Or it may be that planning such a thing is so offensive to the values of the Canadian community that such planning should be made criminal whether the conduct is considered by another state to be offensive or not.

RECOMMENDATION

53. That the existing approach in subsection 423(3) of the *Criminal Code* be maintained, but that in addition, consideration be given by the federal

Department of Justice as to whether there are any specific offences so serious that Parliament should enact that a conspiracy in Canada to commit them outside Canada would constitute a crime in Canada regardless how they may be regarded by the law of any other state.

B. Conspiracy outside Canada to Do Something in Canada

Until 1975, it was doubtful, to say the least, that a conspiracy outside Canada to commit a crime in Canada would itself have constituted a crime in Canada. However, subsection 423(4) of the *Criminal Code* (enacted in 1975) provides that anyone outside Canada who conspires with anyone (apparently anywhere), to do in Canada anything mentioned in subsection 423(1) or (2) shall be deemed to have conspired in Canada to do that thing. In principle we agree with this approach. As Lord Salmon stated in 1973 in *D.P.P.* v. *Doot*:[174] "If a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here [in England]."

However, we feel that subsection 423(4) is too sweeping insofar as it refers to subsection 423(2). Under section 423(2), a conspiracy is an offence so long as its object is "unlawful" or, though lawful, is done by "unlawful means." Thus 423(4) imposes an undue burden on people outside Canada — particularly people doing occasional business in Canada — to check and intend to comply with not only the relevant criminal law of Canada but also *all* relevant federal, provincial and municipal *civil* laws, to avoid *criminal* liability.

If the *Criminal Code* were to be amended to withdraw the jurisdiction of Canadian courts to try conspiracies under subsection 423(2) committed outside Canada, it would be consistent with the original intent of subsection 423(4) as explained to the Senate of Canada, Legal and Constitutional Affairs Committee when it was dealing with the Second Proceedings on *Bill C-71* on 25th February, 1976.[175] At that time the Committee was advised that "[u]nder this provision [423(3)] it would have to be an *offence* both in Canada and abroad, when the conspiracy is in Canada. The other way around, when the conspiracy is outside of Canada [423(4)], it need only be an *offence* in Canada." [Emphasis added] Contrary to that statement, neither subsection 423(3) nor (4) requires that the conspiracy need to be a conspiracy to commit an *offence* in Canada; rather that suffices if the conspiracy is to effect an unlawful purpose (criminal or non-criminal) or to effect a lawful purpose by unlawful means (criminal or non-criminal).

We feel that the only conspiracies outside Canada that should be prosecuted in Canada are those that have as their objective the commission of an [indictable] offence in Canada.

Another concern that we have with subsection 423(4) is that it applies to *anyone* outside Canada. The applicability of that subsection to aliens outside Canada raises the question whether that subsection is inconsistent with applicable principles of international law, and if so, whether such inconsistency with international law would amount to a deprivation of liberty and security of a person, which is not in accordance with the principles of fundamental justice, and therefore contrary to section 7 of the *Canadian Charter of Rights and Freedoms*.

The pre-*Charter* court decisions that courts cannot strike down Parliamentary enactments that by their wording clearly violate international law,[176] might well remain valid. However, given the reference in paragraph 11(*g*) of the *Charter* to international criminal law, and the reference in section 7 of the *Charter* to principles of fundamental justice, and the post-*Charter* general power of the courts to examine legislation for validity under the *Charter* — in addition to examining it from the point of view of division of legislative powers between the federal Parliament and the provincial Legislatures — it may be, at least as far as an individual's rights under criminal law are concerned, that the courts could strike down subsection 423(4) or at least restrictively construe it to apply only in accordance with the principles of international law.[177]

Insofar as Canadian citizens outside Canada are concerned, it would appear that the applicability of subsection 423(4) to them would be justifiable under the nationality principle of international law. But aliens, at least those who owe no allegiance to Canada, are not caught by the nationality principle of international law. The territorial principle is, of course, not applicable and, except in certain cases, neither the universality principle nor the objective personality principle would be applicable. That leaves the protective principle. However, while international law recognizes the right of a state to protect its security by subjecting aliens abroad to its criminal law in respect of offences against that security, it is not clear that that principle of international law is applicable to preliminary conduct such as a conspiracy that has not even reached the stage of an attempt to commit an offence which, if completed, would be an offence against the security of a state. Furthermore, there may be difficulty in getting an alien to come to Canada (voluntarily or involuntarily) to be tried for a conspiracy abroad; the difficulty would arise not only because extradition usually applies only to offences committed within the territorial jurisdiction of the state requesting extradition, but also because the crime of conspiracy, as such, is generally unknown to civil law systems and is not an extraditable offence under many Canadian extradition treaties.

In view of the foregoing we feel that section 423 should be amended to ensure that it is consistent with principles of international law. That could be

Department of Justice as to whether there are any specific offences so serious that Parliament should enact that a conspiracy in Canada to commit them outside Canada would constitute a crime in Canada regardless how they may be regarded by the law of any other state.

B. Conspiracy outside Canada to Do Something in Canada

Until 1975, it was doubtful, to say the least, that a conspiracy outside Canada to commit a crime in Canada would itself have constituted a crime in Canada. However, subsection 423(4) of the *Criminal Code* (enacted in 1975) provides that anyone outside Canada who conspires with anyone (apparently anywhere), to do in Canada anything mentioned in subsection 423(1) or (2) shall be deemed to have conspired in Canada to do that thing. In principle we agree with this approach. As Lord Salmon stated in 1973 in *D.P.P.* v. *Doot*:[174] "If a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here [in England]."

However, we feel that subsection 423(4) is too sweeping insofar as it refers to subsection 423(2). Under section 423(2), a conspiracy is an offence so long as its object is "unlawful" or, though lawful, is done by "unlawful means." Thus 423(4) imposes an undue burden on people outside Canada — particularly people doing occasional business in Canada — to check and intend to comply with not only the relevant criminal law of Canada but also *all* relevant federal, provincial and municipal *civil* laws, to avoid *criminal* liability.

If the *Criminal Code* were to be amended to withdraw the jurisdiction of Canadian courts to try conspiracies under subsection 423(2) committed outside Canada, it would be consistent with the original intent of subsection 423(4) as explained to the Senate of Canada, Legal and Constitutional Affairs Committee when it was dealing with the Second Proceedings on *Bill C-71* on 25th February, 1976.[175] At that time the Committee was advised that "[u]nder this provision [423(3)] it would have to be an *offence* both in Canada and abroad, when the conspiracy is in Canada. The other way around, when the conspiracy is outside of Canada [423(4)], it need only be an *offence* in Canada." [Emphasis added] Contrary to that statement, neither subsection 423(3) nor (4) requires that the conspiracy need to be a conspiracy to commit an *offence* in Canada; rather that suffices if the conspiracy is to effect an unlawful purpose (criminal or non-criminal) or to effect a lawful purpose by unlawful means (criminal or non-criminal).

done abroad must not simply be unlawful in Canada, but must be *an offence* in the country where it is intended to take place.

In feeling that the test of the foreign law should be "offence" rather than simply "unlawful" we are concerned that the definition of the offence of conspiracy under subsection 423(2) of the *Criminal Code* includes conspiring to effect any *unlawful purpose or* conspiring to effect any *lawful purpose by unlawful means*. These unlawful purposes or means need not be criminal in themselves. We will not comment here on the reasonableness or otherwise of that aspect of conspiracy law in the context of conspiring *in Canada* to do something *in Canada*; however, although it is not unreasonable to expect someone who in Canada, plans with others to effect some purpose *in a foreign country*, to be aware of the relevant criminal laws of that country, it may be unreasonable to expect him to know its voluminous multi-level non-criminal law and to hold him *criminally responsible* in Canada *for* having agreed in Canada to do something in a foreign country that is merely a *contravention of a non-criminal law* (for example, municipal by-law) in that country. That is substantially the approach of the *Model Penal Code*.[172] We therefore are of the view that the crime of a conspiracy in Canada to do something abroad is properly limited to conspiracies to do things which constitute "offences" where they are intended to take place.

In England, there has been support for what may be called a *malum in se* approach: that conspiracies in England to do something in another state which would be a serious crime under English law, should be punishable as a conspiracy in England whether or not the thing to be done is prohibited by the law of the other state.[173] We agree with that approach. However, it would be inconsistent with the basis of our *Criminal Code* to leave to the courts the decision as to whether a crime is *malum in se*. Since our law rightly emphasizes that crimes should be clearly defined by statute, Parliament should prescribe what conspiracies in Canada (to commit certain crimes abroad) are criminal and merit punishment regardless of where the result is intended to occur and regardless whether the thing to be done is an offence or even unlawful according to the law of any state other than Canada, for example, treason. Indeed, paragraph 423(1)(*a*) of the *Criminal Code* already so provides in respect of the offence of conspiracy to murder. The reasons for such extensions may vary. It may be because it is thought that persons who plan in Canada to engage in that type of criminal conduct outside Canada evince a threat that they will engage in similar conduct in Canada. Or it may be that planning such a thing is so offensive to the values of the Canadian community that such planning should be made criminal whether the conduct is considered by another state to be offensive or not.

RECOMMENDATION

53. That the existing approach in subsection 423(3) of the *Criminal Code* be maintained, but that in addition, consideration be given by the federal

Department of Justice as to whether there are any specific offences so serious that Parliament should enact that a conspiracy in Canada to commit them outside Canada would constitute a crime in Canada regardless how they may be regarded by the law of any other state.

B. Conspiracy outside Canada to Do Something in Canada

Until 1975, it was doubtful, to say the least, that a conspiracy outside Canada to commit a crime in Canada would itself have constituted a crime in Canada. However, subsection 423(4) of the *Criminal Code* (enacted in 1975) provides that anyone outside Canada who conspires with anyone (apparently anywhere), to do in Canada anything mentioned in subsection 423(1) or (2) shall be deemed to have conspired in Canada to do that thing. In principle we agree with this approach. As Lord Salmon stated in 1973 in *D.P.P.* v. *Doot*:[174] "If a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here [in England]."

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If the *Criminal Code* were to be amended to withdraw the jurisdiction of Canadian courts to try conspiracies under subsection 423(2) committed outside Canada, it would be consistent with the original intent of subsection 423(4) as explained to the Senate of Canada, Legal and Constitutional Affairs Committee when it was dealing with the Second Proceedings on *Bill C-71* on 25th February, 1976.[175] At that time the Committee was advised that "[u]nder this provision [423(3)] it would have to be an *offence* both in Canada and abroad, when the conspiracy is in Canada. The other way around, when the conspiracy is outside of Canada [423(4)], it need only be an *offence* in Canada." [Emphasis added] Contrary to that statement, neither subsection 423(3) nor (4) requires that the conspiracy need to be a conspiracy to commit an *offence* in Canada; rather that suffices if the conspiracy is to effect an unlawful purpose (criminal or non-criminal) or to effect a lawful purpose by unlawful means (criminal or non-criminal).

We feel that the only conspiracies outside Canada that should be prosecuted in Canada are those that have as their objective the commission of an [indictable] offence in Canada.

Another concern that we have with subsection 423(4) is that it applies to *anyone* outside Canada. The applicability of that subsection to aliens outside Canada raises the question whether that subsection is inconsistent with applicable principles of international law, and if so, whether such inconsistency with international law would amount to a deprivation of liberty and security of a person, which is not in accordance with the principles of fundamental justice, and therefore contrary to section 7 of the *Canadian Charter of Rights and Freedoms*.

The pre-*Charter* court decisions that courts cannot strike down Parliamentary enactments that by their wording clearly violate international law,[176] might well remain valid. However, given the reference in paragraph 11(*g*) of the *Charter* to international criminal law, and the reference in section 7 of the *Charter* to principles of fundamental justice, and the post-*Charter* general power of the courts to examine legislation for validity under the *Charter* — in addition to examining it from the point of view of division of legislative powers between the federal Parliament and the provincial Legislatures — it may be, at least as far as an individual's rights under criminal law are concerned, that the courts could strike down subsection 423(4) or at least restrictively construe it to apply only in accordance with the principles of international law.[177]

Insofar as Canadian citizens outside Canada are concerned, it would appear that the applicability of subsection 423(4) to them would be justifiable under the nationality principle of international law. But aliens, at least those who owe no allegiance to Canada, are not caught by the nationality principle of international law. The territorial principle is, of course, not applicable and, except in certain cases, neither the universality principle nor the objective personality principle would be applicable. That leaves the protective principle. However, while international law recognizes the right of a state to protect its security by subjecting aliens abroad to its criminal law in respect of offences against that security, it is not clear that that principle of international law is applicable to preliminary conduct such as a conspiracy that has not even reached the stage of an attempt to commit an offence which, if completed, would be an offence against the security of a state. Furthermore, there may be difficulty in getting an alien to come to Canada (voluntarily or involuntarily) to be tried for a conspiracy abroad; the difficulty would arise not only because extradition usually applies only to offences committed within the territorial jurisdiction of the state requesting extradition, but also because the crime of conspiracy, as such, is generally unknown to civil law systems and is not an extraditable offence under many Canadian extradition treaties.

In view of the foregoing we feel that section 423 should be amended to ensure that it is consistent with principles of international law. That could be

done by limiting its applicability to only certain offences as far as aliens are concerned. But it would be extremely difficult to provide accurately and clearly the extent to which Canadian criminal law could validly, under international law, apply to conspiracies committed outside Canada by aliens. In our view, the better way to remedy the defects of subsection 423(4) would be to have the whole of subsection 423(1) apply outside Canada to Canadian citizens and aliens alike, and to provide also (in the *Criminal Code* — General Part) that a person could not be prosecuted in Canada (for conspiring outside Canada to commit an offence in Canada) unless some overt act toward the commission of the substantive offence was performed in Canada. An exception (to the requirement for an overt act) could be made in respect of conspiracies to commit particularly harmful offences that the international community recognizes as particularly harmful to mankind such as unlawful importation of drugs, excessive environmental pollution, or food contamination. In respect of extraterritorial conspiracies to import narcotics illegally into the United States of America, it has been rather convincingly argued that while no *one* principle of international law would justify the applicability of national law and jurisdiction over the extraterritorial conspiracy, a combination of the three principles of universality, protection and objective territoriality could do so.[178]

In other cases, an overt act in Canada in furtherance of a conspiracy outside Canada could justify Canadian courts being given jurisdiction under the subjective territorial principle of international law. The English Law Commission found that such a requirement for an overt act in England was part of the law of conspiracy in England, and they recommended that it be retained.[179] Recent Bills before the Senate and House of Representatives in the United States proposed the codification of the "overt act" rule for conspiracies outside the United States to commit offences in the United States.[180] Apparently those institutions agreed that an overt act in the forum state was necessary to justify its jurisdiction under the territorial principle of international law, and, perhaps, to satisfy the principle of "reasonableness."

RECOMMENDATION

54. That the *Criminal Code* provide that the only conspiracies outside Canada that may be prosecuted in Canada be those that satisfy both the following conditions, namely conspiracies:

(a) that have as their object the commission of an indictable offence in Canada, and

(b) pursuant to which or in furtherance of which an overt act takes place in Canada, unless the conspiracy had as its object the commission of an offence in Canada that Parliament specifies as an exception to the overt act requirement such as the unlawful importation of drugs into Canada.

To attain that result we recommend that subsections 423(4), (5) and (6) of the *Criminal Code* be deleted, and that the General Part confer jurisdiction on Canadian courts to try any offence against subsection 423(1) of conspiracy, committed outside Canada, if an overt act in furtherance of the conspiracy has been performed in Canada, provided that an overt act not be required in respect of particular offences to be specified by Parliament.

C. Explanatory Note

The above amendments to section 423 and the General Part would change the present law in two ways.

First, no longer would Canadian courts have jurisdiction to try a person for an offence against subsection 423(2) of conspiracy *outside* Canada to do something that was unlawful but non-criminal; rather, their jurisdiction over conspiracies outside Canada would be limited to those which have as their object the commission of an indictable (serious) offence as mentioned in subsection 423(1).

Secondly, an overt act in Canada would be required as a condition precedent to Canadian courts having jurisdiction to try conspiracy offences committed outside Canada unless the conspiracy was to commit one of a number of specified offences in Canada such as unlawful importation of drugs.

III. Attempts

Sections 24 and 421 of the *Criminal Code* read:

> **24.** (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere

preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

421. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,

(*a*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to be sentenced to death or to imprisonment for life, is guilty of an indictable offence and is liable to imprisonment for fourteen years;

(*b*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable; and

(*c*) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

An attempt in Canada to commit an offence outside Canada probably does not constitute the inchoate offence of "attempt" under existing Canadian criminal law. The few *extraterritorial* offences proscribed by the *Criminal Code* or other federal statutes would be exceptions, for example, treason, subsection 46(3). And, if our recommendation regarding transnational offences were adopted, a completion of an offence outside Canada after an attempt in Canada would likely constitute a substantive offence under Canadian criminal law. But is that enough?

If we accept the view that a conspiracy in Canada to commit an offence outside Canada should constitute a crime in Canada, it follows *a fortiori* that this should be true of attempts as well. An attempt can itself constitute a danger where it takes place even if its intended object is abroad; for example, an attempt by a person in Ontario to murder someone in the state of New York by shooting across the United States — Canada border. Such an attempt would be a crime under the *Model Penal Code*,[181] and the Law Commission of England felt that it should be a crime in England to attempt in England to commit outside England any crime that is an extraterritorial offence under English law.[182]

RECOMMENDATION

55. That the *Criminal Code* provide that it is an offence to attempt *in* Canada to commit in another country an act or omission that constitutes an offence under the laws of both countries.

Present Canadian law appears to be that, except in respect of the extraterritorial offences prescribed in Canadian legislation, an attempt *outside* Canada, that takes place entirely abroad, to commit a crime (under Canadian law) in Canada is not an offence under Canadian criminal law; furthermore, by virtue of subsection 5(2) of the *Criminal Code*, it is not an offence in respect of which a person can be *convicted* in Canada. The *Model Penal Code*[183] would make such conduct an offence against the law of the place of intended completion of the crime. The English Law Commission in its Working Paper No. 29 expressed views similar to the *Model Penal Code* approach, subject to the requirement that the offence attempted be also an offence under local law.[184]

Consistent with our approach in respect of the offence of conspiracy, we feel that since we are dealing with another inchoate crime, namely conduct outside Canada that has not resulted in *actual* harm in Canada, an attempt outside Canada should not be punishable in Canada unless the attempt itself or the attempted result constitutes an offence under the law of the place where the attempt took place. Furthermore, again as in respect of the offence of conspiracy, we feel that some overt act in furtherance of the attempt should occur in Canada as a condition precedent to the exercise of jurisdiction by Canadian courts. (The overt act need not, of course, itself amount to an attempt or even a constituent element.) Such an act would provide at least some basis for the exercise of Canadian criminal jurisdiction under the territorial principle of international law.

RECOMMENDATION

56. That the *Criminal Code* make it an offence to attempt *outside* Canada to commit a crime if

(a) the crime attempted was an extraterritorial offence under Canadian federal legislation, *or*

(b) all the following conditions are met:

(i) it was an attempt outside Canada knowingly to do something in Canada,

(ii) that that "something" would constitute an offence under Canadian federal law and a criminal offence under the law of the place where the attempt took place, and

(iii) some overt act in [connection with] [furtherance of] the attempt occurred in Canada, unless the attempt was to commit in Canada an offence inherently harmful to Canadian society — such as unlawful importation of drugs to be specified by Parliament as an exception to the "overt act" requirement.

IV. Counselling, Inciting or Procuring (Inchoate)

The considerations that we have mentioned in dealing with the inchoate offences of conspiracy and attempt, we think, apply also to the inchoate offences of counselling, inciting or procuring the commission of an offence under section 422 of the *Criminal Code* — that is, where the substantive offence is not completed or where the accused is not charged as a participant of a *completed* offence that he counselled, incited or procured another person to commit.

RECOMMENDATION

57. That the *Criminal Code*, in respect of inchoate crimes, make it an offence to counsel, procure or incite the commission of a crime, subject to the same conditions as we have recommended for "attempts" in Recommendations 55 and 56.

V. Party to Offence

A. Counselling, Inciting or Procuring

RECOMMENDATION

58. That the *Criminal Code* provide that anyone who counsels or procures the commission of an offence that is subsequently committed, is liable, under section 22 of the *Criminal Code*, *as a party to the offence* if the counselling or procuring was done outside Canada or in Canada for (a) the commission in Canada of an offence, or (b) the commission outside Canada of an extraterritorial offence under Canadian federal legislation, for example, passport forgery under section 58 of the *Criminal Code*.

B. Accessory after the Fact

Sections 23 and 421 of the *Criminal Code* make it an offence to be an accessory after the fact *in* Canada. We feel that being an accessory after the fact *outside* Canada should not be made an offence punishable in Canada *unless* it is proved that, *before* the offence was committed, the accessory agreed to assist, after the event, someone who committed the offence. Otherwise the conduct of the accessory after the fact outside Canada is simply too remote inasmuch as it occurs outside Canadian territorial jurisdiction *after* the substantive offence has been completed and was not a real factor leading to the commission of the offence. Indeed, in most cases (in the absence of a prior agreement of the accessory to aid the offender after the crime) the only jurisdictional basis for such conduct outside Canada to be tried as a crime before a Canadian court would be the nationality principle. However, we see no logical basis for differentiating between aliens and Canadian citizens in this regard. Of course, as noted earlier in this Paper, federal public servants of Canada, members of the Canadian Forces and certain other groups of persons outside Canada are, for valid reasons, subject to the criminal law of Canada in respect of all offences, or at least all indictable offences (including accessory after the fact) committed outside Canada, and therefore, they can be convicted under sections 23 and 421 for being an accessory after the fact outside Canada in respect of any such offence.

RECOMMENDATION

59. That the *Criminal Code* make it an offence to be an accessory after the fact by having received, comforted or assisted a person outside Canada who has committed an offence inside or outside Canada which is punishable under Canadian federal legislation, *if* the accessory had offered or agreed, *prior* to the commission of the substantive offence, to assist any perpetrator of the substantive offence after the commission of the offence.

PART FIVE:

FURTHER CONSIDERATIONS

ON JURISDICTION

OF CANADIAN CRIMINAL COURTS

CHAPTER TWELVE

Diplomatic Immunity

Although a detailed discussion of diplomatic and other immunities from criminal jurisdiction is beyond the scope of this Paper, we should mention that, in addition to foreign military personnel — whom we will discuss in the next chapter — a number of persons in Canada are immune from prosecution under Canadian criminal law — even for criminal offences committed in Canada. Apart from the common law immunity of the Queen and foreign sovereigns, these immunities are based on international conventions entered into by Canada and implemented by Canadian legislation. They include:

(a) The *Vienna Convention on Diplomatic Relations*, 1961[185] which provides in Article 31, paragraph 1, that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State...." Under Article 37, paragraphs 1, 2 and 3, the immunity of a diplomatic agent from criminal jurisdiction is extended to:

(i) the members of the family of the diplomatic agent forming part of his household if they are not nationals of the receiving state,

(ii) members of the administrative and technical staff of the mission (for example, embassy) together with members of their families forming part of respective households if they are not nationals of or permanently resident in the receiving state, and

(iii) members of the service staff of the mission who are not nationals of or permanently resident in the receiving state, but only in respect of acts performed in the course of their duties.

Section 2 of the *Diplomatic and Consular Privileges and Immunities Act*,[186] confers "the force of law in Canada" on Articles 31 and 37 of the *Vienna Convention on Diplomatic Relations*.

(b) The *Vienna Convention on Consular Relations*, 1963,[187] Article 43 of which provides that consular officers and consular employees are not amenable to the jurisdiction of the judicial or administrative authorities of the receiving state *in respect of acts performed in the*

exercise of consular functions. Section 2 of the *Diplomatic and Consular Privileges and Immunities Act* confers "the force of law in Canada" on Article 43.

(c) The *United Nations Convention on Privileges and Immunities*[188] confers immunity from criminal jurisdiction in the receiving state on representatives of states to the United Nations and, in respect of their United Nations duties, to officials (employees) of the United Nations. The convention is implemented in Canada by the *Privileges and Immunities (International Organizations) Act*[189] and Orders in Council made pursuant to it.

None of the three conventions authorizes the courts of foreign states to conduct criminal trials of their diplomatic or other personnel or dependents *in* the receiving state. The foreign state or, in the case of United Nations personnel, the Secretary General of the United Nations, may either waive the immunity of the person (whereupon the courts of the receiving state could try that person), or remove the person from the receiving state (for possible trial in his home state).

Canadian diplomatic, consular or United Nations personnel serving in countries outside Canada, who are entitled to immunities there from the local criminal jurisdiction, are not immune from Canadian criminal law and jurisdiction if they are "employee(s) within the meaning of the *Public Service Act*"; this is because under subsection 6(2) of the *Criminal Code*, such employees may be tried in Canada for indictable offences committed outside Canada. (See Chapter Six of this Paper for further discussion in this regard.) However, other employees of the Government of Canada and members of their households abroad, although they enjoy diplomatic, consular or United Nations immunity, are not subject to Canadian criminal law under subsection 6(2) of the *Criminal Code*. Hence, in their cases, if the Government of Canada (or the United Nations in the case of United Nations personnel) did not waive their immunity from the local (foreign) jurisdiction, they would not be triable for most indictable offences committed in the host state as the foreign courts would not have jurisdiction to try them, and Canadian courts do not have jurisdiction to try them.

RECOMMENDATIONS

60. That, for the sake of completeness, the *Criminal Code* (General Part) mention or refer to the classes of persons who are immune and the extent to which they are immune from the jurisdiction of criminal courts in Canada, and also mention the statutes conferring the immunity.

61. That the General Part of the *Criminal Code* make the criminal law of Canada applicable to members of the household of Canadian federal public servants abroad who are immune from criminal prosecution under the *Vienna*

***Conventions* of 1961 and 1963 or other Conventions, and also make such persons subject to prosecution in Canada for offences committed in the host state under the same conditions as the public servant concerned.**

In this connection it will be recalled that in Chapter Six of this Paper (Recommendations 33 and 34) we have recommended that subsection 6(2) of the *Criminal Code* be amended to apply conditionally to *all* Canadian federal public servants serving outside Canada.

CHAPTER THIRTEEN

Armed Forces

I. Canadian Forces in Canada

The *National Defence Act* provides that service tribunals of the Canadian Forces have jurisdiction to try members of the Canadian Forces for criminal offences committed in Canada[190] (other than murder, manslaughter, sexual assault offences under sections 246.1 through 246.3, or abduction offences under sections 249 through 250.2 committed in Canada).[191] It also provides that nothing in the Code of Service Discipline affects the jurisdiction of civil courts to try offences.[192] It also provides that after an accused has been tried by a service tribunal or a "civil" (meaning "criminal") court for an offence, he cannot be tried *by a service tribunal* for the same offence.[193] Thus, while the service tribunals (military courts) and criminal courts have concurrent criminal jurisdiction over members of the Canadian Forces, the criminal courts appear to have pre-emptive jurisdiction. Indeed, subsection 61(2) of the *National Defence Act* envisages that a civil court may try an accused who has already been tried by a service tribunal. However, subsection 61(2) is probably of no force or effect now because of the *Canadian Charter of Rights and Freedoms* paragraph 11(*h*) and the *Constitution Act, 1981* subsection 52(1).

II. Foreign Forces in Canada

Pursuant to customary international law, a military, naval or air force from one state (sending state) which is visiting another state (receiving state) at the invitation of the latter, has some immunity from the jurisdiction of the criminal courts of the receiving state. That this rule of international law is applicable to

non-Canadian armed forces visiting Canada is clear from the opinion of the Supreme Court of Canada on a reference concerning United States forces in Canada.[194] However, as seen in the various opinions expressed by the judges in that case, the *extent* of that immunity under *customary* international law is not clear.

According to Kerwin J.:

> The general rule is that everyone in Canada ... is subject to the laws of the country and to the jurisdiction of our courts, but ... there are several well-known exemptions. These exemptions are grounded on reason and recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. By international law there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces....[195]

Rand J. was of the opinion that the customary international law rule was not so broad as to confer complete immunity. In his opinion:

> The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their government; but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.[196]

Parliament enacted the *Visiting Forces Act*,[197] to govern the status of visiting forces in Canada in respect of criminal and other matters. Under that Act, which was amended in 1972[198] the Governor in Counsel has authority to apply the Act to the forces of any designated state in Canada. Under subsection 6(2) of the Act, the courts of the visiting force have the primary right to exercise trial jurisdiction in Canada over a member of the visiting force on a charge of having committed an offence:

(a) against the property of the designated state;

(b) against the security of the designated state;

(c) against the person or property of another member of the visiting force or its civilian component or a dependent of such a member; or

(d) in the performance of official duties.

III. Canadian Forces outside Canada

It should be noted that the *Visiting Forces Act*,[199] does not apply to members of the Canadian Forces serving outside Canada. They are, pursuant

to sections 120 and 121 of the *National Defence Act*,[200] subject to the criminal law of Canada while serving abroad and also to the criminal law of the state in whose territory they are serving (the receiving state). They are subject to the concurrent jurisdiction of Canadian service tribunals and the courts of the receiving state. Their immunity in certain cases from the jurisdiction of the criminal courts of the receiving state flows, in the absence of a treaty or other agreement in that respect between Canada and the receiving state concerned, directly from customary international law. Most often the matter is governed by a bilateral agreement between Canada and the receiving state or by a multilateral agreement to which Canada and the receiving state are parties.

In states of the North Atlantic Treaty Organization (NATO), the customary international law rules have been replaced by express provisions in a multilateral agreement governing the exercise of jurisdiction by the courts of the receiving and sending states over members of visiting armed forces from a NATO state. The agreement, called the *North Atlantic Treaty Status of Forces Agreement* or "NATO SOFA" was signed in 1951 and applies to all NATO states.[201]

Under Article VII of the NATO SOFA, the service tribunals of the Canadian Forces serving in any NATO state (for example, the United States, the United Kingdom, or the Federal Republic of Germany), have primary jurisdiction to try members of a Canadian visiting force and members of the civilian component of the Canadian Forces (including — to the extent authorized by Canadian law — Canadian civilian school teachers of Canadian dependant children there and civilian employees from Canada working for the Canadian Forces there) for (i) offences solely against the property or security of Canada, or offences solely against the person or property of another member of the Canadian visiting force, or civilian component of the Canadian visiting force or dependant of either, and (ii) offences arising out of any act or omission done in the performance of official duty.[202]

In all other cases, the courts of the receiving state have the primary right to exercise jurisdiction.[203]

The NATO SOFA further provides that the state having primary jurisdiction shall give sympathetic consideration to a request from the other state for a waiver of that jurisdiction.[204]

The division of jurisdiction in criminal matters under the NATO SOFA has worked extremely well in practice. In almost all cases where the receiving state has had primary jurisdiction, a request for waiver by a visiting Canadian Force has been granted. The offender is protected against double jeopardy by a provision in the NATO SOFA that, where a member of the visiting force or civilian component or dependant has been tried by a court of the sending state or receiving state in respect of a particular offence, he or she may not be tried again for that same offence by a court of the other state.[205]

In states in which a United Nations force is serving, members of the United Nations force are usually immune from the criminal jurisdiction of the courts of the host states pursuant to agreements or arrangements made by the United Nations with the governments of the host states. For example, pursuant to an agreement between the United Nations and the Government of Cyprus,[206] members of the Canadian Forces contingent serving with the United Nations Force in Cyprus are immune from the jurisdiction of the Cypriot criminal courts. Under the same agreement, the military courts of the Canadian contingent have jurisdiction to conduct trials of members of the contingent for military and criminal offences under Canadian law committed in Cyprus.

Before sending members of the Canadian Forces to serve abroad in a non-NATO state outside the aegis of the United Nations, Canada usually tries to make arrangements with the host state — including arrangements for the exercise of criminal jurisdiction.

It will be seen from the foregoing that members of the Canadian Forces serving abroad have a status similar to diplomats insofar as they are frequently granted immunity from the jurisdiction of the criminal courts of the receiving state. However, they — unlike Canadian diplomats — are subject to trial by Canadian military courts abroad and civil courts in Canada[207] for criminal offences committed abroad. A concern that we have in this regard is that, while we recognize that it is essential for reasons of discipline that Canadian military tribunals have jurisdiction over members of the Canadian Forces and accompanying personnel abroad, we feel that it should probably be limited to offences under Canadian law.

At the present time, under section 121 of the *National Defence Act*:

> (1) An act or omission that takes place outside Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law, is an offence under this Part, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2).
>
> (2) Subject to subsection (3), where a service tribunal finds a person guilty of an offence under subsection (1), the service tribunal shall impose the punishment in the scale of punishments that it considers appropriate, having regard to the punishment prescribed by the law applicable in the place where the act or omission occurred

> and the punishment prescribed for the same or a similar offence in this Act, the *Criminal Code* or any other Act of the Parliament of Canada.

Section 121, in effect, incorporates offences under the criminal law of every country in the world into the Canadian Code of Service Discipline. The result is that offences against sections of foreign penal codes, that are probably couched in language commensurate with, and influenced by, the legal system and criminal procedure applicable to trials by the courts of the country concerned, are prosecuted under Canadian trial procedures that may be completely alien to, and that may fail to provide safeguards envisaged by, the drafters of the foreign offences. For example, the loose definition of the offence in the foreign law may be premised on the assumption that the judge will have been professionally trained as a judge in that foreign legal system.

In any event, where a person is charged with an offence under a foreign law, we think it may be wrong in principle to subject that person to trial (on that foreign offence) under our judicial system that has not been designed and developed to implement prosecution of *that* offence. We wonder if the scope of offences under the federal statutes and regulations of Canada, all of which are applicable under section 120 of the *National Defence Act*, would not suffice to cover all, or most, of the conduct of members of Canadian Forces serving outside Canada that Canada would wish to prosecute them for, and whether therefore, section 121 of the *National Defence Act* concerning foreign law should not be repealed. Could not disciplinary offences take care of the rest so that there would be no need for Canadian service tribunals to try Canadian service personnel for offences under foreign laws?

We appreciate that contraventions of local laws in foreign countries may be difficult to charge properly under Canadian enactments — for example, traffic offences. In this connection the House of Lords in the English case of *Cox* v. *Army Council*[208] looked at the issue (on appeal) as to whether, under the wording of section 70 of the *Army Act, 1955*, a British soldier could, in respect of his conduct in Germany, legally be convicted of an offence under the *English Road Traffic Act, 1960* (which in itself was restricted to applicability in England). The headnote in that case reads:

> By section 70 of the *Army Act*, 1955: "(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section. (2) In this Act the expression 'civil offence' means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law; and in this Act the expression 'the corresponding civil offence' means the civil offence the commission of which constitutes the offence against this section...."
>
> By section 3(1) of the *Road Traffic Act*, 1960: "If a person drives a motor vehicle on a road without due care and attention, or without reasonable

consideration for other persons using the road, he shall be liable on summary conviction to a fine not exceeding £40....''

By section 257(1): ''... 'road' means any highway and any other road to which the public has access, and includes bridges over which a road passes....''

The appellant, while serving with the British Army in Germany, was charged before a district court martial held there with ''committing a civil offence contrary to section 70 of the *Army Act*, 1955, that is to say, driving without due care and attention contrary to section 3(1) of the *Road Traffic Act*, 1960, in that he at Sundern on September 15, 1960, drove a motor vehicle on a road without due care and attention.'' He was convicted: —

Held, (1) that section 70 of the [Army] Act of 1955 is an offence-creating section, providing that acts or omissions which apart from it would not be offences become offences by virtue of it....

(2) That if the offence charged is one of a nature that can be committed only in England the section cannot operate....

(3) That, even though the *Road Traffic Act*, 1960, had no application except to acts done on the roads of England (post, p. 72), the offence charged had a character of universality which brought it within the scope of section 70 of the Act of 1955....

Per Lord Reid. The question is not whether the road on which the appellant was driving was a road within the meaning of the *Road Traffic Act*, but whether there was the requisite degree of similarity between what he did and an act done in England which would have been contrary to section 3(1) of that Act....

The Canadian counterpart of section 70 of the British *Army Act* is paragraph 120(1)(*b*)of the *National Defence Act*[209] of Canada which reads:

> **120** (1) An act or ommission ...
>
> (*b*) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada;
>
> is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).
>
> (2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,
>
> (*a*) if the conviction was in respect of an offence
>
> (i) committed in Canada, under Part XII of this Act, the *Criminal*

Code or any other Act of the Parliament of Canada and for which a minimum punishment is prescribed, or

(ii) committed outside Canada under section 218 of the *Criminal Code*,

impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or

(*b*) in any other case,

(i) impose the penalty prescribed for the offence by Part XII of this Act, the *Criminal Code* or that other Act, or

(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

The decision in *Cox* v. *Army Council* may broaden somewhat the intended scope of the provisions of section 120 of the *National Defence Act*; but, given the division of legislative powers between the federal Parliament and the provincial legislatures in Canada, section 120 of the *National Defence Act* as it is now worded could never be construed to be as wide as its British counterpart — section 70 of the British *Army Act*. For example, a road traffic incident abroad, that would have been an offence under a provincial *Highway Traffic Act* if it had taken place in Canada, cannot be prosecuted as such under section 120 of the *National Defence Act*, because that section only incorporates Canadian *federal* offences; whereas conduct outside England that would have been an offence under the *English Road Traffic Act* if it had taken place in England can be prosecuted before British military tribunals under section 70 of the British *Army Act*. Still, given *Criminal Code* offences such as criminal negligence in the operation of a motor vehicle (subsection 233(1)), dangerous driving (233(4)) and impaired driving (234(1)), we wonder whether there is really any need to retain section 121 of the *National Defence Act* to accommodate prosecution by Canadian military courts of motor vehicle offences under foreign law committed by members of the Canadian Forces outside Canada and persons accompanying them. They could be charged under section 120 of the *National Defence Act* and the *Criminal Code*.

On the other hand we recognize that more than motor vehicle offences are involved and that there are benefits to Canada and the accused in our courts being able to try offences under foreign law. In particular:

(a) if foreign criminal law is to be applied to Canadians it can be applied *by* Canadians using Canadian procedures and punishments which, while they may not necessarily be superior to those of the local law, are *ones* with which the accused is probably at least generally aware, and in respect of which the procedural law (at least) is readily available in a language that he understands; and

(b) it puts Canadian authorities in a better position to request foreign authorities to waive their jurisdiction, for they (Canadian authorities) can say that Canadian tribunals have jurisdiction under Canadian law to try persons charged with offences against the foreign law.

Furthermore, since, in private international law (conflicts), the courts of one state regularly apply the laws of other states, and since the choice of law principles of "reasonableness" and "*forum conveniens*" and "closest connection" developed in private international civil law are spreading to public international criminal law, why should not Canadian courts, in cases where these principles obtain, apply the foreign criminal law — particularly when the foreign state agrees, or at least does not object, to its criminal law being applied in a trial before a Canadian court? Indeed, Canadian authors Williams and Castel have suggested the adoption of a "proper law" concept in criminal cases outside the military context. In their view :

> If the "proper law" concept were adopted, it would not matter where the case were tried. In this way the problem of jurisdiction over the offence would become less important as the forum would not necessarily be applying its own law.[210]

But there is still another point to consider. If it is necessary to make persons outside Canada, who are subject to the Code of Service Discipline, subject to offence-creating provisions in addition to the provisions of Canadian federal enactments, why not apply provincial law? Section 120 of the *National Defence Act* could be amended to incorporate offences under the law of the appropriate province of Canada in each case. Of course, some mechanism for designation or choice of provincial law in each case would have to be provided in the legislation — perhaps based on the official statement of ordinary residence for voting purposes that forms part of the Canadian Forces records of each member of the Forces under section 27 of Schedule II of the *Canada Elections Act*.[211]

After having looked at reasons for and against the retention of section 121 of the *National Defence Act* we think that all we can do at this stage is raise the matter for governmental consideration.

RECOMMENDATION

62. That the Government of Canada consider whether present provisions of section 121 of the *National Defence Act* should be repealed and, if so, whether to replace the foreign law offences with offences against the laws of the provinces of Canada.

CHAPTER FOURTEEN

Extradition/Rendition

Whenever a person in Canada is charged with, or convicted of, an offence under foreign law by authorities of another country, or a person in another country is charged with or convicted of an offence under Canadian law, a question arises as to what procedures and means are available to apprehend and return the offender or fugitive to the other country or Canada respectively.

The formal method and procedure whereby a person who is in one country may be apprehended by the authorities of that country and turned over to the authorities of another country on a charge of having committed an offence or for having been convicted of an offence, is called "extradition" or, as between British Commonwealth countries, "rendition."

Extradition or rendition may not be necessary. The accused person may voluntarily return to the country in which he is to be tried, or, as happened recently to a Canadian citizen in Toronto who was accused of crimes in Florida, he may be abducted by officials or agents of that country while in another country. It is interesting to note that in the latter event, even though the abduction itself could well be an offence under the criminal law of the country where it occurred, and could, as an infringement of the sovereignty of that country, also be contrary to international law, a resultant trial (on the substantive offence in respect of which the accused was returned) in England, the United States or Canada would appear to be lawful under the law of those countries.[212]

International law does not confer a right on any country to extradite a person from another country. One must therefore look to extradition treaties or other relevant agreements between countries to ascertain what countries have what extradition rights *vis-à-vis* what other countries.

Extradition from Canada is governed by the *Extradition Act*[213] and treaties between Canada and other countries.

Extradition to Canada is legally governed by treaties between Canada and other countries and practically by the implementing legislation of the other countries.

Rendition from Canada is governed by the *Fugitive Offenders Act*.[214]

Rendition to Canada is governed by the counterpart of the British *Fugitive Offenders Act* in force in the other British country concerned.

By section 2 of our *Fugitive Offenders Act*, rendition from Canada applies, in respect of accused persons, only to offences committed "in any part of Her Majesty's Realms or Territories *except* Canada." The expression "Her Majesty's Realms and Territories" is not defined in the *Fugitive Offenders Act*. It is defined in the *Interpretation Act*[215] to mean "all realms and territories under the sovereignty of Her Majesty."

By the definition of "fugitive" in section 2 of the *Extradition Act*, a person may only be extradited from Canada for an offence "committed within the jurisdiction of a foreign state." It is not clear whether the word "jurisdiction" as used in section 2 means "territory" or other bases of criminal jurisdiction. Williams and Castel feel that although :

> [a]t one time the use of the word "jurisdiction" may have had connotations of the strict territorial principle [,] [t]oday a wider approach is taken and unless territory is stressed in the treaty, "jurisdiction" may be interpreted to include all the bases of jurisdiction.[216]

However, no authority is cited for that statement, and the wording of the two Acts as quoted above could tend to the opposite conclusion — especially when read in the light of cases such as *Re Commonwealth of Virginia and Cohen*.[217]

The *Extradition Act* and the *Fugitive Offenders Act* have other serious shortcomings — a number of which would have been corrected if *Bill S-9*, which was introduced in 1979, had been passed. That Bill would have enacted a new *Fugitive Offenders Act* and modernized the *Extradition Act*. Unfortunately, it died on the Order Paper. We are therefore left with our two Acts that :

(a) while prohibiting "extradition" for political offences permit "rendition" for them;

(b) while asserting that an accused "extradited" for one crime cannot be tried for another, do not provide this safeguard for "renditions"; and

(c) while, for "extradition" purposes, hold that the conduct in question must amount to a criminal offence under the law of both the requesting state and Canada, do not make this a requirement for "rendition" where an offence against the requesting state law suffices.

The above differences between "extradition" and "rendition" were probably justifiable when a common system of criminal law and jurisdiction applied to all "Her Majesty's Realms and Territories." It is doubtful that they are justifiable today given the great changes in the form of government and in the law of many of the states of the Commonwealth that have occurred since the *Fugitive Offenders Act* was drafted as the United Kingdom's *Fugitive Offenders Act* of 1881.

While we cannot, in the course of this general study on jurisdiction, do more than scratch the surface of the large and complex subjects of extradition and rendition, we have seen enough to convince us of the need to modernize our statutes concerning these subjects. However, before that can be done, the federal Government will have to seek answers to questions such as : Should "political offence" be defined in legislation? Does Canada need two Acts? Would not one suffice? Is there any longer a need to differentiate between "extradition" and "rendition?" Should depositions from other countries admitted in evidence at extradition hearings in Canada be subject to the hearsay rule or be subject to their deponents being cross-examined?

RECOMMENDATION

63. That the *Extradition Act* and the *Fugitive Offenders Act* be amended to provide for uniformity of treatment of persons under both Acts.

CHAPTER FIFTEEN

Double Jeopardy

Whenever jurisdiction is exercised by a court of one state over an offence committed outside its territory, a court of another state will usually have concurrent jurisdiction over the same offence. In such cases there is double jeopardy.

Pursuant to paragraph 11(*h*) of the *Canadian Charter of Rights and Freedoms* : [a]ny person charged with an offence has the right ... if finally acquitted of the offence not to be tried again and, if finally found guilty and punished for the offence, not to be tried or punished for it again. The *Criminal Code* provides protection against being tried twice in Canada for substantially the same offence (section 535). However, apart from a few statutory provisions in respect of particular offences,[218] Canadian law does not expressly provide, and it is difficult to assert with any certainty, what would happen if a person were charged before a Canadian court with an offence for which he had been previously tried and acquitted or convicted by a court in another country. There are a few English cases indicating that he might successfully plead *autrefois acquit* or *autrefois convict*, but they do not delve deeply into the problem.[219]

The validity of the pleas of *autrefois acquit* and *autrefois convict* depends upon whether the offence charged is "substantially *the same as*"[220] the offence upon which the accused was previously tried. In the international context however, one would rarely be faced with two exactly corresponding offences.[221] In our opinion the principle of double jeopardy in respect of extraterritorial offences or transnational offences should therefore apply to "substantially *similar*," rather than "substantially *the same*" offences under the laws of Canada and the other country concerned. Certainly they would have to conform in terms of what conduct constituted the offence and possibly in terms of the gravity of the offence. (The type and severity of the penalty prescribed in the law could, among other things, be indicators of the gravity.)

Though our final recommendations on this aspect of extraterritorial jurisdiction may have to await an opportunity for this Commission to do an in-

depth study of double jeopardy generally, we are inclined at the moment to agree with the sentiments expressed by Professor Glanville Williams that, where a person has previously stood trial in one state :

> [J]ustice requires that [the] accused person should be able to plead *autrefois convict* or *acquit* in a ... [second] state to the same extent as if he had previously stood trial in [the second state].[222]

The *Criminal Code* so provides with respect to some, but relatively few, offences, namely : (i) offences relating to aircraft, (ii) offences against internationally protected persons, (iii) offences by public employees, and (iv) conspiracy offences.[223]

Under English law an acquittal by a court of competent jurisdiction outside England is a bar to an indictment for the same offence before any tribunal in England.[224] But should that be so in all cases of acquittal? If an acquittal in a foreign court was based on a defence that could not successfully be advanced in Canada, justice does not necessarily require that further proceedings be barred in Canada. If, for example, in State "A" it is a defence (to a charge of murder or manslaughter against a husband for killing his wife) to prove that the husband killed his wife when he caught her in an act of adultery, should Canadian courts be denied jurisdiction in the case, say, of a federal public servant of Canada who kills his spouse in State "A" and, after acquittal in State "A," is returned to Canada and here charged with murder under subsection 6(2) of the *Criminal Code*? What if the foreign acquittal was based on a defence of lapse of time which is accepted in some countries as a plea in bar of trial?

Is a subsequent trial by a court in Canada (after a trial in another country by a foreign court) really any different in principle from a new trial by a court in Canada, ordered, on appeal from a trial in Canada, because of an error in law by the court at the first trial in Canada? It would be true to say that what was applied at the first trial in Canada was not "law" in Canada. Similarly, the acquittals by the foreign courts mentioned above would clearly be based on grounds that were not "law" in Canada. We are therefore inclined to differentiate between the legal recognition to be given by Canadian courts to acquittals by foreign courts as compared to convictions by foreign courts. However, the consensus of all the consultation groups with whom we have discussed the matter is that it would be presumptuous and unreasonable to so differentiate. Accordingly, the following recommendation has been drafted with a view to attracting further comments as to whether the words in square brackets should be deleted.

RECOMMENDATIONS

64. That the *Criminal Code* provide for a plea of *autrefois convict* or *autrefois acquit* or pardon being based on a previous trial in a state other than

Canada for any offence substantially similar to the one in respect of which the plea is made, and for such a plea to be treated by Canadian courts as though the plea were based on a trial in a Canadian court [unless, in the case of a previous acquittal, it resulted from a substantive or procedural defence not available under Canadian law].

65. As a matter of form, we also recommend that the subject of double jeopardy in respect of convictions and acquittals by foreign courts be dealt with in a new provision in the General Part of the *Criminal Code*, and that subsections 6(4) and 423(6) be repealed.

PART SIX :

CONCLUSION

CHAPTER SIXTEEN

Proposed Reformulation of the Jurisdictional Provisions of the *Criminal Code* — Discussion

At this point we would like to consider whether the *Criminal Code* adequately provides for trial in Canada of all its extraterritorial offences.

As we have noted earlier in this Paper, the *Criminal Code*, and some other Canadian statutes that contain criminal law provisions, specifically mention in some of their offence-creating sections that the act or omission thereby prohibited constitutes the offence when the act or omission occurs *outside* Canada, for example, subsections 58(1) (passports) and 75(2) (piracy) of the *Criminal Code*, and section 13 of the *Official Secrets Act*. These we will refer to as "extraterritorial offence sections."

Some extraterritorial offence sections (in addition to providing for the extraterritorial applicability of the offence) also specify which criminal courts in Canada have jurisdiction to try the extraterritorial offence; in the *Criminal Code* they are subsections 6(3) and 423(5). These we will refer to as "extraterritorial jurisdiction provisions." However, the remaining extraterritorial offence sections of the *Criminal Code* do *not* state what courts shall have jurisdiction to try the offences. These are : subsection 46(3) (treason), section 58 (passport forgery), section 59 (fraudulent use of certificate of citizenship), section 75 (piracy), section 76 (piratical acts), paragraph 243(1)(*b*) (sending or taking unseaworthy ship to sea) and paragraph 254(1)(*b*) (bigamy).

In Chapter Seven we gave some reasons why we think that Parliament should expressly confer jurisdiction on Canadian courts to try the extraterritorial offences of treason and bigamy. We would like now to examine in more detail the question whether Canadian courts have jurisdiction to try all the extraterritorial offences mentioned in the immediately preceding paragraph.

Must it be assumed that the subsequent presence of the accused within the territorial jurisdiction of any court of criminal jurisdiction in Canada is

sufficient to confer jurisdiction on that court to prosecute him or her for an extraterritorial offence such as an offence of piracy committed in the Indian Ocean in foreign-registered ships? Paragraph 428(*a*) of the *Criminal Code* reads :

> **428.** Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
>
> (*a*) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; ...

But does paragraph 428(*a*) cover extraterritorial offences? The following points must be considered :

(a) At common law the accused has a *prima facie* right to be tried in the country in which the offence was committed, and this rule, in the absence of a court-ordered change of venue, continues except as *modified by this section*.[225]

(b) The opening words of section 428 of the *Criminal Code* : "Subject to this Act," inclusively refer to section 434 of the *Criminal Code* which states in part : "(1) ... nothing in this Act authorizes a court in a province to try an offence committed entirely in another province." Subsection 3 of section 434 provides exceptions "where an accused is charged with an offence that is alleged to have been committed *in Canada* outside the province in which he is."

(c) Section 437 of the *Criminal Code* provides that "[w]here an offence is committed *in a part of Canada, not in a province*, proceedings in respect thereof may be commenced and the accused may be charged, tried and punished in any territorial division in any province in the same manner as if that offence had been committed in that territorial division."

(d) There is no provision similar to section 437 with respect to offences committed *outside* Canada.

(e) Section 455 of the *Criminal Code* provides in what cases a Justice may receive an information.

(f) It will be noted that paragraph 455(*a*) of the *Criminal Code* is not unqualified authorization for a Justice to receive an information in respect of an offence committed anywhere outside his territorial jurisdiction; rather, the Justice shall only receive an information where it is alleged that the person has committed anywhere *an indictable offence that may be tried in the province in which the Justice resides*. As mentioned above, the

sections of the *Criminal Code* (434 *et seq.*) that deal with out-of-province offences only deal with offences committed in other parts of Canada.

Thus, the *Criminal Code* scheme of things would seem to be that, insofar as offences committed outside Canada are concerned, it is left to individual offence provisions of the *Criminal Code* such as sections 6 and 423, or individual provisions of other Acts such as subsections 6(1), (4) and (6) of the *Aeronautics Act*,[226] to provide expressly for the jurisdiction of courts in Canada to try extraterritorial offences.

But, regardless of what is the present scheme of things, it is obvious that a new *Criminal Code* should expressly provide not only what offences can be committed outside Canada, but also what courts in Canada have jurisdiction to try those offences. The obvious possibilities are :

(a) to insert an extraterritorial jurisdiction provision in every extraterritorial offence section; or,

(b) to insert a general extraterritorial jurisdiction provision in the General Part of the *Criminal Code* or in the Jurisdiction Part (now Part XII) of it, *and* either :

(i) word the general extraterritorial provision so that it applies to all extraterritorial offences, in which case the present extraterritorial jurisdiction provisions of extraterritorial offence sections could (perhaps should) be deleted, or

(ii) word the general extraterritorial jurisdiction provision so that it applies only to extraterritorial offence sections other than those that now include extraterritorial jurisdiction provisions.

We prefer the (b)(i) approach.

Furthermore, if the General Part of the *Criminal Code* were to spell out fully which offence-creating provisions have extraterritorial *applicability*, there would be no need for each extraterritorial offence section to state expressly that it applies outside Canada, for example, section 58 (passport forgery).

Adoption of these approaches would mean that no longer would one have to look in different Parts of the *Code* to answer the two questions : Does this offence section of the *Criminal Code* apply outside Canada and what Canadian courts have jurisdiction to try the offence? Rather, the answers would be readily and simply available in the General Part of the *Criminal Code*. The *Criminal Codes* of many countries have been structured in that way; they include the People's Republic of China, Columbia, the Federal Republic of Germany, Greece, Italy, Norway, Poland and Turkey.[227]

What we envisage then is a *Criminal Code* :

(a) which would no longer be *implicitly* based on the premise that the applicability of its offence sections is limited to the territory of Canada;

(b) whose offence sections would *not* expressly restrict themselves to the territory of Canada; (there would be no change here from most of the present offence sections of the *Criminal Code* but there would be changes in sections such as 46(1) which speak of "in Canada");

(c) which would no longer include in extraterritorial offence sections, provisions that the offences are applicable outside Canada (sections 6, 46(3), 58, 59, 75, 76, 254(1)(*b*) and 423(3) and (4));

(d) which would no longer include in some extraterritorial offence-creating sections, provisions as to the jurisdiction of Canadian courts over the respective extraterritorial offences, for example, subsections 6(3) and 423(5); but

(e) which would include a provision in the General Part stating what offences are exceptions to the general rule that the applicability of the offence sections under the *Criminal Code* is territorially restricted to Canada; and

(f) which would include a jurisdiction provision in the General Part stating the conditions under which persons may be tried by Canadian courts for the exceptional offences (that is, those referred to in (e)) committed outside Canada.

RECOMMENDATIONS

66. That in the *Criminal Code* :

(a) the words "in Canada" or "outside Canada" or words similar thereto, be deleted from offence-creating provisions;

(b) the General Part specify which offence-creating provisions have extraterritorial applicability;

(c) the jurisdictional provisions be deleted from offence-creating sections 6 and 423; and

(d) the General Part specify the jurisdiction of courts in Canada to try the specified extraterritorial offences.

67. That the General Part expressly state also that, except as otherwise provided in the *Criminal Code* or any other Act of the Parliament of Canada, the applicability of the offence-creating sections of the *Criminal Code* be limited to conduct in Canada.

The purpose of this recommendation would be to codify the common law presumption mentioned by Lord Reid in 1971 that :

> It has been recognized from time immemorial that there is a strong presumption that when Parliament, in an Act applying in England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England.[228]

CHAPTER SEVENTEEN

Summary of Recommendations

(Page references are to the recommendations themselves, which may be preceded or followed by a discussion of their content.)

I. General

1. In the General Part of the *Criminal Code* briefly mention the international law bases of national criminal jurisdiction, and that, subject to relatively few statutory exceptions, the basis of Canadian criminal law and jurisdiction of Canadian courts is the territorial principle. (See page 14)

II. Place of Commission of Offence

A. Canadian Territory

2. In the General Part of the *Criminal Code* define "Canada," that is, the territorial limits of Canada for criminal law purposes, as including the Canadian Arctic, the internal waters of Canada and the territorial sea of Canada. (See page 17)

B. Territorial Sea of Canada

3. Amend subsection 433(2) of the *Criminal Code* to provide that the consent of the Attorney General of Canada (for prosecution of offences that occur in the territorial sea of Canada) is only required for prosecution of non-Canadians for indictable offences on *non*-Canadian ships. (See page 18)

4. Provide in the *Criminal Code* that charts issued by the Minister of Energy, Mines and Resources under section 6 of the *Territorial Sea and Fishing Zones Act* are conclusive evidence of the limits of the territorial sea of Canada. (See page 20)

5. Provide in the *Criminal Code* that, in the absence of a chart having been issued by the Minister of Energy, Mines and Resources, the Secretary of State for External Affairs may conclusively declare whether or not a place is within the territorial sea, internal waters, fishing zones, exclusive economic zones, or continental shelf of Canada. (See page 20)

6. Define the territorial sea of Canada in the *Criminal Code* by reference to section 3 of the *Territorial Sea and Fishing Zones Act.* (See page 20)

7. Amend defective definition of "territorial sea" in section 3 of the *Territorial Sea and Fishing Zones Act* to define the outer limits of the territorial sea as follows :

> **... as the outer limits, lines drawn parallel to and equidistant from such baselines so that each point on an outer limit is distant twelve nautical miles seaward from the nearest point of a baseline.** (See page 21)

C. Fishing Zones of Canada

8. Provide in the *Criminal Code* that Canadian criminal law is applicable to, and Canadian courts have jurisdiction over, any offence committed in the fishing zones or exclusive economic zones of Canada by (a) Canadian citizens or (b) by non-Canadian citizens *if*, at the time of the offence, either the offender or the victim was engaged in, or present there in connection with, activities over which Canada has sovereign rights under international law. (See pages 29 and 30)

9. The preceding recommendation applies also to Canadian anti-pollution zones in the Arctic. (See page 30)

10. Provide in the *Criminal Code* that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed on, or

within 500 metres of, any artificial island, installation or structure in the fishing or exclusive economic zones of Canada by a Canadian citizen or by a non-Canadian citizen if, at the time of the offence, either the offender or the victim was engaged in, or was present there in connection with, activities over which Canada has sovereign rights under international law. (See page 31)

D. Continental Shelf of Canada

11. Provide in the *Criminal Code* that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed on or within 500 metres of any artificial island, installation or structure on or over the continental shelf of Canada, by a Canadian citizen or by a non-Canadian citizen if, at the time of the offence, either the accused or the victim was engaged in, or present there in connection with, activities over which Canada has sovereign rights under international law. (See page 33)

E. High Sea

12. Provide in the *Criminal Code* that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, any offence committed by anyone (Canadian citizen and non-Canadian citizen alike) on, or within [500 metres] [one nautical mile] of any artificial island, [ice island], installation or structure under the administration and control of the Government of Canada or of a Province of Canada or an agency thereof on the high seas seaward beyond the territorial seas of Canada, other than on ships of non-Canadian registry, if either the offender or the victim at the time of the offence was engaged in, or there in connection with, activities over which Canada has sovereign rights under international law. (See page 35)

F. Ships

13. Repeal subsection 683(1) of the *Canada Shipping Act* and replace it with a provision in the *Criminal Code* General Part to apply Canadian criminal law to Canadian ships everywhere and to everyone on board them. (See page 43)

14. In respect of offences committed outside Canada on Canadian ships, provide in the *Criminal Code* General Part for jurisdiction to be exercised by a court in any place in Canada where the accused happens to be after committing the offence. (See page 44)

15. If the above recommendations are not adopted to apply Canadian criminal law to everyone on Canadian ships, then sections 154, 240.2 and 243 of the *Criminal Code* should be amended to make them applicable outside Canada. (See page 44)

16. Define "Canadian ship" in the *Criminal Code* by reference to the definition of it in section 2 of the *Canada Shipping Act*. (See page 44)

17. Repeal subsection 683(2) of the *Canada Shipping Act* that confers jurisdiction on courts in Commonwealth countries over offences by *British subjects* that occur on Canadian ships. (See page 45)

18. Provide in the *Criminal Code* General Part that Canadian criminal law be applicable to, and Canadian courts have jurisdiction over, extraterritorial onshore offences by crew members of Canadian ships, but not over offences by persons who were *former* crew members when they committed them. Amend section 684 of the *Canada Shipping Act* accordingly. (See page 46)

19. Provide that subsection 682(1) of the *Canada Shipping Act* and subsection 433(1) of the *Criminal Code* be examined by the Departments of Justice and Transport for duplicity and inconsistency. (See page 48)

20. Provide in the *Criminal Code* that the consent of the Attorney General of Canada be required to prosecute a person for an offence in or by a non-Canadian ship outside Canada. (See page 49)

21. Amend subsection BI-6(4) of the *Maritime Code* to state clearly what is intended and to describe accurately the jurisdiction of the authorities of the port-state over Canadian ships in foreign ports. (See page 51)

22. Amend subsection BI-4(2) of the *Maritime Code* so that it does *not* say that only *some* of our criminal law applies to foreign ships in passage through the territorial sea of Canada, but will say that *enforcement* of our criminal law will only be undertaken in the circumstances mentioned in that subsection. (See page 51)

23. Provide in the *Criminal Code* (rather than in the *Maritime Code*) unequivocally that the criminal law of Canada be applicable to all Canadian ships and all persons on board them wherever they may be. (See Recommendations 13 and 14 and page 52).

G. Aircraft

24. Delete paragraph 6(1)(*b*) from the *Criminal Code* as it does not seem justifiable under customary or conventional international law [or amend it to apply to Canadian citizens only]. (See page 56)

25. Delete subparagraph 6(1)(*a*)(ii) from the *Criminal Code*. (See page 57)

26. Amend section 76.1 of the *Criminal Code* to create the clear offence of hijacking that Canada is obligated to do as a party to the *Hague Convention* of 16 December 1970. (See page 58)

27. In the *Criminal Code* create separate offence(s) of items (*a*) through (*d*) of section 76.1 of the *Code*. (See page 58)

28. Provide in the *Criminal Code* for an offence of any act of violence against passengers or crew of an aircraft in flight in connection with the offence of hijacking, and thereby implement Article 4(1) of the *Hague Convention*. (See page 60)

29. Amend the *Criminal Code* subsection 6(1.1) to provide the several bases of trial jurisdiction prescribed in Article 4(1) of the *Hague Convention*. (See page 60)

30. To implement Article 1(1) of the *Montreal Convention* of 23 September 1971, amend subsection 6(1.1) of the *Criminal Code* to limit the extraterritorial applicability of section 76.2 of the *Criminal Code* to things done *intentionally*. (See page 62)

31. Amend subsection 6(1.1) of the *Criminal Code* to provide for the applicability of Canadian criminal law (to the offences proscribed in the *Montreal Convention*) in accordance with *all* the criteria prescribed in the *Montreal Convention*. (See page 63)

32. As an interim measure pending a new *Criminal Code* :

(a) amend paragraph 432(*d*) of the *Criminal Code* to make it apply to offences committed in Canada or offences deemed to have been committed in Canada;

(b) amend subsections 6(1) and (3) of the *Criminal Code* to make them apply to offences committed outside Canada only; and

(c) specify in subsection 6(3) that it confers jurisdiction in addition to paragraph 432(*d*). (See page 67)

III. Status of Accused

A. Public Servants

33. Delete the reference to the *Public Service Employment Act* from subsection 6(2) of the *Criminal Code* and thereby make the subsection applicable

to all federal public servants serving abroad. (See Recommendations 34 and 61 and page 69)

34. Provide in the *Criminal Code* that, apart from employees of the Government of Canada who are Canadian citizens or who otherwise owe allegiance to Canada, only employees who commit offences on federal government property, or against the security of Canada, or in the course or within the scope of their employment, are subject to Canadian criminal law and may be tried by Canadian courts for offences committed while on Canadian government service outside Canada. (See page 70)

B. Armed Forces

35. Mention in the *Criminal Code* the large class of people to whom the criminal law of Canada is generally applicable outside Canada, namely persons subject to the *National Defence Act*'s Code of Service Discipline including, among others, members of the armed forces, members of civilian components and dependants of those members accompanying members on duty abroad and the jurisdiction of Canadian civil and military courts over them pursuant to the *National Defence Act*. (See page 71)

C. Royal Canadian Mounted Police

36. Provide in the *Criminal Code* that members of the R.C.M.P. (and members of their households accompanying them) on service outside Canada be subject to Canadian criminal law in respect of their conduct there — at least to the extent of their diplomatic immunity from criminal prosecution by the host state. (See page 72)

D. Canadian Citizens

37. Provide in the General Part of the *Criminal Code* that courts in Canada have jurisdiction to try Canadian citizens for the offences of bigamy (paragraph 254(1)(*b*)) and treason (paragraph 46(3)(*a*)) when committed outside Canada. (See page 75)

38. Amend federal extraterritorial criminal law enactments such as the *Official Secrets Act* and *Foreign Enlistment Act* to provide uniformity of language and accuracy of terminology, for example, "Canadian citizen" rather than "Canadian national." (See page 76)

39. Provide in the General Part of the *Criminal Code* that courts in Canada have jurisdiction to try anyone for offences under sections 58 and 59 of it concerning passports and certificates of Canadian citizenship when committed outside Canada. (See page 79)

40. Provide in the *Criminal Code* that anyone who makes or utters counterfeit Canadian currency inside or outside Canada commits an offence for which he may be tried by courts in Canada. (See page 80)

IV. Extraterritorial Offences

A. Piracy

41. The Departments of Justice and External Affairs should examine sections 75, 76, 76.1 and 76.2 of the *Criminal Code* with a view to defining "piracy" more precisely. (See page 81)

42. Provide in the *Criminal Code* General Part that courts in Canada have jurisdiction to try anyone for piracy and other piratical offences committed outside Canada. (See page 82)

B. War Crimes

43. The Government of Canada should authorize an in-depth study of the subject "war crimes" with a view to drafting legislation to replace the outdated 1946 *War Crimes Act*. (See page 86)

C. Genocide

44. A study should be made to determine what amendments need be made in the *Criminal Code* to implement the 1948 *Genocide Convention*. (See page 90)

D. Slavery

45. The Departments of Justice and External Affairs and the Ministry of the Solicitor General should examine those international Conventions on this subject that are binding on Canada, and the existing Canadian law, to determine whether the non-applicability of British legislation under section 8 of the *Criminal Code* has resulted in there now being no implementing legislation applicable to Canada, and whether new legislation is required. (See page 92)

E. Hostage Taking

46. Provide in the *Criminal Code* for Canadian courts to exercise jurisdiction (over hostage taking offences outside Canada) as prescribed in the 1979 United Nations *International Convention against the Taking of Hostages* — that is, amend draft subsection 6(1.3) of the *Criminal Code* as it appears in the proposed *Criminal Law Reform Act, 1984* (*Bill C-19*). (See page 95)

F. Protection of Nuclear Material

47. If draft subsections 6(1.5) and (1.6) of the *Criminal Code* as suggested in the draft *Criminal Law Reform Act, 1984* are enacted, they should not deal with the offence of conspiracy. (See page 97)

48. Define nuclear material physical protection offences in the Special Part of the *Criminal Code*, and prescribe the jurisdiction of courts over them in the General Part (rather than combining these two things as appears in draft subsections 6(1.4), (1.5), (1.6) and (1.7) of the *Criminal Code* as proposed in *Bill C-19*, the *Criminal Law Reform Act, 1984*). (See page 97)

V. Transnational Offences

49. Provide in the General Part :

(a) that an offence is committed in Canada when it is committed in whole or in part in Canada, and

(b) that it is committed "in part in Canada" when,

(i) some of its constituent elements occurred outside Canada and at least one of them occurred in Canada, and a constituent element that occurred in Canada established a real and substantial link between the offence and Canada, or

(ii) all of its constituent elements occurred outside Canada, but direct substantial harmful effects were intentionally or knowingly caused in Canada. (See page 105)

50. Provide in the General Part that where an act occurs *in* Canada, if its harmful consequences are designed to occur, or are likely to occur, or do in fact occur only in another state or states *which does (do) not prohibit the act by its criminal law*, the act *in* Canada that causes such consequences, even though it constituted a criminal act in Canada, shall not be prosecuted in Canada. (See page 108)

Alternative 50. Alternatively we would recommend that where a criminal act occurs *in* Canada, the harmful effects of which are designed to occur or are likely to occur or do in fact occur in another state and no substantial harmful effects are felt in Canada, the offence *may be prosecuted in Canada but* that an accused shall *not be convicted* of that offence *if* he proves that his conduct did not amount to an offence under the criminal law of the state in which the harmful effects were designed to occur, or were likely to occur, or did in fact occur. (See page 108)

51. Provide in the General Part of the *Criminal Code* that where an act occurs *outside* Canada that constitutes an offence under Canadian law, *but not under the law of the state where it occurred*, a person shall not be [convicted by a Canadian court] [prosecuted in a Canadian court] for it unless harmful consequences were knowingly or intentionally thereby produced in Canada by that person. (See page 109)

52. Provide in the General Part, for omissions in Canada and outside Canada, in the same way as we have recommended in respect of *acts* in Canada and outside Canada in Recommendations 50 and 51. (See page 110)

VI. Inchoate Offences

A. Conspiracies

53. Consider whether a provision should be inserted in the *Criminal Code* to provide that a conspiracy in Canada to commit outside Canada one of certain

particularly heinous offences would constitute a crime of conspiracy in Canada regardless how they may be regarded elsewhere. (See page 114)

54. Delete subsections 423(4), (5) and (6) of the *Criminal Code* and provide in the General Part that Canadian courts have jurisdiction to try conspiracies committed outside Canada that have as their object an act or omission in Canada that is an indictable (serious) *offence* [under the federal law of Canada] if an overt act in furtherance of the conspiracy has been performed in Canada; provided that an overt act is not required in respect of certain offences to be prescribed by Parliament such as the unlawful importation of drugs into Canada. (See page 117)

B. Attempts

55. Provide in the *Criminal Code* that it is an offence to attempt in Canada to commit in another country an act or omission that is an offence under the law of both countries. (See page 120)

56. Provide in the *Criminal Code* that it is an offence to attempt outside Canada to commit a crime if

(a) the crime attempted was an extraterritorial offence under Canadian federal legislation, or

(b) all the following conditions are met :

(i) it was an attempt outside Canada knowingly to do something in Canada,

(ii) that that "something" would constitute an offence under Canadian federal law and a criminal offence under the law of the place where the attempt took place, and

(iii) some overt act in [connection with] [furtherance of] the attempt occurred in Canada, unless the attempt was to commit in Canada an offence inherently harmful to Canadian society — such as unlawful importation of drugs to be specified by Parliament as an exception to the "overt act" requirement. (See page 120)

C. Counselling, Inciting or Procuring

57. Subject to the same conditions as we have recommended in Recommendations 55 and 56 for attempts, we recommend that the *Criminal Code* make it an offence to counsel, incite or procure, inside or outside Canada a crime that is not completed. (See page 121)

58. Provide in the *Criminal Code* that anyone who counsels or procures the commission of an offence that is subsequently committed, is liable, under section 22 of the *Criminal Code*, *as a party to the offence* if the counselling or procuring was done outside Canada or in Canada for (a) the commission in Canada of an offence, or (b) the commission outside Canada of an extraterritorial offence under Canadian federal legislation, for example, passport forgery under section 58 of the *Criminal Code*. (See page 122)

59. Provide in the *Criminal Code* that it be an offence to be an accessory after the fact by having received, comforted or assisted a person outside Canada who has committed an offence inside or outside Canada which is punishable under Canadian federal legislation, *if* the accessory had offered or agreed, *prior* to the commission of the substantive offence, to assist any perpetrator of the substantive offence after the commission of the offence. (See page 122)

VII. Miscellaneous Matters

A. Diplomatic Immunity

60. Mention in the General Part of the *Criminal Code* all the classes of persons who are immune from the criminal jurisdiction of Canadian courts, and also mention the statutes that confer the immunity. (See page 125)

61. Provide in the General Part of the *Criminal Code* that members of the household of federal public servants outside Canada who are immune from local foreign criminal jurisdiction under the *Vienna Conventions*, be subject to Canadian criminal law and to prosecution in Canada for indictable offences committed in the host state under the same conditions as is the public servant concerned. (See Recommendations 33 and 34 and page 125)

B. Canadian Forces outside Canada

62. The Government of Canada should consider whether to repeal section 121 of the *National Defence Act* (pursuant to which persons subject to the Code of Service Discipline under the *National Defence Act* may be tried by Canadian courts using Canadian procedures for offences under foreign law), and, if so, whether to replace the foreign law offences with offences against the laws of the provinces of Canada. (See page 134)

C. Extradition and Rendition

63. Amend the *Extradition Act* and *Fugitive Offenders Act* to provide for uniformity of treatment of persons under both Acts. (See page 137)

D. Double Jeopardy

64. Provide in the *Criminal Code* that a plea of *autrefois convict* or *autrefois acquit*, based on a previous trial in a state other than Canada, for an offence substantially similar to the one in respect of which the plea is made, be treated by Canadian courts as though the plea were based on a trial in a Canadian court [unless, in the case of a previous acquittal, it resulted from a substantive or procedural defence not available under Canadian law]. (See page 139)

65. The subject of double jeopardy, in respect of persons being tried by Canadian courts for offences for which they have already been tried by foreign courts, should be dealt with in the General Part of the *Criminal Code* to apply to all such offences; subsections 6(4) and 423(6) should consequentially be repealed. (See page 140)

VIII. Jurisdiction Provisions of the *Criminal Code* — Reformulation

66. Delete the words "in Canada" or "outside Canada" or words similar thereto, from all the offence-creating provisions of the *Criminal Code* so that there would be no express or implied territorial limitation on *their applicability*; specify in the General Part what offence-creating provisions have extraterritorial applicability; and in the General Part confer jurisdiction on Canadian courts to try the specified extraterritorial offences. (See page 145)

67. Expressly provide in the General Part of the *Criminal Code* that, unless otherwise provided, the offence-creating sections of the *Code* are limited to conduct in Canada; such a statement would codify the common law presumption that "when Parliament creates an offence ... it does not intend it to apply to any act done by anyone in any ... other [country]." (See page 145)

CHAPTER EIGHTEEN

Draft Legislation

To implement the recommendations made in this Paper, we offer draft legislative provisions for inclusion in :

the General Part of a new *Criminal Code* as shown in Section I of this chapter;

the Special Part of a new *Criminal Code* as shown in Section II of this chapter;

other Acts of the Parliament of Canada as shown in Section III of this chapter; and

the General Part of the present *Criminal Code* as shown in Section IV of this chapter (pending the enactment of a new *Criminal Code*).

The draft provisions are worded on the premise that several expressions used in them will be legislatively defined in the General Part of the *Criminal Code*, or in the *Interpretation Act*, as follows :

— "Arctic waters" means the waters described in subsection 3(1) of the *Arctic Waters Pollution Prevention Act* (R.S.C. 1970, 1st Supp., c. 2);

— "Canada" includes the Canadian Arctic, the internal waters and territorial sea of Canada, and the airspace above the territory, internal waters, and the territorial sea of Canada, [Canadian ships and Canadian aircraft];

— "Canadian aircraft" means an aircraft registered in Canada under the *Aeronautics Act*;

— "Canadian court" means ... [Definition is contingent upon the results of an analysis of the court structure being undertaken currently by the Law Reform Commission of Canada];

— "Canadian ship" means a [ship] [vessel] registered in Canada under the *Canada Shipping Act*, or a vessel of the Canadian Forces;

— "exclusive economic zone of Canada" means the exclusive economic zone as defined in Article 55 of the *United Nations Convention on the Law of the Sea*, 1982 in respect of which Canada is the coastal state;

— "fishing zones of Canada" means the fishing zones of Canada as defined in section 4 of the *Territorial Sea and Fishing Zones Act* (R.S.C. 1970, c. T-6) as amended;

— "internal waters of Canada" include any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada;

— "offence" means an offence created by this Act or any other Act of the Parliament of Canada; and

— "territorial sea of Canada" means the territorial sea of Canada as defined in section 3 of the *Territorial Sea and Fishing Zones Act* (R.S.C. 1970, c. T-6).

I. Draft Legislation for a New *Criminal Code* — General Part

FOREWORD

Under international law, Canada as a sovereign state may authorize its courts to try and punish :

(a) any person who commits an offence in whole or in part in the territory, territorial sea or airspace of Canada (the territorial principle);

(b) any person who is a Canadian citizen or who owes allegiance to Her Majesty in right of Canada and who commits an offence anywhere in or outside Canada (the nationality principle);

(c) any person who commits an offence anywhere against the security, territorial integrity or political independence of Canada including counterfeiting its seals, instruments of credit, currency, passports and stamps (the protective principle);

(d) any person who commits an offence anywhere on a ship registered in Canada or an aircraft registered in Canada [practical principle];

(e) any person who commits a universal crime such as piracy [or a war crime] (universality principle);

(f) any alien who commits an offence against a Canadian citizen in a place outside Canada where no other state has criminal jurisdiction or, where another state has criminal jurisdiction which that state does not exercise (passive personality principle).

The ambit of Canadian criminal law and criminal jurisdiction of Canadian courts has historically been based on the territorial principle; only exceptionally did Parliament exercise its power under international law and the Canadian constitution to create extraterritorial offences, for example : treason by Canadian citizens (nationality principle), Canadian passport offences (protective principle), piracy (universal principle), offences on ships and aircraft registered in Canada (practical principle). By and large, most offences committed outside Canada, whether by Canadian citizens or aliens, [such as homicides, assaults, thefts, frauds, criminal negligence] were not covered by the criminal law of Canada and did not come within the jurisdiction of Canadian courts.

This Code does not differ fundamentally from its predecessors as far as the extraterritorial applicability of its offence-creating provisions is concerned and the jurisdiction of Canadian courts is concerned. However, it does differ in form from its predecessors in its presentation of those matters. The general rule of territoriality — both as to the applicability of our criminal law and the criminal jurisdiction of Canadian courts — is now expressly stated in the General Part. Furthermore, the General Part now also specifies the exceptions to the territorial limitation by stating which offence-creating provisions apply outside Canada, and what courts in Canada have extraterritorial jurisdiction to try them. This form of presentation leaves the Special Part free to deal with the definition of offences without being complicated by extraterritorial concerns.

Applicability of Law

1. Offence-creating provisions of this [Act] [Code] and other Acts of the Parliament of Canada are only applicable to conduct anywhere in Canada unless otherwise expressly provided or the context clearly otherwise requires.

2. The offence-creating provisions of this [Act] [Code] and other Acts of the Parliament of Canada are applicable outside Canada to the same extent and under the same conditions that persons may be tried for contraventions of them pursuant to section 7.

Jurisdiction

3. Subject to diplomatic or other immunity under the law, Canadian courts have jurisdiction to try any person for any offence committed in whole or in part in Canada.

4. An offence is committed in part in Canada when

(*a*) any constituent element of the offence occurs in Canada and any

constituent element of it occurs outside Canada, and a constituent element that occurs in Canada establishes a real and substantial link between the offence and Canada, or

(*b*) all of its constituent elements occur outside Canada, but direct, substantial harmful effects are thereby caused to occur in Canada.

5. No person shall be convicted by a Canadian court of an offence for having performed or omitted to perform an act in Canada that causes harmful effects in another state or states but not in Canada, if

(*a*) the harmful effects of the act or omission were designed or intended only to occur [or only to be felt], or were likely only to occur [or only to be felt] in another state or states; and

(*b*) the act or omission, if it had occurred in that other state or states, would not have constituted, or the harmful effects do not constitute [an] [a criminal] offence against the law of that state or one of those states.

6. No person shall be convicted by a Canadian court of an offence for only having performed or omitted to perform an act in a state other than Canada that caused harmful consequences to be felt or to occur in Canada, unless (a) the harmful consequences were direct and substantial, and (b) that that act or omission was an offence under the laws of Canada and the other state, or, if it was not an offence under the law of the other state, that the person intentionally caused the harmful consequences to occur or to be felt in Canada.

7. [Subject to this Act and any other Act of the Parliament of Canada,] Canadian courts have jurisdiction to try persons for offences committed *outside* Canada as follows :

(*a*) any person on a charge of having committed an offence

(i) against an internationally protected person under sections ...,

(ii) against section [58] of forging a Canadian passport or uttering a forged Canadian passport,

(iii) against section [59] of fraudulently using a certificate of Canadian citizenship,

(iv) against section [76] of piratical acts on or in respect of Canadian ships,

(v) against section [76.1] of hijacking an aircraft and any offence against section [76.1] or [76.2] on or in respect of aircraft if

(A) the aircraft involved lands in Canada with the offender on board,

(B) the alleged offender is, after the commission of the offence, present in Canada and is not extradited from Canada pursuant to provisions of relevant treaties to which Canada is a party, or

(C) the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in Canada,

(vi) against Part [X] in respect of Canadian currency,

(vii) against section 24 of "attempt," or against section 422 of "counselling, procuring, or inciting," or against subsection 423(1) of "conspiracy" if an overt act in furtherance thereof has been performed or occurred in Canada, except that an overt act in Canada

is not required for the purposes of this subparagraph in respect of any offence intended unlawfully to import drugs into Canada,

(viii) against section 247.1 (hostage taking) if

(A) the alleged offender is a Canadian citizen, or is not a citizen of any state and ordinarily resides in Canada,

(B) the act or omission that constitutes the offence is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission,

(C) a person taken hostage in the commission of the offence is a Canadian citizen, or

(D) the alleged offender is, after the commission of the offence, present in Canada and is not extradited from Canada pursuant to provisions of relevant treaties to which Canada is a party, or

(ix) against section ... (protection of nuclear material) if the alleged offender is a Canadian citizen or is, after the commission of the offence, present in Canada and is not extradited from Canada pursuant to provisions of relevant treaties to which Canada is a party;

(*b*) any person on a charge of having committed an offence against any Act of the Parliament of Canada in respect of which offence Canadian courts are given extraterritorial jurisdiction over him by or under this [Act] [Code] or any other Act of the Parliament of Canada;

(*c*) any person on a charge of having committed

(i) any offence on board a Canadian aircraft anywhere,

(ii) any offence on board a Canadian ship anywhere,

(iii) any offence in any fishing zone of Canada, exclusive economic zone of Canada or Canadian arctic waters that was

(A) an offence against an Act of the Parliament of Canada [specifically] applicable to activities in the zone or area of waters concerned, or

(B) any offence against any Act of the Parliament of Canada, if either the offender or the victim was at the time [engaged in] [there in connection with] activities over which Canada has sovereign rights under international law,

(iv) any offence on or within [one nautical mile] [500 metres] of any artificial island, installation or structure that is situated

(A) on or over the continental shelf of Canada,

(B) in a fishing zone of Canada or exclusive economic zone of Canada, or

(C) in or on the high seas and under the administration and control of the Crown in right of Canada or a Province of Canada, [other than on a ship of non-Canadian registry],

if either the accused or the victim was at the time of the offence [engaged in] [there in connection with] activities over which Canada has sovereign rights under international law,

(v) the offence of piracy outside the territory or territorial waters of any state;

(*d*) a Canadian citizen or any other person owing allegiance to Her Majesty in right of Canada charged with having committed

(i) treason under section [46] anywhere,

(ii) bigamy (section 254),

(iii) hostage taking (section ...), or

(iv) an offence involving nuclear material (section ...);

(*e*) an employee of the Government of Canada or a member of the Royal Canadian Mounted Police force serving outside Canada, or a member of his or her household accompanying the employee or the member of the force on service outside Canada on a charge of having committed an [indictable] offence

(i) on property owned or occupied by the [Government of Canada] [Crown in right of Canada],

(ii) against the security or property of the Crown in right of Canada,

(iii) while he owed allegiance to [Canada] [Her Majesty the Queen in right of Canada],

(iv) while he is a citizen of Canada, or

(v) (by the employee or member of the force) in the course of his employment,

provided that if the conduct that constitutes the offence under Canadian law was committed in another state, the conduct also constitutes an offence under the law of the other state, and provided further that, if the offender is other than an employee or member of the force, the offender is not a national of or ordinarily resident in that state;

(*f*) a member of the Canadian Forces or other person to the extent provided in the *National Defence Act* on a charge of having committed any offence under that Act or any other Act of the Parliament of Canada; and

(*g*) a member of a crew of a Canadian ship to the extent provided in the *Canada Shipping Act* on a charge of having committed any offence ashore.

Attempts outside Canada

8. A person shall not be convicted by a Canadian court for an attempt outside Canada unless

(*a*) that person did it

(i) for the purpose of achieving an effect or a result in Canada that would constitute a substantive offence [in Canada], [under the criminal law of Canada], or

(ii) knowing that if the attempt were successful an offence under Canadian law would be committed in Canada; and

(*b*) a successful completion of the attempt would have [resulted in] [constituted] an offence under the law of the place where the attempt was made.

Attempts inside Canada to Commit an Offence outside Canada

9. A person shall not be convicted by a Canadian court for an attempt inside Canada to commit an offence under Canadian law in another state unless a successful completion of the attempt would have [resulted in] [constituted] an offence under the law of that state.

Accessory after the Fact

10. A person shall not be convicted by a Canadian court as an accessory after the fact in respect of the conduct of that person outside Canada unless, prior to the committing of the substantive offence, that person agreed or offered to assist a substantive offender after the offence would have been committed.

Venue of Courts over Extraterritorial Offences

11. Where a person is alleged to have committed an act or omission that is an offence over which Canadian courts have jurisdiction under section 7, the accused may be tried and, if found guilty, punished for that offence by the court having jurisdiction in respect of similar offences in the territorial division where the accused is [found] [present] in the same manner as if the offence had been committed in that territorial division.

Consent of Attorney General of Canada

12. A person who is not a Canadian citizen shall not be prosecuted in Canada for an offence [against this Code] alleged to have been committed outside Canada [and in respect of which Canadian courts have jurisdiction] unless the Attorney General of Canada consents to the prosecution.

13. In respect of an indictable offence alleged to have been committed in [or by] a ship [of non-Canadian registry] [registered in a state other than Canada], no proceedings shall be instituted without the consent of the Attorney General of Canada.

Double Jeopardy

14. [(1) Subject to subsection (2)] [A][a] plea of *autrefois convict* or *autrefois acquit* based on a previous trial in a state other than Canada, shall be treated by Canadian courts as though the plea were based on a trial in a Canadian court if the Canadian offence charged is substantially similar to the offence of which the accused was convicted in the other state.

[(2) A plea of *autrefois acquit*, based on a previous trial in a state other than

Canada, shall not be treated by Canadian courts as though the plea were based on a trial in a Canadian court unless the acquittal resulted from a substantive or procedural defence available under Canadian law.]

Immunity from Prosecution

15. Nothing in this Code affects the privileges and immunities of Her Majesty or foreign sovereigns or privileges and immunities of persons under the *Diplomatic and Consular Privileges and Immunities Act* (S.C. 1976-1977, c.31), *The Privileges and Immunities (NATO) Act* (R.S.C. 1970, c. P-23), *The Privileges and Immunities (International Organizations) Act* (R.S.C. 1970, c. P-22), *The Visiting Forces Act* (R.S.C. 1970, c. V-6) and any other Act of the *Parliament of Canada*.

16. In any criminal proceedings, a chart, issued by or under the authority of the Minister of Energy, Mines and Resources pursuant to section 6 of the *Territorial Sea and Fishing Zones Act* delineating the territorial sea of Canada, is [conclusive] proof of the delineation.

17. In any criminal proceedings, in the absence of a chart delineating the territorial sea of Canada having been issued under section 6 of the *Territorial Sea and Fishing Zones Act*, a declaration, by or under the authority of the Secretary of State for External Affairs as to whether or not a particular place is within the territorial sea of Canada, is [conclusive] proof of that fact.

II. Draft Legislation for a New *Criminal Code* — Special Part

— Delete section 76.1 and substitute therefor :

(1) Everyone on board an aircraft in flight who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of the aircraft is guilty of an indictable offence and is liable to imprisonment for life.

(2) Everyone on board an aircraft who commits any act of violence against a passenger or member of the crew of the aircraft in connection with an offence of hijacking is guilty of an indictable offence and is liable to imprisonment for X years.

— In section 76.2, the first line, after the word "who," insert the word "intentionally."

— Amend section 423 by deleting from paragraph 1(*a*) the words "whether in Canada or not," and by deleting subsections (4), (5) and (6).

— Amend paragraph 432(*d*) by inserting, in the first line after the word "committed," the words "in Canada."

— Delete subsection (2) of section 433 *Offences on Territorial Sea and Waters off the Coast* and substitute therefor :

> (2) In respect of an indictable offence to which subsection (1) applies, alleged to have been committed in a ship registered in a state other than Canada, no proceedings shall be instituted without the consent of the Attorney General of Canada.

III. Draft Legislation for Acts Other than the *Criminal Code*

A. *National Defence Act*

— In paragraph 120(1)(*b*) after the words "Parliament of Canada" insert the words "or any Act of the Legislature of the Province in which is situated the accused's place of ordinary residence under the *Canada Elections Act*."

— Delete section 121.

B. *Canada Shipping Act*

— Delete subsections 683(1) and (2). In section 684 delete the words "or within three months previously has been."

C. *Territorial Sea and Fishing Zones Act*

— Delete subsection (1) of section 3 and substitute therefor :

> **3.** (1) Subject to any exceptions under section 5, the territorial sea of Canada comprises those areas of the sea having, as their inner limits the baselines described in section 5 and, as their outer limits, lines drawn parallel to and equidistant from such baselines so that each point on the outer limits is distant twelve nautical miles seaward from the nearest point of the nearest baseline.

D. *Maritime Code*

— In section BI-6 delete subsection (4) and substitute therefor :

> (4) Where an offence is committed on board a Canadian ship within the waters of a foreign state and the master or owner of the ship, or the diplomatic representative of Canada in that state requests the intervention of a police authority in that state, the laws of that state may be enforced with respect to the ship and the persons on board it to the extent necessary to enable the request to be complied with.

IV. Interim Amendments to the *Criminal Code* — General Part

— Delete subsection 6(1) and substitute therefor :

> (1) Notwithstanding anything in this Act or any other Act, every one who on or in respect of an aircraft registered in Canada under regulations made under the *Aeronautics Act* commits an act or omission outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

— In subsection 6(1.1) delete the last two lines and substitute therefor :

> ... shall be deemed to have committed that offence in Canada if :
>
> (*d*) the aircraft on board which the offence was committed lands in Canada with the alleged offender still on board,
>
> (*e*) the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in Canada, or
>
> (*f*) the alleged offender is present in Canada and Canada does not extradite him pursuant to Articles 4(2) and 8 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, or Articles 5(2) and 8 of the 1971 *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.*

— Amend section 6 by adding thereto the following subsection :

> (9) The jurisdiction of a court pursuant to subsection (3), to try [and punish] an act or omission that is an offence by virtue of subsections (1) and (1.1), is in addition to the special jurisdiction of the court pursuant to paragraph 432(*d*).

Endnotes

1. Exceptionally it is done; see, for example, section 121 of the *National Defence Act*, R.S.C. 1970, c. N-4. *Quaere* : whether paragraph 11(*g*) of the *Canadian Charter of Rights and Freedoms* may give people a *constitutional* right not to be convicted by a Canadian court for an offence under the law of a state other than Canada.

2. Glanville Williams, "Venue and the Ambit of Criminal Law," [1965] 81 *L.Q. Rev.* 276 at 282.

3. *British South Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602 (H.L.) at 631.

4. R.S.C. 1970, c. S-9.

5. R.S.C. 1970, c. C-34.

6. R.S.C. 1970, c. N-4.

7. R.S.C. 1970, c. S-9.

8. R.S.C. 1970, c. O-3.

9. R.S.C. 1970, c. F-29.

10. R.S.C. 1970, c. G-3.

11. We do not propose to deal with the law of outer space which is the subject of ongoing consideration by the United Nations Committee on Outer Space, particularly by its legal subcommittee.

12. Macdonald, "The Relationship between International Law and Domestic Law in Canada" in *Canadian Perspectives on International Law and Organization*, Macdonald, Morris and Johnston, eds. (1974), p. 89.

13. For a detailed discussion on these principles see "Harvard Research Draft Convention on Jurisdiction with Respect to Crime" (1935), 29 *A.J.I.L.* 439; Akehurst, "Jurisdiction in International Law" (1974), 46 *Brit. Y. B. of Int'l L.* 145; Brownlie, *Principles of Public International Law*, 3rd ed. (1979), pp. 298-305; Williams and Castel, *Canadian Criminal Law, International and Transnational*

Aspects (1981), chapters 1 to 5; Blakesley, "United States Jurisdiction over Extraterritorial Crime" (1982), 73 *J. of Crim. L. and Criminology* 1109.

14. Blakesley, *supra*, note 13, p. 1136.

15. American Law Institute, *Model Penal Code*, paragraph 1.03(a).

16. See, for example : Brownlie, *supra*, note 13, p. 300 :

> ... there is the subjective application which creates jurisdiction over crimes commenced within the state but completed or consumated abroad ... (and) the objective territorial principle, according to which jurisdiction is founded when any constituent element of a crime is consummated on State territory.

See also Williams and Castel, *supra*, note 13, p. 29 :

> Under the objective territorial principle, a state has jurisdiction over a crime which is completed within its territory.

But compare Blakesley, *supra*, note 13, p. 1135 :

> The objective territorial theory provides for jurisdiction over crimes committed wholly outside the *forum* state's territory, when the effects or results of those crimes occur within the territory. The subjective territorial principle provides for jurisdiction over crimes in which a material element has occurred within the territory.

17. Although Dr. Michael Akehurst, in his extensive treatise on "Jurisdiction in International Law" (1974) (*supra*, note 13 at 154) submits "that jurisdiction can only be claimed by the state where the *primary effect* is felt," the drafters of a 1981 bill in the U.S. Senate (*Bill 1630*, subparagraph 204(*g*)(i) — *infra*, note 166) would permit federal U.S. Courts to exercise criminal jurisdiction based on "effects" in the United States if the harm or the threatened harm is "of the type sought to be prevented by the statute describing the offence." In a recent doctorial thesis at Columbia Law School (1982) Professor C. L. Blakesley establishes that "the objective territorial theory (the most frequently articulated basis for assertion of extraterritorial jurisdiction) has always required that a *significant adverse effect* occur within the asserting state's territory." (*Supra*, note 13, p. 1111.) The 1982 draft *Restatement of U.S. Foreign Relations Law*, Chapter 1 — "Jurisdiction," Section 402 reads :

> Subject to Section 403, a state may under international law exercise jurisdiction to prescribe and apply its law with respect to : (1) ...
>
> (c) conduct outside its territory which has, or which is intended to have, *substantial effect* within its territory. [Emphasis added]

In 1981 Professor Michael Hirst carefully examined "Jurisdiction over Cross-Frontier Offences" (1981), 97 *L.Q. Rev.* 80 particularly in the light of cases in English law. He notes that :

it is a well-established principle of international law that the states concerned may exercise their territorial jurisdiction either *subjectively* or *objectively*; [(*i.e.* :)] either because the offender was physically present within their territory when committing the offence, or because the harmful effects of his conduct were felt there .... Most reported cases ... appear ... to favour an objective interpretation which deems an offence to be committed where the harmful results are *felt*. [Emphasis added]

18. For example, Federal Republic of Germany, France, Greece, Japan, Poland — as shown in *The American Series of Foreign Penal Codes* (Sweet & Maxwell Ltd.).

19. As to the relationship between the passive personality principle and the universality principle see Fitzgerald "The Territorial Principle in International Law; An Attempted Justification" (1970), 1 *Georgia J. of Int'l. and Comp. L.* 29, p. 41; Akehurst, *supra*, note 13, p. 163; and Brownlie, *supra*, note 13, p. 305. The passive personality principle — or "objective personality principle" or "passive nationality principle" as it is sometimes called, is probably only valid under international law in situations where none of the other principles would be applicable, for example a murder of a national of the state of the forum by an alien on an ice floe on the high seas.

20. *Supra*, note 17, 1982 draft *Restatement of Foreign Relations Law*, p. 92.

21. *Treacy* v. *D.P.P.*, [1971] A.C. 537 (H.L.) at 551 *per* Lord Reid.

22. Subsection 7(1) of the *Criminal Code* appears to be concerned with authorizing possible exemption of political divisions from the application of the *Code*'s provisions rather than limiting the application of the *Code* to Canadian as opposed to foreign territory. Subsection 5(2) of the *Criminal Code* deals with *convicting* a person, that is, the jurisdiction of courts in Canada, rather than the applicability of offence sections outside Canada.

23. Section 433 of the *Criminal Code*, does speak of the locus of offences but it is not an offence-creating section; it merely provides for the jurisdiction of courts to try any offence committed in the territorial sea of Canada.

24. *Minister of National Revenue* v. *LaFleur* (1964), 46 D.L.R. (2d) 439 at 443 (S.C.C.).

25. R.S.C. 1970, c. F-14.

26. R.S.C. 1970, c. C-21.

27. For a brief review of Canada's claim to sovereignty over the Canadian Arctic see Reid, "The Canadian Claim to Sovereignty over the Water of the Arctic" (1974), 12 *Can. Y. B. Int'l. L.* 111; as to the legal status of the Arctic Ocean, see Pharand, "The Arctic Waters in Relation to Canada" in *Canadian Perspectives on International Law and Organization*, *supra*, note 12, p. 434.

28. See respectively *R.* v. *Tootalik E 4-321* (1969), 71 W.W.R. 435, (1970) 74 W.W.R. 740 (Territorial Ct. N.W.T.); Green, "Comment : Canada and Arctic Sover-

eignty" (1970), 48 *Can. Bar Rev.* 740, p. 755; *U.S.* v. *Escamilla* (1974), 467 F. 2d. 341.

29. The legal status of various types of Arctic ice is examined in a recent paper by Susan B. Boyd at the University of London, entitled "The Legal Status of Arctic Ice — A Comparative Approach and a Proposal" to be published in the *Canadian Yearbook of International Law*.

30. *United Nations Convention on the Law of the Sea*, U.N. Doc. A/Conf. 62/122, October 7, 1982, signed by Canada December 10, 1982. In 1958, Canada had signed the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone*, but never ratified it. See *infra*, note 44.

31. R.S.C. 1970, c. T-7.

32. *The Franconia, The Queen* v. *Keyn* (1876), 2 Ex.D. 63. In discussing the relationship between international law and domestic law in Canada, Dean Ronald St J.Macdonald comments that Cockburn C.J., in the *Keyn* case, was saying that the international law rule gave sovereignty but not jurisdiction. The latter was for Parliament to give. (*Canadian Perspectives on International Law and Organization*, *supra*, note 12, p. 96.) Nor does the international law rule extend the applicability of national law over the territorial sea. That, of course, is also for Parliament.

33. As to jurisdiction over offences committed on vessels in ports, see page 39 of this Paper and *infra*, note 73. A coastal state's police powers to investigate crimes and make arrests on board ships in the territorial sea is not unrestricted : see, sections 1 and 2 of Article 19 of the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone* (*infra*, note 44) which read :

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases :
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
>
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
>
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.
>
> 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

34. R.S.C. 1970, c. T-7.

35. R.S.C. 1970, c. T-7, s. 3.

36. R.S.C. 1970, c. T-7, s. 5(3).

37. See, for example, *Re Dominion Coal Co. Ltd. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593 (N.S. S.C.A.D.).

38. [1927] P. 311 (C.A.).

39. See for example, *Chateau-Gai Wines Ltd. and Attorney General of Canada* (1970), 14 D.L.R. (3d) 411 (Ex.).

40. See the Law Commission (U.K.), *The Territorial and Extraterritorial Extent of the Criminal Law* (Report No. 91, 1978), p. 6, note 22.

41. See, for example, Law Reform Commission of Canada, *Theft and Fraud* [Working Paper 19] (1977).

42. See Akehurst, *supra*, note 13, p. 146; Hyde, *International Law*, 2nd ed. (1947), Vol. 1, p. 641, note 1; see remarks regarding the *NATO Status of Forces Agreement* in Chapter Thirteen of this Paper.

43. *Geneva Convention on the High Seas*, done at Geneva, 29 April 1958, U.N. Doc. A/Conf. 131/53, April 28, 1958; signed by Canada, April 29, 1958. B.T.S. 1963 No. 5, T.I.A.S. 5200 (not in C.T.S.), 450 U.N.T.S. 11.

44. *Convention on the Territorial Sea and the Contiguous Zone* done at Geneva, 29 April 1958; (signed by Canada, 29 April 1958; not ratified by Canada). UNTS 516/205, B.T.S. 1965/3, T.I.A.S. 5639, (not in C.T.S.).

45. See, for example, *Croft* v. *Dunphy*, [1933] A.C. 156 (P.C.).

46. R.S.C. 1970, c. C-40, s. 2.

47. *Supra*, note 30.

48. *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas* done at Geneva 29 April 1958; U.N. Doc. A/Conf. 13/38 April 28, 1958; signed by Canada 29 April 1958; T.I.A.S. 5969, 559 U.N.T.S. 285.

49. R.S.C. 1970, c. T-7 and Orders in Council such as the Territorial Sea Geographical Coordinates Order C.R.C., Vol. XVIII, c. 1550, p. 13751.

50. R.S.C. 1970, c. F-14.

51. R.S.C. 1970, c. C-21.

52. R.S.C. 1970, c. F-16.

53. R.S.C. 1970, c. F-17.

54. R.S.C. 1970, c. F-18.

55. R.S.C. 1970, c. F-19.

56. R.S.C. 1970, c. F-14.

57. *Regina* v. *Vassallo* (1981), 131 D.L.R. (3d) 145 (P.E.I. C.A.).

58. *Supra*, note 30.

59. *Supra*, note 48.

60. *Supra*, note 30.

61. 21 October 1968, Essex Assizes (Unrep.). *Times*, Oct. 22, 1968. See also English Law Commission, *supra*, note 40 at 18.

62. *Geneva Convention on the Continental Shelf*, done at Geneva April 29, 1958; signed by Canada April 29, 1958, ratified by Canada effective March 8, 1970; 1970 C.T.S. No. 4.

63. *Supra*, note 30.

64. *Supra*, note 30.

65. R.S.C. 1970, c. O-4, as amended by R.S.C. 1970, 1st Supp. c. 30.

66. *Supra*, note 30.

67. R.S.C. 1970, 1st Supp., c. 2, s. 3.

68. Williams and Castel, *supra*, note 13, p. 33; there are very few areas in which this Commission is not in agreement with this most useful work that so comprehensively deals with the many aspects of the extraterritoriality of Canadian criminal law today.

69. *Supra*, note 43.

70. *Supra*, note 30.

71. (1927) P.C.I.J., Series A, No. 10.

72. English Law Commission, *supra*, note 40, p. 21.

73. *Supra*, note 68, p. 48 (footnotes not included); see also Brownlie, *supra*, note 13, pp. 316-319.

74. This right is often expressed in terms of the *jurisdiction of a state to prosecute and punish for crime* (See Articles 1(b) and 4 of the Second Draft *Convention of Jurisdiction with Respect to Crime* (1931), 29 *A.J.I.L.* 439 and comments relating

to those articles, pp. 509 to 515); in that context the word "jurisdiction" includes legislative as well as judicial power. As mentioned earlier, to avoid confusion we prefer to reserve the word "jurisdiction" *in this Paper* to mean the power of courts to try persons for criminal offences.

75. English Law Commission, *supra*, note 40, p. 21, footnote 88 and p. 22 :

> Quite apart from this section [686 of the *Merchant Shipping Act*] indictable offences committed on British ships on the high seas are covered by section 1 of the *Offences at Sea Act, 1799* and are punishable at common law.

See *R.* v. *Anderson* (1868), [L.R.] 1 C.C.R. 161.

76. English Law Commission, *supra*, note 40, p. 21, para. 54, and footnote 87; *Oteri* v. *The Queen*, [1976] 1 W.L.R. 1272, 1276 (P.C.).

77. R.S.C. 1970, c. S-9.

78. C.T.S. 1931, No. 7.

79. *British Nationality Act*, 1948.

80. The *Citizenship Act*, S.C. 1974-75-76, c. 108, which repealed and replaced the *Canadian Citizenship Act* (R.S.C. 1970, C-19), substantially affected the status of British subjects.

81. Paragraph 678(1)(*b*) of the *Canada Shipping Act* reads in part : "[T]he provisions of the *Criminal Code* relating to summary conviction apply to *all offences against this Act* other than...." [Emphasis added]

82. See Glanville Williams, *supra*, note 2, p. 410; and English Law Commission, *supra*, note 40, p. 22, para. 55.

83. [1981] 2 All E.R. 1098 (H.L.).

84. [1956] 2 All E.R. 86 (Cent. Crim. Ct.).

85. It should be noted that the rationale in the later British aircraft case of *R.* v. *Naylor*, [1961] 2 All E.R. 932 (Cent. Crim. Ct.), was that section 2 of the *Larceny Act, 1916*, under which the accused was charged in that case, was applicable *outside* England; hence, even where an offence under that section was committed on a British aircraft outside England, English courts had jurisdiction under subsection 62(1) of the *Civil Aviation Act 1949*, to try it. That case can therefore readily be distinguished from *R.* v. *Kelly* and *R.* v. *Martin* on the ground that in the latter two cases, the offence provision of the Act or Regulations respectively under which the accused was charged was held by the court *not* to be applicable outside England.

86. *Supra*, note 21, p. 551.

87. [1972] 2 All E.R. 471 (Q.B.).

88. The English Law Commission published Working Paper No. 29 (12 May 1970), p. 17, para. 20; English Law Commission, *supra*, note 40, p. 23, para. 57.

89. Law Commission, *supra*, note 40, p. 27, para. 66.

90. See *Gordon* v. *R. in Right of Canada*, [1980] 6 W.W.R. 519 (B.C. C.A.).

91. *Ibid.*, p. 523.

92. The Code of Service Discipline is made up of Parts IV through IX of the *National Defence Act*, R.S.C. 1970, c. N-4; see in particular, paragraphs 55(1)(*f*) and (4)(*d*), section 120 "Service Trial of Civil Offences" and section 121 "Offences out of Canada."

93. S.C. 1977-78, c. 41 (Not yet proclaimed in force).

94. Williams and Castel, *supra*, note 13, pp. 20 and 36.

95. *Supra*, note 32.

96. Williams and Castel, *supra*, note 13, p. 36.

97. *Ibid.*, pp. 49-53, extracts from which are quoted in the text of this Paper at pages 37 and 38.

98. (*Tokyo Convention*), 1970, C.T.S. No. 5.

99. (*Hague Convention*), 1972, C.T.S. No. 23.

100. (*Montreal Convention*), 1973, C.T.S. No. 6.

101. Subsection 205(2) of the *Air Regulations*, C.R.C. 1978, c. 2, reads in part :

> ... a person is qualified to be the registered owner of a Canadian aricraft if he is :
>
> (*a*) a Canadian citizen; or
>
> (*b*) a person lawfully admitted to Canada for permanent residence; or
>
> (*c*) a Corporation that is incorporated under the laws of Canada ....

102. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* (House of Commons) May 10, 1972, page 6 :9.

103. *Supra*, note 100.

104. (1978), 40 C.C.C. (2d) 353, [1978] 2 S.C.R. 1299.

105. "... we think that a man is 'found in' any place where he is actually present" — *per* Lord Campbell, *R.* v. *Sattler* (1858), 7 Cox. C.C. 431 (Ct. Crim. App.) at 441, quoted in : *Re Falkner and the Queen* (1977), 37 C.C.C. (2d) 330 (B.C. S.C.) at 335, and applied *Gordon* v. *R. in Right of Canada*, *supra*, note 90.

106. R.S.C. 1970, c. P-32.

107. See *Minutes of Proceedings and Evidence of House of Commons Standing Committee on Justice and Legal Affairs*, March 4, 1969, p. 167 where the then Minister of Justice, in answer to a question as to whether the expression "Public Service Employment Act" employee covered "all the civil servants, the ambassadors and so on?" answered : "*All* federal civil servants." [Emphasis added]

108. Order in Council, P.C. 1979-1997, 26 July 1979, SOR/79-545.

109. C.R.C., Vol. XIV, c. 1339, p. 10785.

110. R.S.C. 1970, c. N-4, s. 2 (definition of Code of Service Discipline), s. 55 and s. 120.

111. See the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9, s. 40.

112. See, for example the Criminal Codes of the People's Republic of China, 1980, Articles 4 and 5; the Penal Code of the Polish People's Republic, Chapter XVI (as of May, 1969); the Turkish Criminal Code, Part I, sections 3, 4, 5 and 6 (as of June 1964); the Greek Penal Code, Articles 5 and 6 (as of August, 1950), *supra*, note 18.

113. See Fitzgerald, *supra*, note 19.

114. At one time the bigamy offence-creating section (32 and 33 Vict., c. 20, s. 58) did provide for jurisdiction of courts in Canada as follows :

> Whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage has taken place in Canada or elsewhere, is guilty of felony, and shall be liable to be imprisoned, & c.; and any such offence may be dealt with, enquired of, tried, determined and punished in any district, county or place in Canada where the offender is apprehended or is in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place.

See *Regina* v. *Pierce*, [1887] XIII O.R. 226 (Q.B.) at 228.

115. *Supra*, note 24, and page 13 of this Paper.

116. R.S.C. 1970, c. O-3.

117. R.S.C. 1970, c. F-29.

118. Hirst, "The Criminal Law Abroad," [1982] *Crim. L. Rev.* 496, p. 499 states :

> The common law, it will be recalled, was incapable of extraterritorial effect and even the jurisdiction over piracy, first developed by the Court of the Admiral, is now provided for by statute.

119. 1960 U.K.T.S. 1960 No. 5.

120. Williams and Castel, *supra*, note 13, p. 267.

121. *Ibid.*, p. 268.

122. The Criminal Codes of : the Federal Republic of Germany (current) section 6, item 7; Greece (1950) article 8(g); Italy (1930) article 7(3); People's Republic of China (1969) article 4, item 2 (see *The American Series of Foreign Penal Codes*, *supra*, note 18); *Exchange Control Act 1947* (1947) (U.K.) subsection 1(1) 34, sch. 5, Part II, paras. 1 and 2.

123. See under the heading "II.C. Other Principles" in the "Introduction and Principles" Part of this Paper.

124. *Supra*, note 43.

125. *Supra*, note 30.

126. See *Cameron* v. *H.M. Advocate*, 1971 S.C. (J.C.) 50.

127. See *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.).

128. F.M. 27-10 (1956).

129. S.C. 1946, c. 73.

130. R.S.C. 1970, c. G-3.

131. *Infra*, note 135, re *Interpretation Act*, para. 36(*h*).

132. *National Defence Act*, R.S.C. 1970, c. N-4, Part IX.

133. *Quaere* whether paragraph 11(*g*) of the *Canadian Charter of Rights and Freedoms* would protect a person from being convicted of a war crime that had retroactively been made an offence under a Canadian statute if, at the time of the commission of the offence, "it constituted an offence under ... international law or was criminal according to the general principles of law recognized by the community of nations."

134. A question arises as to the extent, if any, to which section 15 of the *Criminal Code* (obedience to *de facto* law) would be a defence to a charge of having committed a war crime.

135. It may be that by operation of paragraph 36(*h*) of the *Interpretation Act*, R.S.C. 1970, c. I-23, the *National Defence Act* (1950) and rules of procedure for trials by court martial under it would supercede the *British Army Act* and British Rules of Procedure in respect of trials of war criminals under the *War Crimes Act and Regulations* of 1946; but, in any event, obviously outdated legislation such as our 1946 *War Crimes Act* should be replaced as soon as possible.

136. The 1963 *Tokyo Convention* (1970 C.T.S. No. 5); the 1970 *Hague Convention* (1972 C.T.S. No. 23); the 1971 *Montreal Convention* (1973 C.T.S. No. 6).

137. *Geneva Conventions Act*, R.S.C. 1970, c. G-3.

138. (1974), 13 Int. L. Mat. 41.

139. 1949 C.T.S. No. 27.

140. See *Single Convention on Narcotic Drugs* and its amending protocol, 1961, C.T.S. 1964/30; U.N. Doc. E/Cont. 63/8, March 24, 1972.

141. 1928 C.T.S. No. 5. Slavery was dealt with by 5 Geo. IV, c. 113, ss. 9, 16 (Imp.).

142. 1910 B.T.S. 1912 No. 20, as amended by (1949) 98 U.N.T.S. 103.

143. United Nations, New York, 18 December 1979; signed by Canada in 1980.

144. United Nations, New York, 3 March 1980; signed by Canada in 1980.

145. See Chapter Five of this Paper.

146. See Chapter Eight of this Paper.

147. *Supra*, note 138.

148. *Supra*, note 139.

149. R.S.C. 1970, c. N-1.

150. R.S.C. 1970, c. F-27.

151. *Supra*, notes 141 and 142.

152. *Supra*, note 143.

153. *Supra*, note 144.

154. *Atomic Energy Control Act*, R.S.C. 1970, c. A-19.

155. See the Part of this Paper entitled "Introduction and Principles" and *supra*, note 17.

156. (1895), 1 C.C.C. 263 (B.C. C.A.).

157. [1965] 2 O.R. 168 (C.A.).

158. *Re Chapman*, [1970] 5 C.C.C. 46 (Ont. C.A.).

159. Hall, "Territorial Jurisdiction and the Criminal Law," [1972] *Crim. L. Rev.* 276, p. 276-277, and see Williams, *supra*, note 2, p. 518.

160. In its 1978 Report (*supra*, note 40, p. 3, paras. 7 and 8), the Law Commission withdrew this recommendation pending study of individual offences.

161. *Ibid.*

162. *Supra*, note 21, p. 537.

163. This includes any new "computer crimes" such as ones which have been created by recent legislation in the U.S.A. See Bender, *Computer Law : Evidence and Procedure* (1979), section 4.07, pages 4-71 and 4-72 where the *California Penal Code*, section 502, Calif. 1979, chapter 858 is quoted. Paragraphs (b), (c) and (d) of that section read :

> (b) Any person who intentionally accesses or causes to be accessed any computer system or computer network for the purpose of (1) devising or executing any scheme or artifice to defraud or extort or (2) obtaining money, property, or services with false or fraudulent intent, representations, or promises shall be guilty of a public offence.
>
> (c) Any person who maliciously accesses, alters, deletes, damages or destroys any computer system, computer network, computer program, or data shall be guilty of a public offence.
>
> (d) Any person who violates the provisions of subdivision (b) or (c) is guilty of a felony and is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment in the state prison for 16 months, or two or three years, or by both such fine and imprisonment, or by a fine not exceeding two thousand five hundred dollars ($2,500) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

164. *Supra*, note 15, s. 103.

165. English Law Commission, *supra*, note 88, p. 14. In its 1978 Report of the same title, *supra*, note 40, that Commission made final recommendations on many matters dealt with in the Working Paper but did not deal finally with the transnational matters discussed here; it suggested (page 2 of the Report) that progress can be made (on this aspect of the territorial extent of the criminal law) in the context of individual offences. We advocate that the matter be addressed both generally *and* in respect of specific types of offences; for our comments on conspiracies, attempts, and so forth, see Chapter Eleven of this Paper.

166. Senate *Bill 1630* and House *Bill 1647* both of 97th Con., 1st Sess. (1981) : see W. A. Gillon, "Note" (1982), 12 *Georgia J. of Int'l. and Comp. L.* 305, pp. 314 and 315.

167. *Crimes Act, 1961*, s. 7 (N.Z.).

168. *Supra*, note 15.

169. *Supra*, note 40.

170. See *Re Chapman*, *supra*, note 158.

171. See *Board of Trade* v. *Owen*, [1957] A.C. 602 (H.L.).

172. *Supra*, note 15, s. 1.03(d).

173. *Board of Trade* v. *Owen*, *supra*, note 171, p. 633; Wright, *Law of Criminal Conspiracies and Agreements* (1887); Stephen, *A History of the Criminal Law of England*, vol. II (1883), pp. 13-14.

174. *D.P.P.* v. *Doot*, [1973] A.C. 807 at 833 (H.L.).

175. Minutes of the Senate Legal and Constitutional Affairs Committee, 25 Feb. 1976, Issue 31, page 31 :16.

176. *British Columbia Electric Railway Co. Ltd.* v. *The King*, [1946] A.C. 527 (P.C.) at 541; and see LaForest, "May the Provinces Legislate in Violation of International Law?" (1961), 39 *Can. Bar Rev.* 78, p. 87.

177. *U.S.* v. *Toscanino* (1974), 500 F. 2d 267 (U.S.C. App. 2nd Circ.); also Williams and Castel, *supra*, note 13, p. 147 : "The *Toscanino* case ... emphasizes that an accused may raise the question of violation of international law in the domestic courts."

178. Blakesley, *supra*, note 13 *passim*, but especially, p. 1160.

179. English Law Commission, *supra*, note 88, pp. 53 and 54, paras. 95 and 96.

180. Senate *Bill 1630* and House *Bill 1647*, *supra*, note 166.

181. *Supra*, note 15, s. 1.03(d).

182. English Law Commission, *supra*, note 88, pp. 55 and 56.

183. *Supra*, note 15, s. 1.03(b).

184. *Supra*, note 88, p. 56. The Law Commission did not deal with attempts in its Report (*supra*, note 40, p. 3, para. 8).

185. *Vienna Convention on Diplomatic Relations, 1961*, C.T.S. 1966, No. 29.

186. S.C. 1976-77, c. 31.

187. *Vienna Convention on Consular Relations, 1963*, C.T.S. 1974, No. 25.

188. *United Nations Convention on Privileges and Immunities* (forms the Schedule to the *Privileges and Immunities (International Organizations) Act*, R.S.C. 1970, c. P-22).

189. R.S.C. 1970, c. P-22.

190. R.S.C. 1970, c. N-4, s. 120(1)(*a*).

191. R.S.C. 1970, c. N-4, s. 60.

192. R.S.C. 1970, c. N-4, s. 61(1).

193. R.S.C. 1970, c. N-4, s. 56(1).

194. *In the Matter of a Reference as to whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483.

195. *Ibid.*, pp. 485 and 501.

196. *Ibid.*, p. 485.

197. *Visiting Forces Act*, R.S.C. 1970, c. V-6.

198. S.C. 1972, c. 13, s. 75.

199. *Visiting Forces Act*, R.S.C. 1970, c. V-6.

200. R.S.C. 1970, c. N-4, s. 120(1)(*a*).

201. *North Atlantic Treaty Status of Forces Agreement*, signed at London, June 19, 1951; C.T.S. 1953 No. 13.

202. *Ibid.*, Article VII(3)(a).

203. *Ibid.*, Article VII(3)(b).

204. *Ibid.*, Article VII(3)(c).

205. *Ibid.*, Article VII(8). Note that there is no prohibition against the military authorities of the sending state additionally trying the accused for violating rules of discipline.

206. *Exchange of Letters constituting an Agreement concerning the Status of the United Nations Peace-Keeping Force in Cyprus*, 492 U.N.T.S. 57, New York, 31 March, 1964.

207. *National Defence Act*, R.S.C. 1970, chap. N-4, s. 231 states :

> **231.** Where a person subject to the Code of Service Discipline does any act or

> omits to do anything while outside Canada which, if done or omitted in Canada by that person would be an offence punishable by a civil court, that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred. 1955, c. 28, s. 14; 1966-67, c. 96, s. 51.

208. *Cox* v. *Army Council*, [1963] A.C. 48 (H.L.).

209. R.S.C. 1970, c. N-4, s. 120(1)(*a*).

210. *Supra*, note 13, p. 143.

211. *Canada Elections Act*, R.S.C. 1970, 1 Supp., c. 14, schedule II, s. 27.

212. See *R.* v. *Walton* (1905), 10 C.C.C. 269 (Ont. C.A.) which held that, although the accused had been wrongfully arrested in Buffalo, N.Y. and brought to Canada against his will, the jurisdiction of Canadian courts to try him was not thereby impaired. The court of appeal based its decision on the English case of *Ex parte Scott*, 109 E.R. 166 (K.B.) and the United States case of *Kerr* v. *Illinois* (1886), 119 U.S. 436 (U.S. S.C.).

213. *Extradition Act*, R.S.C. 1970, c. E-21.

214. *Fugitive Offenders Act*, R.S.C. 1970 c. F-32; in this connection see O'Higgins, "Extradition within the Commonwealth" (1960), 9 *Int. and Comp. L.Q.* 486; for an extensive commentary on the Canadian law of extradition and rendition and its defects, see : G. V. LaForest, *Extradition to and from Canada*, 2nd ed. (1977), and Williams and Castel, *supra*, note 13, pp. 337-431.

215. *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28.

216. Williams and Castel, *supra*, note 13, p. 343.

217. (1973), 14 C.C.C. (2d) 174 (Ont. H. Ct.) at 179; see also pp. 182 and 183.

218. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 6(4) and 423(6).

219. See *Burrows* v. *Jemino* (1726), 2 Str. 733, 93 E.R. 815 (K.B.); *R.* v. *Roche* (1775), 1 Leach 134, 168 E.R. 169 (K.B.); *R.* v. *Azzopurdi* (1843), 2 Mood 289, 169 E.R. 115 (K.B.). There does not appear to be any reported Canadian case.

220. *Criminal Code*, R.S.C. 1970, c. C-34, s. 538(1).

221. For a recent commentary on the case of *Brannson* v. *Minister of Employment and Immigration*, [1981] 2 F.C. 14, (1980) 34 N.R. 411 (F.C.A.), particularly as to whether a postal offence of which a person was convicted in the United States was one of which he could have been convicted under Canadian law if it had occurred in Canada, see Davis and White, "Comment" (1982), 60 *Can. Bar Rev.* 363.

222. Glanville Williams, *supra*, note 2, p. 538.

223. See subsections 6(4) and 423(6) of the *Criminal Code*. There are no similar provisions in the *Criminal Code* in respect of the other extraterritorial *Code* offences such as those under subsection 46(3), sections 58, 59, 75, and 76 and paragraph 254(1)(*b*).

224. *R.* v. *Roche*, *supra*, note 219; *R.* v. *Aughet* (1918), 13 Cr. Appl. R. 101.

225. *R.* v. *Sarazin and Sarazin* (1978), 39 C.C.C. (2d) 131 (P.E.I. S.C.).

226. *Aeronautics Act*, R.S.C. 1970, c. A-3.

227. See *The American Series of Foreign Penal Codes*, *supra*, note 18.

228. *Treacy* v. *D.P.P.*, *supra*, note 21.

APPENDIX A

Relevant Provisions of the Present *Criminal Code*

R.S.C. 1970, c. C-34 as amended through December 1982

Punishment

5. (1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,

(*a*) a person shall be deemed not to be guilty of that offence until he is convicted thereof; and

(*b*) a person who is convicted of that offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

Offences outside of Canada

(2) Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada. 1953-54, c. 51, s. 5.

Offences committed on aircraft

6. (1) Notwithstanding anything in this Act or any other Act, every one who

(*a*) on or in respect of an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified

under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, or

(*b*) on any aircraft, while the aircraft is in flight if the flight terminated in Canada,

commits an act or omission in or outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

(1.1) Notwithstanding this Act or any other Act, every one who

(*a*) on an aircraft, while the aircraft is in flight, commits an act or omission outside Canada that if committed in Canada or on an aircraft registered in Canada under regulations made under the *Aeronautics Act* would be an offence against section 76.1 or paragraph 76.2(*a*),

(*b*) in relation to an aircraft in service, commits an act or omission outside Canada that if committed in Canada would be an offence against any of paragraphs 76.2(*b*), (*c*) or (*e*), or

(*c*) in relation to an air navigation facility used in international air navigation, commits an act or omission outside Canada that if committed in Canada would be an offence against paragraph 76.2(*d*)

shall, if he is found anywhere in Canada, be deemed to have committed that act or omission in Canada. 1972, c. 13, s. 3(1).

(1.2) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 387.1 (attack on official premises, etc.) used by him that if

committed in Canada would be an offence against section 218 (murder), 219 (manslaughter), 245 (assault), 245.1 (assault with a weapon or causing bodily harm), 245.2 (aggravated assault), 245.3 (unlawfully causing bodily harm), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping), 249 to 250.2 (abduction and detention of young persons) or 381.1 (threats against internationally protected persons) shall be deemed to commit that act or omission in Canada if

(*a*) the act or omission is committed on a ship registered pursuant to any Act of Parliament;

(*b*) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations;

(*c*) the person who commits the act or omission is a Canadian citizen or is present in Canada; or

(*d*) the Act or omission is against

(i) a person who enjoys his status as an internationally protected person by virtue of the functions he exercises on behalf of Canada, or

(ii) a member of the family of a person described in subparagraph (i) who qualifies under paragraph (*b*) or (*d*) of the definition "internationally protected person" in section 2. 1974-75-76, c. 93, s. 3(1).

(2) Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment, shall be deemed to have committed that act or omission in Canada.

(3) Where a person has committed an act or omission that is an offence by virtue of subsection (1), (1.1), (1.2) or (2), the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the territorial division where he is found in the same manner as if the offence had been committed in that territorial division.

(4) Where, as a result of committing an act or omission that is an offence by virtue of subsection (1), (1.1), (1.2) or (2), a person has been tried and convicted or acquitted outside Canada, he shall be deemed to have been tried and convicted or acquitted, as the case may be, in Canada. 1972, c. 13, s. 3(2); 1974-75-76, c. 93, s. 3(2).

(5) No proceedings shall be instituted under this section without the consent of the Attorney General of Canada if the accused is not a Canadian citizen.

(6) For the purposes of this section, of the definition "peace officer" in section 2 and of sections 76.1 and 76.2, "flight" means the act of flying or moving through the air and an aircraft shall be deemed to be in flight from the time when all external doors are closed following embarkation until the later of

(*a*) the time at which any such door is opened for the purpose of disembarkation; and

(*b*) where the aircraft makes a forced landing in circumstances in which the owner or operator thereof or a person acting on behalf of either of them is not in control of the aircraft, the time at which control of the aircraft is restored to the owner or operator thereof or a person acting on behalf of either of them.

(7) For the purposes of this section and section 76.2, an aircraft shall be deemed to be in service from the time when pre-flight preparation of the aircraft by ground personnel or the crew thereof begins for a specific flight until

(*a*) the flight is cancelled before the aircraft is in flight,

(*b*) twenty-four hours after the aircraft, having commenced the flight, lands, or

(*c*) the aircraft, having commenced the flight, ceases to be in flight,

whichever is the latest. 1972, c. 13, s. 3(3).

Hijacking

76.1 Every one who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with intent

(*a*) to cause any person on board the aircraft to be confined or imprisoned against his will,

(*b*) to cause any person on board the aircraft to be transported against his will to any place other than the next scheduled place of landing of the aircraft,

(*c*) to hold any person on board the aircraft for ransom or to service against his will, or

(*d*) to cause the aircraft to deviate in a material respect from its flight plan,

is guilty of an indictable offence and is liable to imprisonment for life. 1972, c. 13, s. 6.

Endangering safety of aircraft in flight and rendering aircraft incapable of flight

76.2 Every one who,

(*a*) on board an aircraft in flight, commits an assault that is likely to endanger the safety of the aircraft,

(*b*) causes damage to an aircraft in service that renders the aircraft incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(*c*) places or causes to be placed on board an aircraft in service anything that is likely to cause damage to the aircraft that will render it incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(*d*) causes damages to or interferes with the operation of any air navigation facility where the damage or interference is likely to endanger the safety of an aircraft in flight, or

(*e*) endangers the safety of an aircraft in flight by communicating to any other person any information that he knows to be false,

is guilty of an indictable offence and is liable to imprisonment for life. 1972, c. 13, s. 6.

High treason

46. (1) Every one commits high treason who, in Canada,

(*a*) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;

(*b*) levies war against Canada or does any act preparatory thereto; or

(*c*) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are.

(2) Every one commits treason who, in Canada,

(*a*) uses force or violence for the purpose of overthrowing the government of Canada or a province;

(*b*) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;

(*c*) conspires with any person to commit high treason or to do anything mentioned in paragraph (*a*);

(*d*) forms an intention to do anything that is high treason or that is mentioned in paragraph (*a*) and manifests that intention by an overt act; or

(*e*) conspires with any person to do anything mentioned in paragraph (*b*) or forms an intention to do anything mentioned in paragraph (*b*) and manifests that intention by an overt act.

(3) Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,

(*a*) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or

(*b*) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

(4) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason. 1953-54, c. 51, s. 46; 1974-75-76, c. 105, s. 2.

Forgery of or uttering forged passport

58. (1) Every one who, while in or out of Canada,

(*a*) forges a passport, or

(*b*) knowing that a passport is forged

(i) uses, deals with or acts upon it, or

(ii) causes or attempts to cause any person to use, deal with, or act upon it, as if the passport were genuine,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) Every one who, while in or out of Canada, for the purposes of procuring a passport for himself or any other person, makes a written or oral statement that he knows is false or misleading is guilty of an indictable offence and is liable to imprisonment for two years.

(3) Every one who without lawful excuse, the proof of which lies upon him, has in his possession a forged passport or a passport in respect of which an offence under subsection (2) has been committed is guilty of an indictable offence and is liable to imprisonment for five years.

(4) For the purposes of proceedings under this section

(*a*) the place where a passport was forged is not material; and

(*b*) the definition "false document" in section 282, section 324 and subsection 325(2) are applicable *mutatis mutandis*.

(5) In this section "passport" means a document issued by or under the authority of the Secretary of State for External Affairs for the purpose of identifying the holder thereof. 1968-69, c. 38, s. 4.

Fraudulent use of certificate of citizenship

59. (1) Every one who, while in or out of Canada,

(*a*) uses a certificate of citizenship or a certificate of naturalization for a fraudulent purpose, or

(*b*) being a person to whom a certificate of citizenship or a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with intent that it should be used for a fraudulent purpose,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) In this section, "certificate of citizenship" and, "certificate of naturalization," respectively, mean a certificate of citizenship and a certificate of naturalization as defined by the *Canadian Citizenship Act*. 1953-54, c. 51, s. 59; 1968-69, c. 38, s. 5.

Piracy by law of nations

75. (1) Every one commits piracy who does any act that, by the law of nations, is piracy.

(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and is liable to imprisonment for life. 1953-54, c. 51, s. 75; 1974-75-76, c. 105, s. 3.

Piratical acts

76. Every one who, while in or out of Canada,

(*a*) steals a Canadian ship,

(*b*) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,

(*c*) does or attempts to do a mutinous act on a Canadian ship, or

(*d*) counsels or procures a person to do anything mentioned in paragraph (*a*), (*b*) or (*c*),

is guilty of an indictable offence and is liable to imprisonment for fourteen years. 1953-54, c. 51, s. 76.

Bigamy

254. (1) Every one commits bigamy who

(*a*) in Canada,

(i) being married, goes through a form of marriage with another person,

(ii) knowing that another person is married, goes through a form of marriage with that person, or

(iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or

(*b*) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (*a*)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

Conspiracy

423. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,

(*a*) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years;

(*b*) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable

(i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to be sentenced to death or to imprisonment for life or for fourteen years, or

(ii) to imprisonment for five years, if the alleged offence is one for which, upon conviction, that person would be liable to imprisonment for less than fourteen years;

(*c*) repealed, 1980-81-82, c. 125, s. 23.

(*d*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*), (*b*) or (*c*) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.

(2) Every one who conspires with any one

(*a*) to effect an unlawful purpose, or

(*b*) to effect a lawful purpose by unlawful means,

is guilty of an indictable offence and is liable to imprisonment for two years.

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) or (2) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.

(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) or (2) in Canada shall be deemed to have conspired in Canada to do that thing.

(5) Where a person has conspired to do anything that is an offence by virtue of subsection (3) or (4), the offence is within the competence of and may be tried and punished by the court having similar jurisdiction in respect of similar offences in the territorial division where he is found in the

same manner as if the offence had been committed in that territorial division.

(6) Where, as a result of a conspiracy that is an offence by virtue of subsection (3) or (4), a person has been tried and convicted or acquitted outside Canada, he shall be deemed to have been tried and convicted or acquitted, as the case may be, in Canada. 1953-54, c. 51, s. 408; 1974-75-76, c. 93, s. 36; 1980-81-82, c. 125, s. 23.

Master of ship maintaining discipline

44. The master or officer in command of a vessel on a voyage is justified in using as much force as he believes, on reasonable and probable grounds, is necessary for the purpose of maintaining good order and discipline on the vessel. 1953-54, c. 51, s. 44.

Seduction of female passengers on vessels

154. Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority, has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 146.

Navigating or operating a vessel with more than 80 mgs. of alcohol in blood

240.2 Every one who navigates or operates a vessel having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 milligrams of alcohol in 100 millilitres of blood, is guilty of an offence punishable on summary conviction. Add., 1972, c. 13, s. 20.

Sending or taking unseaworthy ship to sea

243. (1) Every one who sends or attempts to send or being the master knowingly takes a Canadian ship

(*a*) on a voyage from a place in Canada to any other place, whether

that voyage is by sea or by coastal or inland waters, or

(*b*) on a voyage from a place on the inland waters of the United States to a place in Canada,

in an unseaworthy condition from any cause, and thereby endangers the life of any person, is guilty of an indictable offence and is liable to imprisonment for five years.

(2) An accused shall not be convicted of an offence under this section where he proves

(*a*) that he used all reasonable means to ensure that the ship was in a seaworthy state, or

(*b*) that to send or take the ship in that unseaworthy condition was, under the circumstances, reasonable and justifiable.

(3) No proceedings shall be instituted under this section without the consent in writing of the Attorney General of Canada. 1953-54, c. 51, s. 229.

APPENDIX B

Relevant Provisions of *Bill C-19, Criminal Law Reform Act, 1984*

5 ...

(3) Section 6 of the said Act [Criminal Code] is further amended by adding thereto, immediately after subsection (1.2) thereof, the following subsections :

"(1.3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 247.1 shall be deemed to commit that act or omission in Canada if

(*a*) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

(*b*) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations;

(*c*) the person who commits the act or omission

(i) is a Canadian citizen, or

(ii) is not a citizen of any state and ordinarily resides in Canada;

(*d*) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;

(*e*) a person taken hostage by the act or omission is a Canadian citizen; or

(*f*) the person who commits the act or omission is, after the commission thereof, present in Canada.

(1.4) Notwithstanding anything in this Act or any other Act, where

(*a*) a person, outside Canada, receives, has in his possession, uses, transfers the possession of, sends or delivers to any person, transports, alters, disposes of, disperses or abandons nuclear material and thereby

(i) causes or is likely to cause the death of, or serious bodily harm to, any person, or

(ii) causes or is likely to cause serious damage to, or destruction of, property, and

(*b*) the act or omission described in paragraph (*a*) would, if committed in Canada, be an offence against this Act,

that person shall be deemed to commit that act or omission in Canada if paragraph (1.7)(*a*), (*b*) or (*c*) applies in respect of the act or omission.

(1.5) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would constitute

(*a*) a conspiracy or an attempt to commit,

(*b*) being an accessory after the fact in relation to, or

(*c*) counselling in relation to,

an act or omission that is an offence by virtue of subsection (1.4) shall be deemed to commit the act or omission in Canada if paragraph (1.7)(*a*), (*b*) or (*c*) applies in respect of the act or omission.

(1.6) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit or being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against,

(*a*) section 294, 298, 303 or 338 in relation to nuclear material,

(*b*) section 305 in respect of a threat to commit an offence against section 294 or 303 in relation to nuclear material,

(*c*) section 381 in relation to a demand for nuclear material, or

(*d*) paragraph 243.5(1)(*a*) or (*b*) in respect of a threat to use nuclear material

shall be deemed to commit that act or omission in Canada if paragraph (1.7)(*a*), (*b*) or (*c*) applies in respect of the act or omission.

(1.7) For the purposes of subsections (1.4) to (1.6), a person shall be deemed to commit an act or omission in Canada if

(*a*) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

(*b*) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations; or

(*c*) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada.

(1.8) For the purposes of this section, "nuclear material" means

(*a*) plutonium, except plutonium with an isotopic concentration of plutonium-238 exceeding eighty per cent,

(*b*) uranium-233,

(*c*) uranium containing uranium-233 or uranium-235 or both in such an amount that the abundance ratio of the sum of those isotopes to the isotope uranium-238 is greater than 0.72 per cent,

(*d*) uranium with an isotopic concentration equal to that occurring in nature, and

(*e*) any substance containing anything described in paragraphs (*a*) to (*d*),

but does not include uranium in the form of ore or ore-residue."

(4) Subsections 6(3) and (4) of the said Act are repealed and the following substituted therefor :

" (3) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(3.1) For greater certainty, the provisions of this Act relating to

(*a*) requirements that an accused appear at and be present during proceedings, and

(*b*) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (3).

(4) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if he had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*, *autrefois convict* or pardon, he shall be deemed to have been so tried and dealt with in Canada."

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