by so notifying the depositary in writing; and by states which had acceded to the Agreement.

The Annex to the Agreement addresses a number of issues raised by developed states. In particular, it is provided that all organs and bodies established under the Convention and Agreement are to be cost-effective and based upon an evolutionary approach taking into account the functional needs of such organs or bodies; a variety of institutional arrangements are detailed with regard to the work of the International Seabed Authority (section 1); the work of the Enterprise is to be carried out initially by the Secretariat of the Authority and the Enterprise shall conduct its initial deep seabed mining operations through joint ventures that accord with sound commercial principles (section 2); decision-making in the Assembly and Council of the Authority is to comply with a series of specific rules[393] (section 3); the Assembly upon the recommendation of the Council may conduct a review at any time of matters referred to in article 155(1) of the Convention, notwithstanding the provisions of that article as a whole (section 4); and transfer of technology to the Enterprise and developing states is to be sought on fair and reasonable commercial terms on the open market or through joint-venture arrangements (section 5).[394]

### *The International Seabed Authority*[395]

The Authority is the autonomous organisation which the states parties to the 1982 Convention have agreed is to organise and control activities in the Area, particularly with a view to administering its resources.[396] It became fully operational in June 1996. The principal organs of the Authority are the Assembly, the Council and the Secretariat. Also to be noted are the Legal and Technical Commission and the Finance Committee. The

[393] Note especially the increase in the role of the Council vis-à-vis the Assembly with regard to general policy matters. Note also that the Agreement guarantees a seat on the Council for the state 'on the date of entry into force of the Convention having the largest economy in terms of gross domestic product', i.e. the US (section 3, para. 15a), and establishes groups of states on the Council of states with particular interests (section 3, paras. 10 and 15).

[394] Thus, the provisions in the Convention on the mandatory transfer of technology are not to apply (section 5, para. 2). Note also that provisions in the Convention regarding production ceilings and limitations, participation in commodity agreements, etc. are not to apply (section 6, para. 7).

[395] Details of the Authority may be found at www.isa.org.jm/en/default.htm.

[396] Article 157.

Assembly is composed of all members of the Authority, i.e. all states parties to the Convention, and at July 2007 there were 155.[397] The Assembly is the supreme organ of the Authority with powers to elect *inter alia* the Council, Secretary-General and the members of the Governing Boards of the Enterprise and its Director-General, to establish subsidiary organs and to assess the contributions of members to the administrative budget. It has the power to establish the general policy of the Authority.[398] The Council consists of thirty-six members elected by the Assembly in accordance with certain criteria.[399] The Council is the executive organ of the Authority and has the power to establish the specific policies to be pursued by the Authority.[400] The Council has two organs, an Economic Planning Commission and a Legal and Technical Commission.[401] The

[397] See www.isa.org.jm/en/about/members/states. See also article 159(1).

[398] Article 160. However, the effect of the 1994 Agreement on Implementation has been to reduce the power of the Assembly in favour of the Council by providing in Annex, section 3 that decisions of the Assembly in areas for which the Council also has competence or on any administrative, budgetary or financial matter be based upon the recommendations of the Council, and if these recommendations are not accepted, the matter has to be returned to the Council. Further, this section also provides that, as a general rule, decision-making in the organs of the Authority should be by consensus.

[399] Article 161(1) provides for members to be elected in the following order: (a) four members from among those states parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one state from the Eastern European (Socialist) region, as well as the largest consumer; (b) four members from among the eight states parties which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one state from the Eastern European (Socialist) region; (c) four members from among states parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area, including at least two developing states whose exports of such minerals have a substantial bearing upon their economies; (d) six members from among developing states parties, representing special interests. The special interests to be represented shall include those of states with large populations, states which are landlocked or geographically disadvantaged, states which are major importers of the categories of minerals to be derived from the Area, states which are potential producers of such minerals, and least developed states; (e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose, the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western European and Others.

[400] Article 162. In some cases, Council decisions have to be adopted by consensus and in others by two-thirds majority vote: see article 161.

[401] Articles 163–5. As to the secretariat, see articles 166–9.

organ of the Authority actually carrying out activities in the Area is the Enterprise.[402]

## Settlement of disputes[403]

The 1982 Convention contains detailed and complex provisions regarding the resolution of law of the sea disputes. Part XV, section 1 lays down the general provisions. Article 279 expresses the fundamental obligation to settle disputes peacefully in accordance with article 2(3) of the UN Charter and using the means indicated in article 33,[404] but the parties are able to choose methods other than those specified in the Convention.[405] States of the European Union, for example, have agreed to submit fisheries disputes amongst member states to the European Court of Justice under the EC Treaty.

Article 283 of the Convention provides that where a dispute arises, the parties are to proceed 'expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means' and article 284 states that the parties may resort if they wish to conciliation procedures, in which case a conciliation commission will be established, whose report will be non-binding.[406] Where no settlement is reached by means freely chosen by the parties, the compulsory procedures laid down in Part XV, section 2 become operative.[407] Upon signing, ratifying or acceding to the Convention, or at any time thereafter, a state may choose one of the following means of dispute settlement: the International Tribunal for the Law of the Sea,[408] the International Court of Justice,[409] an arbitral tribunal

[402] See article 170 and Annex IV.

[403] See e.g. N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge, 2005; J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005, chapter 8; Churchill and Lowe, *Law of the Sea*, chapter 19; J. Collier and A. V. Lowe, *The Settlement of Disputes in International Law*, Oxford, 1999, chapter 5; A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 ICLQ, 1997, p. 37; R. Ranjeva, 'Le Règlement des Différends' in *Traité du Nouveau Droit de la Mer* (eds. R. J. Dupuy and D. Vignes), Paris, 1985, p. 1105; J. P. Quéneudec, 'Le Choix des Procédures de Règlement des Différends selon la Convention des NU sur le Droit de la Mer' in *Mélanges Virally*, Paris, 1991, p. 383, and A. O. Adede, *The System for the Settlement of Disputes under the United Nations Convention on the Law of the Sea*, Dordrecht, 1987.

[404] See further below, chapter 18.

[405] Article 280.

[406] See Annex V, Section 1.

[407] See articles 286 and 287.

[408] Annex VI.

[409] See below, chapter 19.

under Annex VII[410] or a special arbitral tribunal under Annex VIII for specific disputes.[411]

There are some exceptions to the obligation to submit a dispute to one of these mechanisms in the absence of a freely chosen resolution process by the parties. Article 297(1) provides that disputes concerning the exercise by a coastal state of its sovereign rights or jurisdiction in the exclusive economic zone may only be subject to the compulsory settlement procedure in particular cases.[412] Article 297(2) provides that while disputes concerning marine scientific research shall be settled in accordance with section 2 of the Convention, the coastal state is not obliged to accept the submission to such compulsory settlement of any dispute arising out of the exercise by the coastal state of a right or discretion to regulate, authorise and conduct marine scientific research in its economic zone or on its continental shelf or a decision to order suspension or cessation of such research.[413] Article 297(3) provides similarly that while generally disputes with regard to fisheries shall be settled in accordance with section 2, the coastal state shall not be obliged to accept the submission to compulsory settlement of any dispute relating to its sovereign rights with respect to the

[410] This procedure covers both disputes concerning states and those concerning international organisations, such as the European Union. A five-person tribunal is chosen by the parties from a panel to which each state party may make up to four nominations. Annex VII arbitrations have included *Australia and New Zealand* v. *Japan (Southern Bluefin Tuna)*, Award of 4 August 2000, 119 ILR, p. 508; *Ireland* v. *UK (Mox)* 126 ILR, pp. 257 ff. and 310 ff.; *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006 and *Guyana* v. *Suriname*, Award of 17 September 2007. The latter cases may be found on the Permanent Court of Arbitration website, www.pca-cpa.org.

[411] I.e. relating to fisheries, protection and preservation of the marine environment, marine scientific research, or navigation, including pollution from vessels and by dumping: see article 1, Annex VIII. The nomination process is slightly different from Annex VII situations.

[412] That is, with regard to an allegation that a coastal state has acted in contravention of the provisions of the Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58; or when it is alleged that a state in exercising these freedoms, rights or uses has acted in contravention of the Convention or of laws or regulations adopted by the coastal state in conformity with the Convention and other rules of international law not incompatible with the Convention; or when it is alleged that a coastal state has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal state and which have been established by the Convention or through a competent international organisation or diplomatic conference in accordance with the Convention.

[413] In such a case, the dispute is to be submitted to the compulsory conciliation provisions under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal state of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.

living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other states and the terms and conditions established in its conservation and management laws and regulations.[414] There are also three situations with regard to which states may opt out of the compulsory settlement procedures.[415]

The Convention also provides for a Seabed Disputes Chamber of the International Tribunal for the Law of the Sea,[416] which under article 187 shall have jurisdiction with regard to matters concerning the Deep Seabed and the International Seabed Authority. By article 188, inter-state disputes concerning the exploitation of the international seabed are to be submitted only to the Seabed Disputes Chamber.

One problem that has arisen has been where a dispute arises under one or more conventions including the 1982 Law of the Sea Convention, and the impact that this may have upon dispute settlement. In the *Southern Bluefin Tuna* case between Australia and New Zealand on the one hand and Japan on the other,[417] the arbitration tribunal had to consider the effect of the 1993 Convention for the Conservation of Southern Bluefin Tuna, the binding settlement procedures of which require the consent of all parties to the dispute. However, these states were also parties to the 1982 Convention, the provisions of which concerning highly migratory fish stocks (which included the southern bluefin tuna) referred to compulsory arbitration.[418] The parties were unable to agree within the Commission established by the 1993 Convention and the applicants invoked the compulsory arbitration provisions of the 1982 Convention. The International Tribunal for the Law of the Sea indicated provisional measures[419] and the matter went to arbitration. Japan argued that the dispute was one under the 1993 Convention so that its consensual settlement procedures were applicable[420] and not the compulsory procedures under the 1982 Convention. The tribunal held that the dispute was one common to both Conventions and that there was only one dispute. Article 281(1) of the 1982 Convention provides essentially for the priority of procedures agreed to by the parties, so that the 1982 Convention's provisions would

[414] In such a case, the dispute in certain cases is to be submitted to the compulsory conciliation provisions under Annex V, section 2: see further article 297(3)(b).

[415] Disputes concerning delimitation and claims to historic waters; disputes concerning military and law enforcement activities, and disputes in respect of which the Security Council is exercising its functions: see article 298(1).

[416] See Annex VI, section 4.

[417] 119 ILR, p. 508.

[418] See Part XV and Annex VII.

[419] 117 ILR, p. 148. The International Tribunal called for arbitration and stated that the latter tribunal would *prima facie* have jurisdiction.

[420] See article 16 of the 1993 Convention.

only apply where no settlement had been reached using the other means agreed by the parties and the agreement between the parties does not exclude any further procedure. Since article 16 of the 1993 Convention fell within the category of procedures agreed by the parties and thus within article 281(1), the intent and thus the consequence of article 16 was to remove proceedings under that provision from the reach of the compulsory procedures of the 1982 Convention.[421] Accordingly, the extent to which the compulsory procedures of the 1982 Convention apply depends on the circumstances and, in particular, the existence and nature of any other agreement between the parties relating to peaceful settlement.[422]

Outside the framework of the 1982 Convention, states may adopt a variety of means of resolving disputes, ranging from negotiations, inquiries,[423] conciliation[424] and arbitration[425] to submission to the International Court of Justice.[426]

### *The International Tribunal for the Law of the Sea*[427]

The Tribunal was established as one of the dispute settlement mechanisms under Part XV of the Law of the Sea Convention. The Statute of the

[421] See 119 ILR, pp. 549–52.

[422] See also B. Oxman, 'Complementary Agreements and Compulsory Jurisdiction', 95 AJIL, 2001, p. 277. Note that the Arbitral Tribunal established under Annex VII of the Convention in the *Mox* case, between Ireland and the UK, suspended hearings on 13 June 2003 due to uncertainty as to whether relevant provisions of the Convention fell within the competence of the European Community or member states: see Order No. 3 of 24 June 2003 and Order No. 4 of 14 November 2003, 126 ILR, pp. 257 ff. and 310 ff. See also the decision of the European Court of Justice of 30 May 2006, Case C-459/03, *Commission* v. *Ireland*.

[423] E.g. the *Red Crusader* incident, 35 ILR, p. 485. See further on these mechanisms, below, chapters 18 and 19.

[424] E.g. the *Jan Mayen Island Continental Shelf* dispute, 20 ILM, 1981, p. 797; 62 ILR, p. 108.

[425] E.g. the *Anglo-French Continental Shelf* case, Cmnd 7438; 54 ILR, p. 6.

[426] E.g. the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 116; 18 ILR, p. 84; the *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 16; 41 ILR, p. 29 and others referred to in this chapter.

[427] See e.g. P. C. Rao and R. Khan, *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague, 2001; P. C. Rao and P. Gautier, *Rules of the International Tribunal for the Law of the Sea: A Commentary*, The Hague, 2006; M. M. Marsit, *Le Tribunal du Droit de la Mer*, Paris, 1999; A. E. Boyle, 'The International Tribunal for the Law of the Sea and the Settlement of Disputes' in *The Changing World of International Law in the 21st Century* (eds. J. Norton, M. Andenas and M. Footer), The Hague, 1998; D. Anderson, 'The International Tribunal for the Law of the Sea', in *Remedies* in *International Law* (eds. M. D. Evans and S. V. Konstanidis), Oxford, 1998, p. 71; J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, Oxford, 1999, chapter 5; Churchill and Lowe, *Law of the Sea*, chapter 19; Merrills, *International Dispute Settlement*, chapter 8; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 912, and G. Eiriksson, *The International Tribunal for the Law of the Sea*, The Hague, 2000. See also www.itlos.org.

Tribunal[428] provides that it shall be composed of twenty-one independent members enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea, while the representation of the principal legal systems of the world and equitable geographical distribution are to be assured.[429] Judges are elected for nine-year terms by the states parties to the Convention.[430] The Statute also allows for the appointment of ad hoc judges. Article 17 provides that where the Tribunal includes a member of the nationality of one of the parties to the dispute, any other party may choose a person to participate as a member of the Tribunal. Where in a dispute neither or none of the parties have a judge of the same nationality, they may choose a person to participate as a member of the Tribunal.[431] The Tribunal may also, at the request of a party or of its own motion, decide to select no fewer than two scientific or technical experts to sit with it, but without the right to vote.[432]

The Tribunal, based in Hamburg, is open to states parties to the Convention[433] and to entities other than states parties in accordance with Part XI of the Convention, concerning the International Seabed Area, thereby including the International Seabed Authority, state enterprises and natural and juridical persons in certain circumstances,[434] or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.[435] The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.[436] The provisions of the Convention and other rules of international law not

[428] Annex VI of the Convention.

[429] Article 2 of the Statute. A quorum of eleven judges is required to constitute the Tribunal, article 13.

[430] Article 5.

[431] See also articles 8, 9 and 18–22 of the Rules of the Tribunal 1997 (as amended in March and September 2001). Note, in particular, that under article 22 of the Rules, a non-state entity may choose an ad hoc judge in certain circumstances.

[432] Article 289 of the Convention and article 15 of the Rules.

[433] Article 292(1) of the Convention and article 20(1) of the Statute. This would include the European Community (now Union): see article 1(2) of the Convention.

[434] See in particular articles 153 and 187 of the Convention. See also A. Serdy, 'Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity', 75 BYIL, 2004, p. 183.

[435] Article 20(2) of the Statute.

[436] Article 21. Where the parties to a treaty in force covering law of the sea matters so agree, any disputes concerning the interpretation or application of such treaty may be submitted to the Tribunal, article 22.

incompatible with the Convention constitute the applicable law of the Tribunal.[437]

Pursuant to Part XI, section 5 of the Convention and article 14 of the Statute, a Seabed Disputes Chamber of the Tribunal has been formed with jurisdiction to hear disputes regarding activities in the international seabed area. The Chamber is composed of eleven judges representing the principal legal systems of the world and with equitable geographical distribution.[438] Ad hoc chambers consisting of three judges may be established if a party to a dispute so requests. The composition is determined by the Seabed Disputes Chamber with the approval of the parties to the dispute.[439] The Chamber shall apply the provisions of the Convention and other rules of international law not incompatible with the Convention,[440] together with the rules, regulation and procedures of the International Seabed Authority adopted in accordance with the Convention and the terms of contracts concerning activities in the International Seabed Area in matters relating to those contracts.[441] The Seabed Disputes Chamber has jurisdiction to give advisory opinions at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities and such opinions shall be given as a matter of urgency.[442] In addition, the Tribunal may create such chambers of three or more persons as it considers necessary[443] and a five-person Chamber of Summary Procedure.[444]

[437] Article 293 of the Convention and article 23 of the Statute.

[438] See article 35. The Chamber shall be open to the states parties, the International Seabed Authority and the other entities referred to in Part XI, section 5 of the Convention. Ad hoc judges may be chosen: see articles 23–5 of the Rules.

[439] Articles 187 and 188 of the Convention and article 36 of the Statute. See also article 27 of the Rules.

[440] Article 293 of the Convention.

[441] Article 38 of the Statute. The decisions of the Seabed Chamber shall be enforceable in the territories of the states parties in the same manner as judgments or orders of the highest court of the state party in whose territory the enforcement is sought, article 39. Articles 115–23 of the Rules deal with procedural issues in contentious cases before the Chamber.

[442] See articles 159(10) and 191. See also articles 130–7 of the Rules.

[443] See article 15(1). A Chamber for Fisheries Disputes (1997), a Chamber for Marine Environment Disputes (1997) and a Chamber for Maritime Delimitation Disputes (2007) have been formed under this provision. Under article 15(2), the Tribunal may form a chamber for dealing with a specific dispute if the parties so wish and a Chamber was formed in December 2000 to deal with the *Swordfish Stocks* dispute between Chile and the European Community. See also articles 29 and 30 and 107–9 of the Rules.

[444] Article 15(3). This may hear cases on an accelerated procedure basis and provisional measures applications when the full Tribunal is not sitting: see article 25(2). See also article 28 of the Rules.

The Tribunal[445] and the Seabed Disputes Chamber have the power to prescribe provisional measures in accordance with article 290 of the Convention.[446] Article 290 provides *inter alia* that if a dispute has been duly submitted to the Tribunal, which considers that *prima facie* it has jurisdiction, any provisional measures considered appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment pending the final decision may be prescribed. Such provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. Further, the Tribunal or, with respect to activities in the International Seabed Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures. The Convention also makes it clear that provisional measures are binding, requiring the parties to the dispute to comply promptly with any provisional measures prescribed under article 290.[447]

Where a party does not appear before the Tribunal, the other party may request that the Tribunal continue the hearings and reach a decision.[448] Before so doing, the Tribunal must satisfy itself not only that it has jurisdiction, but also that the claim is well founded in fact and law.[449] A party may present a counter-claim in its counter-memorial, provided that it is directly concerned with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal.[450] The Statute provides also for third-party intervention, where a state party considers that it has an interest of a legal nature which may be affected by the decision in any dispute. It is for the Tribunal to decide on this request and, if

[445] See also the Resolution on Internal Judicial Practice, 31 October 1997, and articles 40–2 of the Rules.

[446] Article 25(1) of the Statute. See also articles 89–95 of the Rules. See e.g. S. Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, The Hague, 2004.

[447] See article 290(6) of the Convention. Article 95(1) of the Rules declares that each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed.

[448] See generally Part III of the Rules concerning the procedure of the Tribunal. As to preliminary proceedings and preliminary objections, see article 294 of the Convention and articles 96 and 97 of the Rules.

[449] Article 28.

[450] See article 98 of the Rules.

such a request is granted, the decision of the Tribunal in the dispute shall be binding upon the intervening state party in so far as it relates to matters in respect of which that state party intervened.[451] This is different from the equivalent provision relating to the International Court of Justice and thus should avoid the anomalous position of the non-party intervener.[452] There is, however, a right to intervene in cases where the interpretation or application of the Convention is in question.[453] Decisions of the Tribunal are final and binding as between the parties to the dispute.[454]

The Tribunal also has jurisdiction to give advisory opinions on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.[455]

The Tribunal has heard a number of cases since its first case in 1997. Most of these cases have concerned article 292 of the Convention which provides that where a state party has detained a vessel flying the flag of another state party and has not complied with the prompt release requirement upon payment of a reasonable bond or other financial security, the question of release from detention may be submitted to the Tribunal.[456] In the *Camouco* case,[457] for example, the Tribunal discussed the scope of the article and held that it would not be logical to read into it the requirement of exhaustion of local remedies. Article 292 provided for an independent remedy and no limitation should be read into it that would have the effect of defeating its very object and purpose.[458] The Tribunal found a violation of article 292 in the case of the *Volga*, where it was held that the bond set for the release of the vessel in question, while reasonable in terms of the financial condition, was not reasonable in that the non-financial conditions set down by the Respondent with regard to the vessel carrying a vessel monitoring system (VMS) and the submission of information about the owner of the ship could not be considered as

451 Article 31. See also articles 99–104 of the Rules.

452 See below, chapter 19, p. 1097.

453 Article 32.

454 Article 33. In the case of a dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party. See also articles 126–9 of the Rules.

455 Article 138 of the Rules. In such cases, articles 130–7 of the Rules concerning the giving of advisory opinions by the Seabed Disputes Chamber shall apply *mutatis mutandis.*

456 See e.g. Y. Tanaka, 'Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the Itlos Jurisprudence', 51 NILR, 2004, p. 237, and D. R. Rothwell and T. Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests', 53 ICLQ, 2004, p. 171.

457 Case No. 5, judgment of 7 February 2000. See 125 ILR, p. 164.

458 *Ibid.*, paras. 57 and 58.

components of the bond or other financial security for the purposes of article 292 of the Convention. It was also held that the circumstances of the seizure of the vessel were not relevant to a consideration of a breach of article 292, while the proceeds of the catch were irrelevant to the bond issue.[459] In the *Hoshinmaru (Japan* v. *Russia)* case, the Tribunal held that it was not reasonable that a bond should be set on the basis of the maximum penalties applicable to the owner and the Master, nor was it reasonable that the bond should be calculated on the basis of the confiscation of the vessel, given the circumstances of the case. In setting a reasonable bond for the release of the vessel the Tribunal stated that the amount of the bond should be proportionate to the gravity of the alleged offences.[460]

The *Mox* case[461] was a case where the parties (Ireland and the UK) appeared before the Tribunal at the provisional measures stage under article 290(5), while later moving to an arbitral tribunal for the merits. The Tribunal prescribed provisional measures requiring the parties to exchange information regarding the possible consequences for the Irish Sea arising out of the commissioning of the Mox nuclear plant, to monitor the risks or the effects of the operation of the plant and to devise, as appropriate, measures to prevent any pollution of the marine environment which might result from the operation of the plant. In so doing, the Tribunal specifically mentioned statements made by the UK concerning *inter alia* transportation of radioactive material, which the Tribunal characterised as 'assurances' and which it placed 'on record'.[462]

The *Saiga (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)* case[463] has been one of the most important decisions to date made by the Tribunal.[464] Issues addressed included the impermissibility of extending customs jurisdiction into the exclusive economic zone, the failure to comply with the rules underpinning the right of hot pursuit under article 111 of the Law of the Sea Convention, the use of force and admissibility issues such as the registration of the vessel and the need for a 'genuine link'.[465]

459 126 ILR, p. 433. See also as to prompt release issues, the *Juno Trader* 128 ILR, p. 267.

460 See www.itlos.org/start2_en.html (6 August 2007).

461 Case No. 10, Order of 3 December 2001. See 126 ILR, pp. 257 ff. and 310 ff.

462 *Ibid.*, paras. 78–80. See also as to provisional measures, the *Land Reclamation (Malaysia* v. *Singapore)* case, 126 ILR, p. 487.

463 Case No. 2, judgment of 1 July 1999. See 120 ILR, p. 143.

464 See e.g. B. H. Oxman and V. Bantz, 'The *M/V "Saiga" (No. 2) (St Vincent and the Grenadines* v. *Guinea)*', 94 AJIL, 2000, p. 40, and L. de la Fayette, 'The *M/V Saiga (No. 2)* Case', 49 ICLQ, 2000, p. 467.

465 See above, p. 611.

The Tribunal's part in the *Southern Bluefin Tuna* case[466] was limited to the grant of provisional measures.[467] Thereafter the matter went to arbitration.[468] As far as the Tribunal was concerned, this was the first case applying article 290(5) of the Law of the Sea Convention regarding the grant of provisional measures pending the constitution of an arbitral tribunal to which the dispute had been submitted. The Tribunal thus had to satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction.[469] This the Tribunal was able to do and the measures it prescribed included setting limits on the annual catches of the fish in question. The Tribunal's judgment in the application for prompt release in the *Grand Prince* case[470] focused on jurisdiction and, in particular, whether the requirements under article 91 of the Law of the Sea Convention regarding nationality of ships had been fulfilled.[471] The Tribunal emphasised that, like the International Court, it had to satisfy itself that it had jurisdiction to hear the application and thus possessed the right to deal with all aspects of jurisdiction, whether or not they had been expressly raised by the parties.[472] The Tribunal concluded that the documentary evidence submitted by the applicant failed to establish that it was the flag state of the vessel when the application was made, so that the Tribunal did not have jurisdiction to hear the case.[473]

## Suggestions for further reading

D. Anderson, *Modern Law of the Sea: Selected Essays*, The Hague, 2007

R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd edn, Manchester, 1999

*International Maritime Boundaries* (eds. J. I. Charney and L. M. Alexander), Washington, vols. I–III, 1993–8, *ibid.* (eds. J. I. Charney and R. W. Smith), vol. IV, 2002 and *ibid.* (eds. D. A. Colson and R. W. Smith), vol. V, 2005, The Hague

*Law of the Sea: Progress and Prospects* (eds. D. Freestone, R. Barnes and D. Ong), Oxford, 2006

[466] Case Nos. 3 and 4, Order of 27 August 1999. See 117 ILR, p. 148.

[467] See e.g. R. Churchill, 'The Southern Bluefin Tuna Cases', 49 ICLQ, 2000, p. 979, and B. Kwiatkowska, 'The Southern Bluefin Tuna Cases', 15 *International Journal of Marine and Coastal Law*, 2000, p. 1 and 94 AJIL, 2000, p. 150.

[468] 119 ILR, p. 508. See e.g. A. E. Boyle, 'The *Southern Bluefin Tuna* Arbitration', 50 ICLQ, 2001, p. 447.

[469] See the Order, paras. 40 ff.; 117 ILR, pp. 148, 160. See also above, p. 637.

[470] Case No. 8, judgment of 20 April 2001. See 125 ILR, p. 272.

[471] *Ibid.*, paras. 62 ff. [472] *Ibid.*, para. 79. [473] *Ibid.*, para. 93.

# 12

# Jurisdiction

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.[1] Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations. It may be achieved by means of legislative, executive or judicial action. In each case, the recognised authorities of the state as determined by the legal system of that state perform certain functions permitted them which affect the life around them in various ways. In the UK, Parliament passes binding statutes, the courts make binding decisions and the administrative machinery of government has the power and jurisdiction (or legal authority) to enforce the rules of law. It is particularly necessary to distinguish between the capacity to make law, whether by legislative or executive or judicial action (prescriptive jurisdiction or the jurisdiction to prescribe) and the capacity to ensure compliance with such law whether by executive

[1] See e.g. C. E. Amerasinghe, *Jurisdiction of International Tribunals*, The Hague, 2003; *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (ed. S. Macedo), Philadelphia, 2004; L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, 2002; *La Saisine des Jurisdictions Internationales* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, 2006; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2003; M. Hirst, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, 2003; M. Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972–3, p. 145; F. A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 HR, 1964, p. 1, and Mann, 'The Doctrine of Jurisdiction in International Law Revisited After Twenty Years', 186 HR, 1984, p. 9; D. W. Bowett, 'Jurisdiction: Changing Problems of Authority over Activities and Resources', 53 BYIL, 1982, p. 1; R. Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws', 33 BYIL, 1957, p. 146; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, pp. 456 ff.; I. Brownlie, Principles of Public International Law, 6th edn, Oxford, 2003, chapters 14 and 15; O. Schachter, *International Law in Theory and Practice*, Dordrecht, 1991, chapter 12, and R. Higgins, *Problems and Process*, Oxford, 1994, chapter 4. See also *Third US Restatement of Foreign Relations Law*, 1987, vol. I, part IV.

action or through the courts (enforcement jurisdiction or the jurisdiction to enforce). Jurisdiction, although primarily territorial, may be based on other grounds, for example nationality, while enforcement is restricted by territorial factors.

To give an instance, if a man kills somebody in Britain and then manages to reach the Netherlands, the British courts have jurisdiction to try him, but they cannot enforce it by sending officers to the Netherlands to apprehend him. They must apply to the Dutch authorities for his arrest and dispatch to Britain. If, on the other hand, the murderer remains in Britain then he may be arrested and tried there, even if it becomes apparent that he is a German national. Thus, while prescriptive jurisdiction (or the competence to make law) may be exercised as regards events happening within the territorial limits irrespective of whether or not the actors are nationals, and may be founded on nationality as in the case of a British subject suspected of murder committed abroad who may be tried for the offence in the UK (if he is found in the UK, of course), enforcement jurisdiction is another matter entirely and is essentially restricted to the presence of the suspect in the territorial limits.[2]

However, there are circumstances in which it may be possible to apprehend a suspected murderer, but the jurisdictional basis is lacking. For example, if a Frenchman has committed a murder in Germany he cannot be tried for it in Britain, notwithstanding his presence in the country, although, of course, both France and Germany may apply for his extradition and return to their respective countries from Britain.

Thus, while jurisdiction is closely linked with territory it is not exclusively so tied. Many states have jurisdiction to try offences that have taken place outside their territory, and in addition certain persons, property and situations are immune from the territorial jurisdiction in spite of being situated or taking place there. Diplomats, for example, have extensive immunity from the laws of the country in which they are working[3] and various sovereign acts by states may not be questioned or overturned in the courts of a foreign country.[4]

The whole question of jurisdiction is complex, not least because of the relevance also of constitutional issues and conflict of laws rules. International law tries to set down rules dealing with the limits of a state's exercise

[2] Reference has also been made to the jurisdiction to adjudicate, whereby persons or things are rendered subject to the process of a state's court system: see *Third US Restatement of Foreign Relations Law*, p. 232.

[3] See below, chapter 13, p. 750. [4] *Ibid.*, p. 697.

of governmental functions while conflict of laws (or private international law) will attempt to regulate in a case involving a foreign element whether the particular country has jurisdiction to determine the question, and secondly, if it has, then the rules of which country will be applied in resolving the dispute.

The grounds for the exercise of jurisdiction are not identical in the cases of international law and conflict of laws rules. In the latter case, specific subjects may well be regulated in terms of domicile or residence (for instance as regards the recognition of foreign marriages or divorces) but such grounds would not found jurisdiction where international law matters were concerned.[5] Although it is by no means impossible or in all cases difficult to keep apart the categories of international law and conflict of laws, nevertheless the often different definitions of jurisdiction involved are a confusing factor.

One should also be aware of the existence of disputes as to jurisdictional competence within the area of constitutional matters. These problems arise in federal court structures, as in the United States, where conflicts as to the extent of authority of particular courts may arise.

While the relative exercise of powers by the legislative, executive and judicial organs of government is a matter for the municipal legal and political system, the extraterritorial application of jurisdiction will depend upon the rules of international law, and in this chapter we shall examine briefly the most important of these rules.

## The principle of domestic jurisdiction[6]

It follows from the nature of the sovereignty of states that while a state is supreme internally, that is within its own territorial frontiers, it must not intervene in the domestic affairs of another nation. This duty of non-intervention within the domestic jurisdiction of states provides for the shielding of certain state activities from the regulation of international law. State functions which are regarded as beyond the reach of international legal control and within the exclusive sphere of state management include the setting of conditions for the grant of nationality

[5] See generally, G. C. Cheshire and P. M. North, *Private International Law*, 13th edn, London, 1999. Questions may also arise as to the conditions required for leave for service abroad: see e.g. *Al-Adsani* v. *Government of Kuwait and Others* 100 ILR, p. 465.

[6] See e.g. Brownlie, *Principles*, pp. 290 ff., and M. S. Rajan, *United Nations and Domestic Jurisdiction*, 2nd edn, London, 1961. See further above, chapter 4.

and the elaboration of the circumstances in which aliens may enter the country.

However, the influence of international law is beginning to make itself felt in areas hitherto regarded as subject to the state's exclusive jurisdiction. For example, the treatment by a country of its own nationals is now viewed in the context of international human rights regulations, although in practice the effect of this has often been disappointing.[7]

Domestic jurisdiction is a relative concept, in that changing principles of international law have had the effect of limiting and reducing its extent[8] and in that matters of internal regulation may well have international repercussions and thus fall within the ambit of international law. This latter point has been emphasised by the International Court of Justice. In the *Anglo-Norwegian Fisheries* case[9] it was stressed that:

> [a]lthough it is true that the act of delimitation [of territorial waters] is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.[10]

The principle was also noted in the *Nottebohm* case,[11] where the Court remarked that while a state may formulate such rules as it wished regarding the acquisition of nationality, the exercise of diplomatic protection upon the basis of nationality was within the purview of international law. In addition, no state may plead its municipal laws as a justification for the breach of an obligation of international law.[12]

Accordingly, the dividing line between issues firmly within domestic jurisdiction on the one hand, and issues susceptible to international legal regulation on the other, is by no means as inflexible as at first may appear.

Article 2(7) of the UN Charter declares that:

> [n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.

[7] See above, chapters 6 and 7.

[8] Whether a matter is or is not within the domestic jurisdiction of states is itself a question for international law: see *Nationality Decrees in Tunis and Morocco* case, PCIJ, Series B, No. 4, 1923, pp. 7, 23–4; 2 AD, pp. 349, 352.

[9] ICJ Reports, 1951, p. 116; 18 ILR, p. 86. [10] ICJ Reports, 1951, p. 132; 18 ILR, p. 95.

[11] ICJ Reports, 1955, pp. 4, 20–1; 22 ILR, pp. 349, 357. [12] See above, chapter 4, p. 133.

This paragraph, intended as a practical restatement and reinforcement of domestic jurisdiction, has constantly been reinterpreted in the decades since it was first enunciated. It has certainly not prevented the United Nations from discussing or adopting resolutions relating to the internal policies of member states and the result of over fifty years of practice has been the further restriction and erosion of domestic jurisdiction.

In the late 1940s and 1950s, the European colonial powers fought a losing battle against the United Nations debate and adoption of resolutions concerning the issues of self-determination and independence for their colonies. The involvement of the United Nations in human rights matters is constantly deepening and, until their disappearance, South Africa's domestic policies of apartheid were continually criticised and condemned. The expanding scope of United Nations concern has succeeded in further limiting the extent of the doctrine of domestic jurisdiction.[13] Nevertheless, the concept does retain validity in recognising the basic fact that state sovereignty within its own territorial limits is the undeniable foundation of international law as it has evolved, and of the world political and legal system.[14]

## Legislative, executive and judicial jurisdiction

Legislative jurisdiction[15] refers to the supremacy of the constitutionally recognised organs of the state to make binding laws within its territory. Such acts of legislation may extend abroad in certain circumstances.[16] The state has legislative exclusivity in many areas. For example, a state lays down the procedural techniques to be adopted by its various organs, such as courts, but can in no way seek to alter the way in which foreign courts operate. This is so even though an English court might refuse to recognise a judgment of a foreign court on the grounds of manifest bias. An English law cannot then be passed purporting to alter the procedural conditions under which the foreign courts operate.

[13] See e.g. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963. See also the view of the British Foreign Secretary on 27 January 1993 that article 2(7) was 'increasingly eroded as humanitarian concerns prevail over the respect for each nation's right to manage or mis-manage its affairs and its subjects', UKMIL, 64 BYIL, 1993, p. 599.

[14] Note also the importance of the doctrine of the exhaustion of domestic remedies: see above, chapter 6, p. 273.

[15] See e.g. Akehurst, 'Jurisdiction', pp. 179 ff.

[16] See further below, p. 688.

International law accepts that a state may levy taxes against persons not within the territory of that state, so long as there is some kind of real link between the state and the proposed taxpayer, whether it be, for example, nationality or domicile.[17] A state may nationalise foreign-owned property situated within its borders,[18] but it cannot purport to take over foreign-owned property situated abroad. It will be obvious that such a regulation could not be enforced abroad, but the reference here is to the prescriptive jurisdiction, or capacity to pass valid laws.

The question of how far a court will enforce foreign legislation is a complicated one within, basically, the field of conflict of laws, but in practice it is rare for one state to enforce the penal or tax laws of another state.[19]

Although legislative supremacy within a state cannot be denied, it may be challenged. A state that adopts laws that are contrary to the provisions of international law, for example as regards the treatment of aliens or foreign property within the country, will render itself liable for a breach of international law on the international scene, and will no doubt find itself faced with protests and other action by the foreign state concerned. It is also possible that a state which abuses the rights it possesses to legislate for its nationals abroad may be guilty of a breach of international law. For example, if France were to order its citizens living abroad to drive only French cars, this would most certainly infringe the sovereignty and independence of the states in which such citizens were residing and would constitute an illegitimate exercise of French legislative jurisdiction.[20]

Executive jurisdiction relates to the capacity of the state to act within the borders of another state.[21] Since states are independent of each other and possess territorial sovereignty,[22] it follows that generally state

[17] Akehurst, 'Jurisdiction', pp. 179–80. [18] See below, chapter 14, p. 827.

[19] See e.g. Cheshire and North, *Private International Law*, chapter 8. English courts in general will not enforce the penal laws of foreign states. It will be for the court to decide what a foreign penal law is. See also *Huntington* v. *Attrill* [1893] AC 150, and Marshall CJ, *The Antelope* 10 Wheat 123 (1825). As far as tax laws are concerned, see *Government of India* v. *Taylor* [1955] AC 491; 22 ILR, p. 286. See in addition *Attorney-General of New Zealand* v. *Ortiz* [1982] 3 All ER 432; 78 ILR, p. 608, particularly Lord Denning, and *ibid.* [1983] 3 All ER 93 (House of Lords); 78 ILR, p. 631. See also *Williams & Humbert* v. *W & H Trade Marks* [1985] 2 All ER 619 and [1986] 1 All ER 129 (House of Lords); 75 ILR, p. 269, and *Re State of Norway's Application* [1986] 3 WLR 452 and [1989] 1 All ER 745, 760–2 (House of Lords). See also above, p. 186.

[20] See Mann, 'Doctrine of Jurisdiction', pp. 36–62. [21] See Akehurst, 'Jurisdiction', p. 147.

[22] See e.g. *Lotus* case, PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153, and the *Island of Palmas* case, 2 RIAA, pp. 829, 838 (1928); 4 AD, p. 103.

officials may not carry out their functions on foreign soil (in the absence of express consent by the host state)[23] and may not enforce the laws of their state upon foreign territory. It is also contrary to international law for state agents to apprehend persons or property abroad. The seizure of the Nazi criminal Eichmann by Israeli agents in Argentina in 1960 was a clear breach of Argentina's territorial sovereignty and an illegal exercise of Israeli jurisdiction.[24] Similarly, the unauthorised entry into a state of military forces of another state is clearly an offence under international law.

Judicial jurisdiction[25] concerns the power of the courts of a particular country to try cases in which a foreign factor is present. There are a number of grounds upon which the courts of a state may claim to exercise such jurisdiction. In criminal matters these range from the territorial principle to the universality principle and in civil matters from the mere presence of the defendant in the country to the nationality and domicile principles. It is judicial jurisdiction which forms the most discussed aspect of jurisdiction and criminal questions are the most important manifestation of this.

## Civil jurisdiction[26]

Although jurisdiction in civil matters is enforced in the last resort by the application of the sanctions of criminal law, there are a number of differences between civil and criminal issues in this context.

In general it is fair to say that the exercise of civil jurisdiction has been claimed by states upon far wider grounds than has been the case in criminal matters, and the resultant reaction by other states much more muted.[27] This is partly due to the fact that public opinion is far more easily roused where a person is tried abroad for criminal offences than if a person is involved in a civil case.

In common law countries, such as the United States and Britain, the usual basis for jurisdiction in civil cases remains service of a writ upon the defendant within the country, even if the presence of the defendant

[23] This cannot, of course, be taken too far. An official would still be entitled, for example, to sign a contract: see Akehurst, 'Jurisdiction', p. 147.
[24] See further below, p. 680. [25] See e.g. Akehurst, 'Jurisdiction', pp. 152 ff.
[26] *Ibid.*, pp. 170 ff.; Mann, 'Doctrine of Jurisdiction', pp. 49–51, and Brownlie, *Principles*, p. 298. See also Bowett, 'Jurisdiction', pp. 1–4.
[27] See e.g. Akehurst, 'Jurisdiction', pp. 152 ff.

is purely temporary and coincidental.[28] In continental European countries on the other hand, the usual ground for jurisdiction is the habitual residence of the defendant in the particular state.

Many countries, for instance the Netherlands, Denmark and Sweden, will allow their courts to exercise jurisdiction where the defendant in any action possesses assets in the state, while in matrimonial cases the commonly accepted ground for the exercise of jurisdiction is the domicile or residence of the party bringing the action.[29]

In view of, for example, the rarity of diplomatic protests and the relative absence of state discussions, some writers have concluded that customary international law does not prescribe any particular regulations as regards the restriction of courts' jurisdiction in civil matters.[30]

## **Criminal jurisdiction**[31]

International law permits states to exercise jurisdiction (whether by way of legislation, judicial activity or enforcement) upon a number of grounds.[32] There is no obligation to exercise jurisdiction on all, or any particular one, of these grounds. This would be a matter for the domestic system to decide. The importance of these jurisdictional principles is that they are accepted by all states and the international community as being consistent with international law. Conversely, attempts to exercise jurisdiction upon another ground would run the risk of not being accepted by another state.

### *The territorial principle*

The territorial basis for the exercise of jurisdiction reflects one aspect of the sovereignty exercisable by a state in its territorial home, and is the indispensable foundation for the application of the series of legal

[28] See e.g. *Maharanee of Baroda* v. *Wildenstein* [1972] 2 All ER 689. See also the Civil Jurisdiction and Judgments Act 1982.

[29] See, for example, the 1970 Hague Convention on the Recognition of Divorces and Legal Separations.

[30] See e.g. Akehurst, 'Jurisdiction', p. 177. Cf. Mann, 'Doctrine of Jurisdiction', pp. 49–51, and see also Brownlie, *Principles*, p. 298, and Bowett, 'Jurisdiction', pp. 3–4.

[31] See e.g. Akehurst, 'Jurisdiction', pp. 152 ff.; Mann, 'Doctrine of Jurisdiction', pp. 82 ff., and D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. II, pp. 823–31.

[32] It was noted in the *Wood Pulp* case that 'the two undisputed bases on which state jurisdiction is founded in international law are territoriality and nationality', [1998] 4 CMLR 901 at 920; 96 ILR, p. 148.

rights that a state possesses.[33] That a country should be able to legislate with regard to activities within its territory and to prosecute for offences committed upon its soil is a logical manifestation of a world order of independent states and is entirely understandable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state. It is also highly convenient since in practice the witnesses to the crime will be situated in the country and more often than not the alleged offender will be there too.[34]

Thus, all crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is so even where the offenders are foreign citizens.[35] The converse of the concept of territorial jurisdiction is that the courts of one country do not, as a general principle, have jurisdiction with regard to events that have occurred or are occurring in the territory of another state.[36] Further, there is a presumption that legislation applies within the territory of the state concerned and not outside.[37] One state cannot lay down criminal laws for another in

[33] See Lord Macmillan, *Compañía Naviera Vascongado* v. *Cristina SS* [1938] AC 485, 496–7; 9 AD, pp. 250, 259. Note also Bowett's view that the 'dynamism and adaptability of the principle in recent years has been quite remarkable', 'Jurisdiction', p. 5, and Marshall CJ in *The Schooner Exchange* v. *McFaddon* 7 Cranch 116, 136 (1812) to the effect that '[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute'. Donaldson LJ also pointed to the general presumption in favour of the territoriality of jurisdiction, *R* v. *West Yorkshire Coroner, ex parte Smith* [1983] QB 335, 358; 78 ILR, p. 550. See also, for the view that the concept of jurisdiction is essentially territorial, *Banković* v. *Belgium*, European Court of Human Rights, Judgment of 12 December 2001, paras. 63, 67 and 71; 123 ILR, pp. 110, 111 and 113, and *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26, para. 109, per Lord Brown; 133 ILR, p. 736.

[34] See e.g. the Separate Opinion of Judge Guillaume in *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 36; 128 ILR, pp. 60, 92.

[35] See e.g. *Holmes* v. *Bangladesh Binani Corporation* [1989] 1 AC 1112, 1137; 87 ILR, pp. 365, 380–1, per Lord Griffiths and Lord Browne-Wilkinson in *Ex parte Pinochet* (*No. 3*) [2000] 1 AC 147, 188; 119 ILR, p. 139.

[36] See e.g. *Kaunda* v. *President of South Africa* (CCT 23/04) [2004] ZACC 5 (4 August 2004) and *R* v. *Cooke* [1998] 2 SCR 597.

[37] See as to the UK, e.g. F. Bennion, *Statutory Interpretation*, 4th London, edn, 2002, p. 282. See also *Clark (Inspector of Taxes)* v. *Oceanic Contractors Inc.* [1983] 2 AC 130, 145, per Lord Scarman; *Al Sabah* v. *Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, para. 13, per Lord Walker of Gestingthorpe for the Privy Council; *Lawson* v. *Serco Limited* [2006] UKHL 3, [2006] ICR 250, para. 6, per Lord Hoffmann; *Agassi* v. *Robinson (Inspector of Taxes)* [2006] UKHL 23, [2006] 1 WLR 1380, paras. 16, 20, per Lord Scott of Foscote and Lord Walker of Gestingthorpe, and *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26, paras. 11 ff. per Lord Bingham. But note that in *Masri* v. *Consolidated Contractors* [2008] EWCA Civ 303 at para. 31, it was said that, 'nowadays the presumption has little

the absence of consent, nor may it enforce its criminal legislation in the territory of another state in the absence of consent.[38]

The principal ground for the exercise of criminal jurisdiction is, therefore, territoriality,[39] although it is not the only one. There are others, such as nationality, but the majority of criminal prosecutions take place in the territory where the crime has been committed. However, the territorial concept is more extensive than at first appears since it encompasses not only crimes committed wholly on the territory of a state but also crimes in which only part of the offence has occurred in the state: one example being where a person fires a weapon across a frontier killing somebody in the neighbouring state. Both the state where the gun was fired and the state where the injury actually took place have jurisdiction to try the offender, the former under the subjective territorial principle of territoriality and the latter under the objective territorial principle. Of course, which of the states will in the event exercise its jurisdiction will depend upon where the offender is situated, but the point remains that both the state where the offence was commenced and the state where the offence was concluded may validly try the offender.[40] For example, the Scottish Solicitor General made it clear that Scottish courts had jurisdiction with regard to the alleged bombers of the airplane which exploded over the Scottish town of Lockerbie as the locus of the

force and it is simply a matter of construction'. See also *Société Eram Shipping Co. Ltd* v. *Cie Internationale de Navigation* [2004] 1AC 260, para. 54 (per Lord Hoffmann) and *Office of Fair Trading* v. *Lloyds TSB Bank plc* [2007] UKHL 48.

38 See e.g. the Separate Opinion of Judge Guillaume, *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 36; 128 ILR, pp. 60, 92. However, in a situation of belligerent occupation, the occupier may exercise certain criminal enforcement powers with regard to the local population: see the Fourth Geneva Convention on the Protection of Civilian Persons, articles 64–78.

39 See the statement by a Home Office Minister, noting that 'As a general rule, our courts have jurisdiction to try offences that are committed within this country's territory only. This is because generally speaking the Government believes that trials are best conducted in the jurisdiction in which they occurred not least because there are very real difficulties associated with the obtaining of evidence necessary to effectively prosecute here offences that are committed in foreign jurisdictions. The Government have no plans to depart from this general rule', HC Deb., vol. 445 col. 1419, Written Answer, 2 May 2006, UKMIL, 77 BYIL, 2006, p. 756.

40 See e.g. the *Lotus* case, PCIJ, Series A, No. 10, 1927, pp. 23, 30; 4 AD, pp. 153, 159, and Judge Moore, *ibid.*, p. 73; the Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 29 AJIL, 1935, Supp., p. 480 (article 3), and Akehurst, 'Jurisdiction', pp. 152–3. See Lord Wilberforce, *DPP* v. *Doot* [1973] AC 807, 817; 57 ILR, pp. 117, 119 and *R* v. *Berry* [1984] 3 All ER 1008. See also *Strassheim* v. *Dailey* 221 US 280 (1911); *US* v. *Columba-Colella* 604 F.2d 356 and *US* v. *Perez-Herrera* 610 F.2d 289.

offences.[41] Such a situation would also apply in cases of offences against immigration regulations and in cases of conspiracy where activities have occurred in each of two, or more, countries.[42] Accordingly, courts are likely to look at all the circumstances in order to determine in which jurisdiction the substantial or more significant part of the crime in question was committed.[43]

The nature of territorial sovereignty in relation to criminal acts was examined in the *Lotus* case.[44] The relevant facts may be summarised as follows. The French steamer, the *Lotus*, was involved in a collision on the high seas with the *Boz-Kourt*, a Turkish collier. The latter vessel sank and eight sailors and passengers died as a result. Because of this the Turkish authorities arrested the French officer of the watch (at the time of the incident) when the *Lotus* reached a Turkish port. The French officer was charged with manslaughter and France protested strongly against this action, alleging that Turkey did not have the jurisdiction to try the offence. The case came before the Permanent Court of International Justice, which was called upon to decide whether there existed an international rule prohibiting the Turkish exercise of jurisdiction.

Because the basis of international law is the existence of sovereign states, the Court regarded it as axiomatic that restrictions upon the

[41] Before the International Court in oral pleadings at the provisional measures phase of the *Lockerbie* case, CR 92/3, pp. 11–12, UKMIL, 63 BYIL, 1992, p. 722. The trial of the two accused took place in the Netherlands, but in a facility that was deemed to be a Scottish court, with Scottish judges and lawyers and under Scots law: see e.g. A. Aust, 'Lockerbie: The Other Case', 49 ICLQ, 2000, p. 278, and for the verdict, see 94 AJIL, 2000, p. 405.

[42] See e.g. *Board of Trade* v. *Owen* [1957] AC 602, 634 and *DPP* v. *Stonehouse* [1977] 2 All ER 909, 916; 73 ILR, p. 252. In *R* v. *Abu Hamza*, *The Times*, 30 November 2006, the Court of Appeal (Criminal Division) held that it was an offence for a person to incite a foreign national in England and Wales to commit murder abroad. See also the Home Secretary speaking as to the Criminal Justice Bill on 14 April 1993, and noting that the effect of the proposed legislation would be to ensure that where a fraud had a significant connection with the UK, British courts would have jurisdiction, whether or not the final element of the crime occurred within the country, UKMIL, 64 BYIL, 1993, pp. 646–7. See G. Gilbert, 'Crimes Sans Frontières: Jurisdictional Problems in English Law', 63 BYIL, 1992, pp. 415, 430 ff. Note also Akehurst, who would restrict the operation of the doctrine so that jurisdiction could only be claimed by the state where the primary effect is felt, 'Jurisdiction', p. 154.

[43] See e.g. La Forest J in *Libman* v. *The Queen* (1985) 21 CCC (3d) 206 and Lord Griffiths in *Somchai Liangsiriprasert* v. *The United States* [1991] 1 AC 225; 85 ILR, p. 109.

[44] PCIJ, Series A, No. 10, 1927; 4 AD, p. 153. See e.g. Mann, 'Doctrine of Jurisdiction', pp. 33–6, 39, 92–3; J. W. Verzijl, *The Jurisprudence of the World Court*, Leiden, vol. I, 1965, pp. 73–98, and Schachter, 'International Law', p. 250. See also *Oppenheim's International Law*, p. 478.

independence of states could not be presumed.[45] However, a state was not able to exercise its power outside its frontiers in the absence of a permissive rule of international law. But, continued the Court, this did not mean that 'international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law'. In this respect, states had a wide measure of discretion limited only in certain instances by prohibitive rules.[46] Because of this, countries had adopted a number of different rules extending their jurisdiction beyond the territorial limits so that 'the territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty'.[47] The Court rejected the French claim that the flag state had exclusive jurisdiction over the ship on the high seas, saying that no rule to that effect had emerged in international law, and stated that the damage to the Turkish vessel was equivalent to affecting Turkish territory so as to enable that country to exercise jurisdiction on the objective territorial principle, unrestricted by any rule of international law prohibiting this.[48]

The general pronouncements by the Court leading to the dismissal of the French contentions have been criticised by writers for a number of years, particularly with respect to its philosophical approach in treating states as possessing very wide powers of jurisdiction which could only be restricted by proof of a rule of international law prohibiting the action concerned.[49] It is widely accepted today that the emphasis lies the other way around.[50] It should also be noted that the *Lotus* principle as regards collisions at sea has been overturned by article 11(1) of the High Seas Convention, 1958, which emphasised that only the flag state or the state of which the alleged offender was a national has jurisdiction over sailors regarding incidents occurring on the high seas. The territorial principle covers crimes committed not only upon the land territory of the state but also upon the territorial sea and in certain cases upon the contiguous and

[45] PCIJ, Series A, No. 10, 1927, pp. 18–19; 4 AD, p. 155.

[46] PCIJ, Series A, No. 10, 1927, p. 19; 4 AD, p. 156.

[47] PCIJ, Series A, No. 10, 1927, p. 20. [48] *Ibid.*, p. 24; 4 AD, p. 158.

[49] See e.g. G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 HR, 1957, pp. 1, 56–7, and H. Lauterpacht, *International Law: Collected Papers*, Cambridge, 1970, vol. I, pp. 488–9.

[50] See e.g. the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 116; 18 ILR, p. 86 and the *Nottebohm* case, ICJ Reports, 1955, p. 4; 22 ILR, p. 349.

other zones and on the high seas where the state is the flag state of the vessel.[51]

As modern communications develop, so states evolve new methods of dealing with new problems. In the case of the Channel Tunnel, for example, providing a land link between the UK and France, these countries entered into an agreement whereby each state was permitted to exercise jurisdiction within the territory of the other. The Protocol concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance relating to the Channel Fixed Link was signed on 25 November 1991.[52] Under this Protocol, French and UK frontier control officers are empowered to work in specified parts of one another's territory. These areas are termed 'control zones' and are located at Cheriton, Coquelles, on board through trains and at international railway stations. The frontier control laws and regulations of one state thus apply and may be enforced in the other. In particular, the officers of the adjoining state shall in their exercise of national powers be permitted in the control zone in the host state to detain or arrest persons in accordance with the frontier control laws and regulations of the adjoining state. Article 38(2) of the Protocol provides that within the Fixed Link (i.e. the Tunnel), each state shall have jurisdiction and shall apply their own law when it cannot be ascertained with certainty where an offence has been committed or when an offence committed in the territory of one state is related to an offence committed on the territory of the other state or when an offence has begun in or has been continued in its own territory.[53] However, it is also provided that the state which first receives the person suspected of having committed such an offence shall have priority in exercising jurisdiction.

Another example of such cross-state territorial jurisdictional arrangements may be found in the Israel–Jordan Treaty of Peace, 1994. Annex I(b) and (c) of the Treaty, relating to the Naharayim/Baqura Area and the Zofar/Al-Ghamr Area respectively, provides for a special regime on a temporary basis. Although each area itself is recognised as under Jordan's sovereignty, with Israeli private land ownership rights and property

[51] See above, chapter 11.

[52] The Protocol was brought into force in the UK by the Channel Tunnel (International Arrangements) Order 1993: see e.g. UKMIL, 64 BYIL, 1993, p. 647. See also the Protocol of 29 May 2000, UKMIL, 71 BYIL, 2000, p. 589, and the *Eurotunnel* case, partial award of 30 January 2007, 132 ILR, p. 1.

[53] This is in addition to the normal territorial jurisdiction of the states within their own territory up to the frontier in the Tunnel under the sea, article 38(1).

interests, Jordan undertakes to grant unimpeded entry to, exit from, land usage and movement within the area to landowners and to their invitees or employees and not to apply its customs or immigration legislation to such persons. In particular, Jordan undertakes to permit with minimum formality the entry of uniformed Israeli police officers for the purpose of investigating crime or dealing with other incidents solely involving the landowners, their invitees or employees. Jordan undertakes also not to apply its criminal laws to activities in the area involving only Israeli nationals, while Israeli laws applying to the extraterritorial activities of Israelis may be applied to Israelis and their activities in the area. Israel could also take measures in the area to enforce such laws.[54]

Thus although jurisdiction is primarily and predominantly territorial, it is not inevitably and exclusively so and states are free to consent to arrangements whereby jurisdiction is exercised outside the national territory and whereby jurisdiction by other states is exercised within the national territory.[55]

A rather more unusual situation developed with regard to persons detained by the US in Guantanamo Bay Naval Base, situated in a part of the island of Cuba leased to the US pursuant to agreements made in 1903 and 1934. Following the conflict in Afghanistan in 2001 and thereafter, persons were taken to and held in Guantanamo Bay, which the US initially argued lay outside federal jurisdiction, being under US control but not sovereignty.[56] The Supreme Court, however, in *Rasul* v. *Bush* held that District Courts did have jurisdiction to hear petitions challenging the legality of detention of foreign nationals who had been detained abroad in connection with an armed conflict and held at Guantanamo Bay.[57]

[54] See also e.g. the treaties of 1903 and 1977 between the US and Panama concerning jurisdictional rights over the Panama Canal Zone and the NATO Status of Forces Agreement, 1951 regulating the exercise of jurisdiction of NATO forces based in other NATO states. The Boundary Commission in *Eritrea/Ethiopia* noted that it was not unknown for states to locate a checkpoint or customs post in the territory of a neighbouring state, Decision of 13 April 2002, 130 ILR, pp. 1, 112.

[55] Jurisdiction, and its concomitant international responsibility for acts done in the exercise of that jurisdiction, may also exist on the basis of the acts of officials committed abroad and on the basis of actual control of the territory in question in specific contexts. See e.g. *Loizidou* v. *Turkey* (*Preliminary Objections*), European Court of Human Rights, Series A, No. 310, 1995, p. 20; 103 ILR, p. 621. For the European Convention on Human Rights, see above, chapter 7 and for international responsibility, see below, chapter 14.

[56] Relying upon *Johnson* v. *Eisenträger* 339 US 763 (1950).

[57] 542 US 466 (2004). Congress then passed the Detainee Treatment Act of 2005, which denied jurisdiction concerning an application for habeas corpus with regard to an alien detainee at Guantanamo Bay. In *Hamdan* v. *Rumsfeld* 548 US 557, 576–7, the Court

### *The nationality principle*[58]

Since every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, it is essential that a link between the two be legally established. That link connecting the state and the people it includes in its territory is provided by the concept of nationality.[59]

By virtue of nationality, a person becomes entitled to a series of rights ranging from obtaining a valid passport enabling travel abroad to being able to vote. In addition, nationals may be able to undertake various jobs (for example in the diplomatic service) that a non-national may be barred from. Nationals are also entitled to the protection of their state and to various benefits prescribed under international law. On the other hand, states may not mistreat the nationals of other states nor, ordinarily, conscript them into their armed forces, nor prosecute them for crimes committed outside the territory of the particular state.

held this provision inapplicable to pending cases. The Military Commissions Act of 2006 subsequently provided for denial of jurisdiction with regard to detained aliens determined to be an enemy combatant with effect from 11 September 2001, i.e. including applications pending at the time of the adoption of this Act. However, in *Boumediene* v. *Bush* 553 US – (2008), US Supreme Court, 12 June 2008, Slip Opinion, it was held that the doctrine of habeas corpus did apply, thus permitting applications by detained enemy combatants to the federal courts challenging their detention. Justice Kennedy, writing for the majority, while noting that, 'In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches', declared that, 'The laws and Constitution are designed to survive, and remain in force, in extraordinary times.' *Ibid.*, pp. 67 and 70.

[58] Akehurst, 'Jurisdiction', pp. 156–7; Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 29 AJIL, 1935, Supp., pp. 519 ff.; M. Whiteman, *Digest of International Law*, Washington, DC, 1967, vol. VIII, pp. 1–22, 64–101, 105–13, 119–87; R. Donner, *The Regulation of Nationality in International Law*, 2nd edn, New York, 1995; D. Campbell and J. Fisher, *International Immigration and Nationality Law*, The Hague, 1993; M. J. Verwilghen, 'Conflits de Nationalité, Plurinationalité et Apatridie', 277 HR, 1999, p. 9; J. F. Rezek, 'Le Droit International de la Nationalité', 198 HR, 1986 III, p. 333; H. Silving, 'Nationality in Comparative Law', 5 *American Journal of Comparative Law*, 1956, p. 410, and Brownlie, *Principles*, p. 301 and chapter 19. See also Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, pp. 492 ff., and below, chapter 14, p. 808.

[59] Note that several instruments provide for a right to a nationality: see e.g. the Universal Declaration on Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the Convention on the Rights of the Child, 1989 and the European Convention on Nationality, 1997. See also A. Grossman, 'Nationality and the Unrecognised State', 50 ICLQ, 2001, p. 849.

The concept of nationality is important since it determines the benefits to which persons may be entitled and the obligations (such as conscription) which they must perform. The problem is that there is no coherent, accepted definition of nationality in international law and only conflicting descriptions under the different municipal laws of states. Not only that, but the rights and duties attendant upon nationality vary from state to state.

Generally, international law leaves the conditions for the grant of nationality to the domestic jurisdiction of states.

This was the central point in the *Nationality Decrees in Tunis and Morocco* case.[60] This concerned a dispute between Britain and France over French nationality decrees which had the effect of giving French nationality to the children of certain British subjects. The Court, which had been requested to give an advisory opinion by the Council of the League of Nations, declared that:

> [t]he question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this court, in principle within this reserved domain.[61]

However, although states may prescribe the conditions for the grant of nationality, international law is relevant, especially where other states are involved. As was emphasised in article 1 of the 1930 Hague Convention on the Conflict of Nationality Laws:

> it is for each state to determine under its own law who are its nationals. This law shall be recognised by other states in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.

The International Court of Justice noted in the *Nottebohm* case[62] that, according to state practice, nationality was:

> a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

[60] PCIJ, Series B, No. 4, 1923; 2 AD, p. 349.
[61] PCIJ, Series B, No. 4, 1923, p. 24.
[62] ICJ Reports, 1955, pp. 4, 23; 22 ILR, pp. 349, 360. See also below, p. 813.

It was a legal manifestation of the link between the person and the state granting nationality and a recognition that the person was more closely connected with that state than with any other.[63]

Since the concept of nationality provides the link between the individual and the benefits of international law, it is worth pointing to some of the basic ideas associated with the concept, particularly with regard to its acquisition.[64]

In general, the two most important principles upon which nationality is founded in states are first by descent from parents who are nationals (*jus sanguinis*) and second by virtue of being born within the territory of the state (*jus soli*).

It is commonly accepted that a child born of nationals of a particular state should be granted the nationality of that state by reason of descent. This idea is particularly utilised in continental European countries, for example, France, Germany and Switzerland, where the child will receive the nationality of his father, although many municipal systems do provide that an illegitimate child will take the nationality of his mother. On the other hand, in common law countries such as Britain and the US the doctrine of the *jus sanguinis* is more restricted, so that where a father has become a national by descent it does not always follow that that fact alone will be sufficient to make the child a national.

The common law countries have tended to adopt the *jus soli* rule, whereby any child born within the territorial limits of the state automatically becomes a national thereof.[65] The British Nationality Act of 1948, for example, declared that 'every person born within the United Kingdom and Colonies · · · shall be a citizen of the United Kingdom and Colonies by birth'.[66] There is an exception to this, however, which applies to virtually every country applying the *jus soli* rule, and that is with regard to persons entitled to immunity from the jurisdiction of the state. In other words, the children of diplomatic personnel born within the country do

63 See below, chapter 14, p. 815, as to dual nationality and state responsibility for injuries to aliens.

64 See e.g. Brownlie, *Principles*, p. 378; P. Weiss, *Nationality and Statelessness in International Law*, 2nd edn, Germantown, 1979, and H. F. Van Panhuys, *The Role of Nationality in International Law*, Leiden, 1959.

65 See e.g. *United States* v. *Wong Kim Ark* 169 US 649 (1898).

66 But see now the British Nationality Act of 1981.

not automatically acquire its nationality.[67] Precisely how far this exception extends varies from state to state. Some countries provide that this rule applies also to the children of enemy alien fathers[68] born in areas under enemy occupation.[69]

Nationality may also be acquired by the wives of nationals, although here again the position varies from state to state. Some states provide for the automatic acquisition of the husband's nationality, others for the conditional acquisition of nationality and others merely state that the marriage has no effect as regards nationality. Problems were also caused in the past by the fact that many countries stipulated that a woman marrying a foreigner would thereby lose her nationality.

The Convention of 1957 on the Nationality of Married Women provides that contracting states accept that the marriage of one of their nationals to an alien shall not automatically affect the wife's nationality, although a wife may acquire her husband's nationality by special procedures should she so wish.

It should be noted also that article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 provides that states parties shall grant women equal rights with men to acquire, change or retain their nationality and that in particular neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. It is also provided that women shall have equal rights with men with respect to the nationality of their children. As far as children themselves are concerned, article 24(3) of the International Covenant on Civil and Political Rights, 1966 stipulated that every child has the right to acquire a nationality, while this is reaffirmed in article 7 of the Convention on the Rights of the Child, 1989.

Nationality may be obtained by an alien by virtue of a naturalisation process usually involving a minimum period of residence, but the conditions under which this takes place vary considerably from country to country.[70]

[67] See e.g. *In re Thenault* 47 F.Supp. 952 (1942) and article 12, Convention on Conflict of Nationality Law, 1930. See also article II, Optional Protocol on Acquisition of Nationality (UN Conference on Diplomatic Law), 1961.

[68] But see *Inglis* v. *Sailor's Snug Harbour* 3 Peters 99 (1830), US Supreme Court.

[69] Note the various problems associated with possible extensions of the *jus soli* rule, e.g. regarding births on ships: see Brownlie, *Principles*, pp. 379 ff. See also *Lam Mow* v. *Nagle* 24 F.2d 316 (1928); 4 AD, pp. 295, 296.

[70] See e.g. Weiss, *Nationality*, p. 101.

Civil jurisdiction, especially as regards matters of personal status, in a number of countries depends upon the nationality of the parties involved. So that, for example, the appropriate matrimonial law in any dispute for a Frenchman anywhere would be French law. However, common law countries tend to base the choice of law in such circumstances upon the law of the state where the individual involved has his permanent home (domicile).

Many countries, particularly those with a legal system based upon the continental European model, claim jurisdiction over crimes committed by their nationals, notwithstanding that the offence may have occurred in the territory of another state.[71] Common law countries tend, however, to restrict the crimes over which they will exercise jurisdiction over their nationals abroad to very serious ones.[72] In the UK this is generally limited to treason, murder and bigamy committed by British nationals abroad.[73] Under section 21 of the Antarctic Act 1994, when a British national does or omits to do anything in Antarctica which would have constituted an offence if committed in the UK, then such person will be deemed to have committed an offence and be liable to be prosecuted and punished if convicted. In addition, the War Crimes Act 1991 provides for

[71] See e.g. Gilbert, 'Crimes', p. 417. See also *Re Gutierrez* 24 ILR, p. 265, *Public Prosecutor* v. *Antoni* 32 ILR, p. 140 and *Serre et Régnier*, *Recueil Dalloz Sirey* (*jurisprudence*), 1991, p. 395.

[72] See the statement by a Home Office Minister, noting that 'We have exceptionally, however, assumed extra-territorial jurisdiction over some serious crime, such as murder, where the factors in favour of the ability to prosecute here outweigh those against', HC Deb., vol. 445, col. 1419, Written Answer, 2 May 2006, UKMIL, 77 BYIL, 2006, p. 756. Note, however, the comment by Lord Rodger that 'there can be no objection in principle to Parliament legislating for British citizens outside the United Kingdom, provided that the particular legislation does not offend against the sovereignty of other states', *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26, para. 46; 133 ILR, p. 716.

[73] See e.g. the Official Secrets Acts 1911 (s. 10), 1970 (s. 8) and 1989 (s. 15); the Offences Against the Person Act 1861 ss. 9 and 57; the Merchant Shipping Act 1894 s. 686(1) and *R* v. *Kelly* [1982] AC 665; 77 ILR, p. 284 and the Suppression of Terrorism Act 1978 s. 4. See P. Arnell, 'The Case for Nationality-Based Jurisdiction', 50 ICLQ, 2001, p. 955. This has now been extended to cover various sexual offences committed abroad: see the Sexual Offences (Conspiracy and Incitement) Act 1996; the Sex Offenders Act 1997 and the Sexual Offences Act 2003 s. 72, and certain offences of bribery and corruption committed overseas by UK companies or nationals: see the Anti-Terrorism Crime and Security Act 2001, Part 12. Note that in *Skiriotes* v. *Florida* 313 US 69, 73 (1941); 10 AD, pp. 258, 260, Hughes CJ declared that 'the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed'. See also DUSPIL, 1976, pp. 449–57, regarding legislation to subject US nationals and citizens to US district court jurisdiction for crimes committed outside the US, particularly regarding Antarctica.

jurisdiction against a person who was on 8 March 1990 or subsequently became a British citizen or resident in the UK. Proceedings for murder, manslaughter or culpable homicide may be brought against that person in the UK, irrespective of his nationality at the time of the alleged offence, if the offence was committed during the Second World War in a place that was part of Germany or under German occupation and constituted a violation of the laws and customs of war.[74] Further, the common law countries have never protested against the extensive use of the nationality principle to found jurisdiction in criminal matters by other states.

It should be finally noted that by virtue of article 91 of the 1982 Convention on the Law of the Sea, ships have the nationality of the state whose flag they are entitled to fly. Each state is entitled to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. However, there must be a genuine link between the state and the ship.[75] By article 17 of the Chicago Convention on International Civil Aviation, 1944, aircraft have the nationality of the state in which they are registered, although the conditions for registration are a matter for domestic law.[76]

### *The passive personality principle*[77]

Under this principle, a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state.

The leading case on this particular principle is the *Cutting* case in 1886[78] which concerned the publication in Texas of a statement defamatory of a Mexican by an American citizen. Cutting was arrested while in Mexico and convicted of the offence (a crime under Mexican law) with Mexico maintaining its right to jurisdiction upon the basis of the passive personality principle. The United States strongly protested against this, but there

[74] See also, with regard to the nationality of ships and aircraft, above, chapter 11, p. 611, and below, p. 677, and as to the nationality of corporations, below, chapter 14, p. 815. See further, as to the nationality of claims, below, chapter 14, p. 808.

[75] See also article 5 of the Geneva Convention on the High Seas, 1958.

[76] See article 19.

[77] See e.g. Akehurst, 'Jurisdiction', pp. 162–6; Mann, 'Doctrine of Jurisdiction', pp. 40–1; E. Beckett, 'The Exercise of Criminal Jurisdiction over Foreigners', 6 BYIL, 1925, p. 44 and Beckett, 'Criminal Jurisdiction over Foreigners', 8 BYIL, 1927, p. 108; W. W. Bishop, 'General Course of Public International Law, 1965', 115 HR, 1965, pp. 151, 324, and Higgins, *Problems and Process*, p. 65. See also the *Eichmann* case, 36 ILR, pp. 5, 49–57, 304.

[78] J. B. Moore, *Digest of International Law*, Washington, 1906, vol. II, p. 228.

was an inconclusive end to the incident, the charges being withdrawn by the injured party.[79]

A strong attack on this principle was made by Judge Moore, in a Dissenting Opinion in the *Lotus* case,[80] since the Turkish criminal code provided for jurisdiction where harm resulted to a Turkish national. However, the Court did not resolve the issue and concentrated upon the objective territorial jurisdiction principle.[81]

The overall opinion has been that the passive personality principle is rather a dubious ground upon which to base claims to jurisdiction under international law and it has been strenuously opposed by the US[82] and the UK, although a number of states apply it.

However, article 9 of the International Convention against the Taking of Hostages, 1979, in detailing the jurisdictional bases that could be established with regard to the offence, included the national state of a hostage 'if that state considers it appropriate'.[83] The possibility of using the passive personality concept was taken up by the US in 1984 in the Comprehensive Crime Control Act[84] *inter alia* implementing the Convention and in the provision extending the special maritime and territorial jurisdiction of the US to include '[a]ny place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States'.[85] In 1986, following the *Achille Lauro* incident,[86] the US adopted the Omnibus Diplomatic Security and Anti-Terrorism Act,[87] inserting into the criminal

79 See *US Foreign Relations*, 1886, p. viii; 1887, p. 757; and 1888, vol. II, p. 1114.

80 PCIJ, Series A, No. 10, 1927, p. 92; 4 AD, p. 153.

81 PCIJ, Series A, No. 10, 1927, pp. 22–3. See also O'Connell, *International Law*, vol. II, pp. 901–2, and Higgins, *Problems and Process*, pp. 65–6.

82 See, for example, US protests to Greece, concerning the service of summonses by Greek Consuls in the US on US nationals involved in accidents with Greek nationals occurring in the United States, DUSPIL, 1973, pp. 197–8 and DUSPIL, 1975, pp. 339–40.

83 See *Rees* v. *Secretary of State for the Home Department* [1986] 2 All ER 321. See generally, J. J. Lambert, *Terrorism and Hostages in International Law*, Cambridge, 1990. See also article 3(1)c of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973 and article 5(1)c of the Convention against Torture, 1984.

84 See new section 1203 of the Criminal Code, 18 USC para. 1203, Pub. L. No. 98-473, ch. 19, para. 2002(a), 98 Stat. 1976, 2186.

85 Pub. L. No. 98-473, para. 1210, 98 Stat. at 2164. Note also article 689(1) of the French Code of Criminal Procedure adopted in 1975.

86 See below, p. 679.

87 Pub. L. No. 99-399, tit. XII, para. 1202(a), 100 Stat. 853, 896. See e.g. C. Blakesley, 'Jurisdictional Issues and Conflicts of Jurisdiction' in *Legal Responses to International Terrorism* (ed. M. C. Bassiouni), Charlottesville, 1988. See also article 689 of the French Code of Criminal Procedure 1975.

code a new section which provided for US jurisdiction over homicide and physical violence outside the US where a national of the US is the victim. The section is less sweeping than it appears, since the written certification of the Attorney General is required, before a prosecution may commence by the US, to the effect that the offence was intended to coerce, intimidate or retaliate against a government or a civilian population.

In *US* v. *Yunis* (*No. 2*)[88] the issue concerned the apprehension of a Lebanese citizen by US agents in international waters and his prosecution in the US for alleged involvement in the hijacking of a Jordanian airliner. The only connection between the hijacking and the US was the fact that several American nationals were on that flight. The Court accepted that both the universality principle[89] and the passive personality principle provided an appropriate basis for jurisdiction in the case. It was stated that although the latter principle was the most controversial of the jurisdictional principles in international law, 'the international community recognises its legitimacy'.[90] It was pointed out that although the US had historically opposed the passive personality principle, it had been accepted by the US and the international community in recent years in the sphere of terrorist and other internationally condemned crimes.[91] Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in the *Congo* v. *Belgium (Arrest Warrant)* case noted that in this particular context, the passive personality principle 'today meets with relatively little opposition'.[92]

### *The protective principle*[93]

This principle provides that states may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the

[88] 681 F.Supp. 896 (1988); 82 ILR, p. 344. See also *US* v. *Yunis* (*No. 3*) 924 F.2d 1086, 1091; 88 ILR, pp. 176, 181.

[89] See below, p. 668.

[90] 681 F.Supp. 896, 901; 82 ILR, p. 349.

[91] 681 F.Supp. 896, 902; 82 ILR, p. 350. Note that a comment to paragraph 402 of the *Third US Restatement of Foreign Relations Law*, vol. I, p. 240, states that the passive personality principle 'is increasingly accepted as applied to terrorist and other organised attacks on a state's nationals by reason of their nationality, or to assassinations of a state's diplomatic representatives or other officials'. See also *US* v. *Benitez* 741 F.2d 1312, 1316 (1984), cert. denied, 471 US 1137, 105 S. Ct. 2679 (1985).

[92] ICJ Reports, 2002, pp. 3, 63, 76–7; 128 ILR, pp. 60, 118, 132.

[93] See e.g. Akehurst, 'Jurisdiction', pp. 157–9; Harvard Research, pp. 543–63, and M. Sahovic and W. W. Bishop, 'The Authority of the State: Its Range with Respect to Persons and Places' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, pp. 311, 362–5. See also M. S. McDougal, H. Lasswell and V. Vlasic, *Law and Public Order in Space*, New Haven, 1963, pp. 699–701.

security of the particular state concerned. It is a well-established concept, although there are uncertainties as to how far it extends in practice and particularly which acts are included within its net.[94]

The principle is justifiable on the basis of protection of a state's vital interests, since the alien might not be committing an offence under the law of the country where he is residing and extradition might be refused if it encompassed political offences. However, it is clear that it is a principle that can easily be abused, although usually centred upon immigration and various economic offences, since far from protecting important state functions it could easily be manipulated to subvert foreign governments. Nevertheless, it exists partly in view of the insufficiency of most municipal laws as far as offences against the security and integrity of foreign states are concerned.[95]

This doctrine seems to have been applied in the British case of *Joyce* v. *Director of Public Prosecutions*,[96] involving the infamous pro-Nazi propagandist 'Lord Haw-Haw'. Joyce was born in America, but in 1933 fraudulently acquired a British passport by declaring that he had been born in Ireland. In 1939, he left Britain and started working for German radio. The following year, he claimed to have acquired German nationality. The case turned on whether the British court had jurisdiction to try him after the war, on a charge of treason. The House of Lords decided that jurisdiction did exist in this case. Joyce had held himself out to be a British subject and had availed himself of the protection (albeit fraudulently) of a British passport. Accordingly he could be deemed to owe allegiance to the Crown, and be liable for a breach of that duty. The fact that the treason occurred outside the territory of the UK was of no consequence since states were not obliged to ignore the crime of treason committed against them outside their territory. Joyce was convicted and suffered the penalty for his actions.[97]

[94] See e.g. *In re Urios* 1 AD, p. 107 and article 694(1) of the French Code of Criminal Procedure.

[95] See e.g. *Rocha* v. *US* 288 F.2d 545 (1961); 32 ILR, p. 112; *US* v. *Pizzarusso* 388 F. 2d 8 (1968), and *US* v. *Rodriguez* 182 F.Supp. 479 (1960). See also the *Italian South Tyrol Terrorism* case, 71 ILR, p. 242.

[96] [1946] AC 347; 15 AD, p. 91.

[97] See, with regard to US practice, *Rocha* v. *US* 288 F.2d 545 (1961); *US* v. *Pizzarusso* 388 F.2d 8 (1968) and *US* v. *Layton* 509 F.Supp. 212 (1981). See also *Third US Restatement of Foreign Relations Law*, vol. I, pp. 237 ff. and the Omnibus Diplomatic Security and Anti-Terrorism Act 1986. The US has also asserted jurisdiction on the basis of the protective principle over aliens on the high seas: see the Maritime Drug Law Enforcement Act 1986 and *US* v. *Gonzalez* 776 F.2d 931 (1985) and see also S. Murphy, 'Extraterritorial Application of US Laws to Crimes on Foreign Vessels', 97 AJIL, 2003, p. 183.

The protective principle is often used in treaties providing for multiple jurisdictional grounds with regard to specific offences.[98]

## *The universality principle*[99]

Under this principle, each and every state has jurisdiction to try particular offences. The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole. There are two categories that clearly belong to the sphere of universal jurisdiction, which has been defined as the competence of the state to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality or other grounds of jurisdiction recognised by international law.[100] These are piracy[101] and war crimes. However, there are a growing number of other offences which by international treaty may be subject to the jurisdiction of contracting parties and which form a distinct category closely allied to the concept of universal jurisdiction.

### War crimes, crimes against peace and crimes against humanity

In addition to piracy, war crimes are now accepted by most authorities as subject to universal jurisdiction, though of course the issues

[98] See e.g. the Hostages Convention, 1979; the aircraft hijacking conventions and the Safety of United Nations and Associated Personnel Convention, 1994: see below, pp. 676 ff.

[99] See e.g. Akehurst, 'Jurisdiction', pp. 160–6; Bowett, 'Jurisdiction', pp. 11–14; Harvard Research, pp. 563–92; Jennings, 'Extraterritorial Jurisdiction', p. 156; Gilbert, 'Crimes', p. 423; K. C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review*, 1988, p. 785; M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Dordrecht, 1992; L. Reydams, *Universal Jurisdiction*, Oxford, 2003; Redress Report on Legal Redress for Victims of International Crimes, March 2004; M. Inazumi, *Universal Jurisdiction in Modern International Law for Prosecuting Serious Crimes under International Law*, Antwerp, 2005; R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice*, 2004, p. 735; A. H. Butler, 'The Doctrine of Universal Jurisdiction: A Review of the Literature,' 11 *Criminal Law Forum*, 2001, p. 353; M. Henzelin, *Le Principe de l'Universalité en Droit Pénal International*, Brussels, 2000, and L. Benvenides, 'The Universal Jurisdiction Principle: Nature and Scope', 1 *Annuario Mexicano de Derecho Internacional*, 2001, p. 58. See also the *Princeton Principles on Universal Jurisdiction*, Princeton, 2001 and the Cairo Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Violations, Inazumi, *Universal Jurisdiction*, p. 5. Note also H. Kissinger, 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs*, July/August 2001.

[100] See the resolution adopted by the Institut de Droit International on 26 August 2005, para. 1.

[101] As to piracy, see above, chapter 8, p. 398 and chapter 11, p. 615

involved are extremely sensitive and highly political.[102] While there is little doubt about the legality and principles of the war crimes decisions emerging after the Second World War, a great deal of controversy arose over suggestions of war crimes with regard to American personnel connected with the Vietnam war,[103] Pakistani soldiers involved in the Bangladesh war of 1971 and persons concerned with subsequent conflicts.

Article 6 of the Charter of the International Military Tribunal of 1945 referred to crimes against peace, violations of the law and customs of war and crimes against humanity as offences within the jurisdiction of the Tribunal for which there was to be individual responsibility.[104] This article can now be regarded as part of international law. In a resolution unanimously approved by the General Assembly of the United Nations in 1946, the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal were expressly confirmed.[105] The General Assembly in 1968 adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, reinforcing the general conviction that war crimes form a distinct category under international law, susceptible to universal jurisdiction,[106] while the four Geneva 'Red Cross' Conventions of 1949 also contain provisions for universal jurisdiction over grave breaches.[107] Such grave breaches include wilful killing, torture or inhuman treatment, unlawful deportation of protected

[102] See e.g. Akehurst, 'Jurisdiction', p. 160; A. Cowles, 'Universality of Jurisdiction over War Crimes', 33 *California Law Review*, 1945, p. 177; Brownlie, *Principles*, pp. 303–5; Bowett, 'Jurisdiction', p. 12; Higgins, *Problems and Process*, p. 56; Mann, 'Doctrine of Jurisdiction', p. 93, and Bassiouni, *Crimes against Humanity*, p. 510. See also the *Eichmann* case, 36 ILR, pp. 5 and 277 and the UN War Crimes Commission, 15 *Law Reports of Trials of War Criminals*, 1949, p. 26. However, cf. the Separate Opinion of Judge Guillaume in *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 42; 128 ILR, p. 98 (restricting universal jurisdiction to piracy) and the Joint Separate Opinion, *ibid.*, pp. 3, 78; 128 ILR, p. 134 (universal jurisdiction may possibly exist with regard to the Geneva Conventions of 1949 on war crimes, etc.). See further above, chapter 8.

[103] See e.g. *Calley* v. *Calloway* 382 F.Supp. 650 (1974), rev'd 519 F.2d 184 (1975), cert. denied 425 US 911 (1976).

[104] See also article 228 of the Treaty of Versailles, 1919.

[105] Resolution 95 (I). See also *Yearbook of the ILC*, 1950, vol. II, p. 195; 253 HL Deb., col. 831, 2 December 1963; the *British Manual of Military Law*, Part III, 1958, para. 637; Brownlie, *Principles*, pp. 561 ff., and P. Weiss, 'Time Limits for the Prosecution of Crimes against International Law', 53 BYIL, 1982, pp. 163, 188 ff.

[106] See e.g. Weiss, 'Time Limits'.

[107] See article 49 of the First Geneva Convention; article 50 of the Second Geneva Convention; article 129 of the Third Geneva Convention and article 146 of the Fourth Geneva

persons and the taking of hostages. The list was extended in Protocol I of 1977 to the 1949 Conventions to include, for example, attacking civilian populations.[108]

Nuremberg practice demonstrates that crimes against peace consist of the commission by the authorities of a state of acts of aggression. In theory this is not controversial, but in practice serious problems are likely to arise within the framework of universal jurisdiction.[109] However, whether this category can be expanded to include support for international terrorism is open to question. Crimes against humanity clearly cover genocide and related activities. They differ from war crimes in applying beyond the context of an international armed conflict, but cover essentially the same substantive offences.[110] The UN Secretary-General's Report on the Establishment of an International Tribunal for the Former Yugoslavia[111] noted in the commentary to article 5 of what became the Statute of the Tribunal[112] that 'crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character' and that 'crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religous grounds'.[113] The 1998 Rome Statute for the International Criminal Court provides that jurisdiction is limited to the 'most serious crimes of concern to the international community as a whole' being genocide, crimes against humanity, war crimes and aggression,[114] and that a person who commits a crime within the jurisdiction of the Court 'shall be individually responsible and liable for punishment' in accordance with the Statute.[115]

Convention. See also e.g. G. I. A. D. Draper, *The Red Cross Conventions*, London, 1958, p. 105. Cf. Bowett, 'Jurisdiction', p. 12.

108 See further above, chapter 8, and below, chapter 21.

109 See e.g. *R* v. *Jones* [2006] UKHL 16; 132 ILR, p. 668, and see above, chapter 4, p. 146.

110 See e.g. Brownlie, *Principles*, p. 562; L. C. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000, chapter 18; E. Schwelb, 'Crimes Against Humanity', 23 BYIL, 1946, p. 178. See also the Commentary to article 20 of the Draft Statute for an International Criminal Court which refers to the concept as a term of art, Report of the International Law Commission, A/49/10, 1994, p. 75.

111 S/25704, 1993, at paragraphs 47–8.

112 Security Council resolution 827 (1993).

113 See article 3 of the Statute of the International Criminal Tribunal for Rwanda, 1994, Security Council resolution 955 (1994). See also the *Barbie* case, 100 ILR, p. 330 and the *Touvier* case, *ibid.*, p. 337.

114 Article 5.

115 Article 25.

The International Law Commission adopted a Draft Code of Crimes against the Peace and Security of Mankind in 1996.[116] Article 8 provides that each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes laid down in the Draft, while article 9 provides that a state in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either extradite or prosecute that individual. The Commentary to this article declares that the national courts of states parties would be entitled to exercise the 'broadest possible jurisdiction' over the crimes 'under the principle of universal jurisdiction'.[117] The Crimes against the Peace and Security of Mankind, for which there is individual responsibility, comprise aggression (article 16);[118] genocide (article 17); crimes against humanity (article 18); crimes against UN and associated personnel (article 19); and war crimes (article 20).[119]

The fact that a particular activity may be seen as an international crime does not of itself establish universal jurisdiction and state practice does not appear to have moved beyond war crimes, crimes against peace and crimes against humanity in terms of permitting the exercise of such jurisdiction. In particular, references made to, for example, apartheid, mercenaries and environmental offences in the 1991 Draft but omitted in the Draft Code adopted in 1996 must be taken as *de lege ferenda*.

In so far as universal jurisdiction as manifested in domestic courts is concerned, the starting point is the *Eichmann* case[120] decided by the District Court of Jerusalem and the Supreme Court of Israel in 1961. Eichmann was prosecuted and convicted under an Israeli law of 1951 for

[116] Report of the International Law Commission, A/51/10, 1996, p. 9. This had been under consideration since 1982: see General Assembly resolution 36/106 of 10 December 1981. A Draft Code was formulated in 1954 by the ILC and submitted to the UN General Assembly: see *Yearbook of the ILC*, 1954, vol. II, p. 150. The General Assembly postponed consideration of it until a definition of aggression had been formulated, resolution 897 (IX). This was achieved in 1974: see resolution 3314 (XXIX). A Draft Code was provisionally adopted in 1991: see A/46/10 and 30 ILM, 1991, p. 1584.

[117] Report of the International Law Commission, A/51/10, 1996, p. 51. This does not apply to the crime of aggression.

[118] Article 8 provides that jurisdiction concerning individuals will rest with an international criminal court.

[119] Additional crimes referred to in the 1991 Draft also included recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs and wilful and severe damage to the environment.

[120] 36 ILR, pp. 5 and 277. See also the *Barbie* cases, 78 ILR, pp. 78, 125, 136 and *Demjanjuk* v. *Petrovsky* 776 F.2d 571 (1985); 79 ILR, p. 534. See also *Keesing's Record of World Events*, p. 36189 regarding the *Demjanjuk* case in Israel.

war crimes, crimes against the Jewish people and crimes against humanity. The District Court declared that far from limiting states' jurisdiction with regard to such crimes, international law was actually in need of the legislative and judicial organs of every state giving effect to its criminal interdictions and bringing the criminals to trial. The fact that the crimes were committed prior to the establishment of the state of Israel did not prevent the correct application of its powers pursuant to universal jurisdiction under international law. Israel's municipal law merely reflected the offences existing under international law.

It is a matter for domestic law whether the presence of the accused is required for the exercise of the jurisdiction of the particular domestic court. Different states adopt different approaches. The Belgian Court of Cassation took the view in its decision of 12 February 2003 in *HSA et al.* v. *SA et al.* that the presence of the accused was not necessary.[121] But this was in the context of the Belgian Statute of 1993, as amended in 1999, which provided for a wide jurisdiction in the case of genocide, crimes against humanity and war crimes. This Statute was amended on 23 April 2003 to provide that the alleged serious violation of international law in question shall be one committed against a person who at the time of the commission of the acts is a Belgian national or legally resident in Belgium for at least three years and that any prosecution, including a preliminary investigation phase, may only be undertaken at the request of the Federal Prosecutor. In addition, the Federal Prosecutor may decide not to proceed where it appears that in the interests of the proper administration of justice and in compliance with Belgium's international obligations, the case would be better placed before an international court or the court of the place where the acts were committed or the courts of the state of nationality of the alleged offender or the courts of the place where he may be found.[122] The Statute was further amended on 5 August 2003, requiring a foreigner wishing to submit an application to be resident in Belgium for a minimum of three years.[123] It appears that Belgium has in effect ceased to permit prosecutions under the universal jurisdiction model in the absence of the accused.[124] This is consistent with the approach of the Institut de Droit International which has stated that 'the exercise of

[121] Relating to the indictment of defendants Ariel Sharon, Amos Yaron and others concerning events in the Shabra and Shatilla camps in Lebanon in 1982, No. P. 02.1139. F/1.

[122] See article 16(2), 42 ILM, 2003, pp. 1258 ff.

[123] *Moniteur Belge*, 7 August 2003, pp. 40506–15.

[124] See e.g. Inazumi, *Universal Jurisdiction*, p. 97. See also S. Ratner, 'Belgium's War Crimes Statute: A Postmortem', 97 AJIL, 2003, p. 888.

universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting state or on board a vessel flying its flag or an aircraft which is registered under its laws or other lawful forms of control over the alleged offender'.[125]

The Supreme Court of Spain decided on 25 February 2003 in the *Guatemalan Genocide* case that jurisdiction would cover only acts of genocide in which Spanish nationals were victims.[126] However, this decision was overturned on 26 September 2005 by the Constitutional Court which decided that the domestic jurisdiction provision with regard to crimes against humanity was not limited to cases involving Spanish nationals who were victims of genocide and that no tie to Spain was needed in order to initiate a complaint.[127]

### Treaties providing for jurisdiction

In addition to the accepted universal jurisdiction to apprehend and try pirates and war criminals, there are a number of treaties which provide for the suppression by the international community of various activities, ranging from the destruction of submarine cables to drug trafficking and slavery.[128] These treaties provide for the exercise of state jurisdiction but not for universal jurisdiction. Some conventions establish what might be termed a quasi-universal jurisdiction in providing for the exercise of jurisdiction upon a variety of bases by as wide a group of states parties as possible coupled with an obligation for states parties to establish such jurisdiction in domestic law. In many instances the offence involved will constitute *jus cogens*. The view is sometimes put forward that where a norm of *jus cogens* exists, particularly where the offence is regarded as especially serious, universal jurisdiction as such may be created.[129] More correct is the approach that in such circumstances international law recognises that domestic legal orders may validly establish and exercise jurisdiction over the alleged offenders. Such circumstances thus include the presence of

[125] Resolution adopted on 26 August 2005, para. 3(b).

[126] Judgment No. 327/2003. See also the same court's decision a few months later in the *Peruvian Genocide* case, where it was held that Spanish courts could not exercise universal jurisdiction over claims of genocide and other serious crimes alleged to have been committed by Peruvian officials from 1986, Judgment No. 712/2003.

[127] Judgment No. 237/2005. See e.g. N. Roht-Arriaza, '*Guatemala Genocide* Case. Judgment no. STC 237/2005', 100 AJIL, 2006, p. 207.

[128] See e.g. Akehurst, 'Jurisdiction', pp. 160–1.

[129] See e.g. Millett LJ in *Ex parte Pinochet* (*No. 3*) [2000] 1 AC 147, 275; 119 ILR, p. 229. See also R. Van Alebeek, 'The *Pinochet* Case: International Human Rights Law on Trial', 71 BYIL, 2000, p. 29.

the accused in the state concerned and in this way may be differentiated from universal jurisdiction as such, where, for example, a pirate may be apprehended on the high seas and then prosecuted in the state. Therefore, the type of jurisdiction at issue in such circumstances cannot truly be described as universal, but rather as quasi-universal.[130] Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in *Congo* v. *Belgium* referred to this situation rather as an 'obligatory territorial jurisdiction over persons' or 'the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events' rather than as true universal jurisdiction.[131]

There are a number of treaties that follow the quasi-universal model, that is providing for certain defined offences to be made criminal offences within the domestic orders of states parties; accepting an obligation to arrest alleged offenders found on the national territory and then prosecuting those persons on the basis of a number of stated jurisdictional grounds, ranging from territoriality to nationality and passive personality grounds. Such treaties normally also provide for mutual assistance and for the offences in question to be deemed to be included as extraditable offences in any extradition treaty concluded between states parties. The agreements in question include, for example, the UN Torture Convention, 1984[132] and treaties relating to hostage-taking, currency counterfeiting, hijacking and drug trafficking. Such treaties are then normally implemented nationally.[133]

It is interesting to note that the International Law Commission's Draft Statute for an International Criminal Court proposed that the court would have jurisdiction in certain conditions with regard to a range of 'treaty crimes',[134] but this suggestion was not found acceptable in later discussions

[130] The phrase 'conditional universal jurisdiction' has also been suggested: see A. Cassese, 'When may Senior State Officials be Tried for International Crimes?', 13 EJIL, 2002, pp. 853, 856.

[131] ICJ Reports, 2002, pp. 3, 74–5; 128 ILR, pp. 60, 130–1. See also the Separate Opinion of Judge Guillaume, who uses the term 'subsidiary universal jurisdiction' to refer to the international conventions in question providing for the trial of offenders arrested on national territory and not extradited: *ibid.*, p. 40; 128 ILR, p. 96.

[132] See further above, chapter 6, p. 326.

[133] See e.g. the UK Taking of Hostages Act 1982.

[134] That is those arising out of the Geneva Conventions of 1949 and Protocol I thereto; the Hague Convention, 1970; the Montreal Convention, 1971; the Apartheid Convention, 1973; the Internationally Protected Persons Convention, 1973; the Hostages Convention, 1979; the Torture Convention, 1984; the Safety of Maritime Navigation Convention and Protocol, 1988 and the Convention against Illicit Traffic in Narcotic Drugs and

and does not appear in the 1998 Rome Statute. It is helpful to look at some of these treaties. The Convention against Torture, 1984 provides that each state party shall ensure that all acts of torture are offences under domestic criminal law[135] and shall take such measures as may be necessary to establish its jurisdiction over torture offences where committed in any territory under its jurisdiction or on board a ship or aircraft registered in the state concerned or when the alleged offender is a national or when the victim is a national if that state considers it appropriate.[136] Further, each state party agrees to either extradite or prosecute alleged offenders,[137] while agreeing that the offences constitute extraditable offences within the context of extradition agreements concluded between states parties.[138] This Convention was the subject of consideration in *Ex parte Pinochet* (*No. 3*), where the majority of the House of Lords held that torture committed outside the UK was not a crime punishable under UK law until the provisions of the Convention against Torture were implemented by s. 134 of the Criminal Justice Act 1988.[139] Lord Millett, however, took the view that torture was a crime under customary international law with universal jurisdiction and that since customary international law was part of the common law,[140] English courts 'have and always have had extraterritorial criminal jurisdiction in respect of universal jurisdiction under customary international law'.[141] The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, was adopted in 1973 by the General Assembly of the United Nations and came into force in 1977. This stipulates that contracting states should make acts such as assaults upon the person, premises and transport of such persons a crime under their domestic law.[142] This, of course, would require little if any revision of existing penal statutes. Each state is to establish its jurisdiction over these crimes when committed in its territory or on board ships or aircraft registered in its territory, or when the alleged offender is a national or when the crimes have been committed against an internationally protected person functioning on behalf of that state.[143] A person is regarded as internationally protected where he is a head of

Psychotropic Substances, 1988: see Report of the International Law Commission, A/49/10, 1994, pp. 141 ff.

135 Article 4. 136 Article 5. 137 Article 7. 138 Article 8.

139 [2000] 1 AC 147, 148, 159–60, 188–90, 202, 218–19 and 233; 119 ILR, p. 135.

140 See above, chapter 4, p. 141.

141 [2000] 1 AC 147, 276; 119 ILR, p. 135. See also e.g. R. O'Keefe, 'Customary International Crimes in English Courts', 72 BYIL, 2001, p. 293.

142 Article 2. See e.g. the UK Internationally Protected Persons Act 1978. 143 Article 3.

state or government, or foreign minister abroad, or state representative or official of an international organisation.[144]

The International Convention against the Taking of Hostages, 1979 came into force in 1983 and, like the Internationally Protected Persons Treaty, requires each state party to make the offence punishable under national law,[145] and provides that states parties must either extradite or prosecute an alleged offender found on their territory and incorporate the offence of hostage-taking into existing and future extradition treaties. The grounds upon which a state party may exercise jurisdiction are laid down in article 5 and cover offences committed in its territory or on board a ship or aircraft registered in that state; by any of its nationals, or if that state considers it appropriate, by stateless persons having their habitual residence in its territory; in order to compel that state to do or abstain from doing any act; or with respect to a hostage who is a national of that state, if that state considers it appropriate.

The Convention on the Safety of United Nations and Associated Personnel, 1994 provides that attacks upon UN or associated personnel or property be made a crime under national law by each state party[146] and that jurisdiction should be established with regard to such offences when the crime is committed in the territory of that state or on board a ship or aircraft registered in that state or when the alleged offender is a national of that state. States parties may also establish their jurisdiction over any such crimes when committed by a stateless person whose habitual residence is in the state concerned, or with regard to a national of that state, or in an attempt to compel that state to do or to abstain from doing any act.[147] In addition, the state in whose territory the alleged offender is present shall either prosecute or extradite such person.[148]

As far as the hijacking of and other unlawful acts connected with aircraft is concerned, the leading treaties are the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971. The latter two instruments arose as a result of the wave of aircraft hijacking and attacks upon civilian planes that took place in the late 1960s, and tried to deal with the problem of how to apprehend and punish the perpetrators of such deeds.

[144] Article 1. [145] See e.g. the UK Taking of Hostages Act 1982.
[146] Article 9. [147] Article 10. [148] Article 14.

The Tokyo Convention applies to both general offences and acts which, whether or not they are offences, may or do jeopardise the safety of the aircraft or of persons or property therein or which jeopardise good order and discipline on board. It provides for the jurisdiction of the contracting state over aircraft registered therein while the aircraft is in flight, or on the surface of the high seas or on any other area outside the territory of any state. Contracting states are called upon to take the necessary measures to establish jurisdiction by municipal law over such aircraft in such circumstances. In addition, the Convention permits interference with an aircraft in flight in order to establish criminal jurisdiction over an offence committed on board in certain specific circumstances by contracting states not being the state of registration. The circumstances specified are where the offence has effect on the territory of such state; has been committed by or against a national or permanent resident of such state; is against the security of such state; consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such state or where the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.[149] No obligation to extradite is provided for.

The Hague Convention provides that any person who, on board an aircraft in flight, is involved in the unlawful seizure of that aircraft (or attempts the same), commits an offence which contracting states undertake to make punishable by severe penalties. Each contracting state is to take such measures as may be necessary to establish its jurisdiction over the offence or related acts of violence when the offence is committed on board an aircraft registered in that state, when the aircraft in question lands in its territory with the alleged offender still on board or when the offence is committed on board an aircraft leased without a 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 that state. The Convention also provides that contracting states in the territory of which an alleged offender is found must either extradite or prosecute him.

The Montreal Convention contains similar rules as to jurisdiction and extradition as the Hague Convention but is aimed at controlling and punishing attacks and sabotage against civil aircraft in flight and on the ground

[149] Article 4. See S. Shuber, *Jurisdiction over Crimes on Board Aircraft*, The Hague, 1973; N. D. Joyner, *Aerial Hijacking as an International Crime*, Dobbs Ferry, 1974, and E. McWhinney, *Aerial Piracy and International Terrorism*, 2nd edn, Dordrecht, 1987. See also the US Anti-Hijacking Act of 1974.

rather than dealing with hijacking directly.[150] A Protocol to the Montreal Convention was signed in 1988. This provides for the suppression of unlawful acts of violence at airports serving international civil aviation which cause or are likely to cause serious injury, and acts of violence which destroy or seriously damage the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupt the service of the airport.[151]

The wide range of jurisdictional bases is to be noted, although universality as such is not included. Nevertheless, condemnation of this form of activity is widespread and it is likely that hijacking has become an international crime of virtually universal jurisdiction in practice.[152] Further, it is possible that international terrorism may in time be regarded as a crime of universal jurisdiction.[153]

Of course questions as to enforcement will arise where states fail either to respect their obligations under the above Conventions or, if they are not parties to them, to respect customary law on the reasonable assumption that state practice now recognises hijacking as an unlawful act.[154] A number of possibilities exist, in addition to recourse to the United Nations

[150] Note that neither the Tokyo nor the Hague Conventions apply to aircraft used in military, customs or police services: see articles 1(4) and 3(2) respectively.

[151] Note the Hindawi episode, where the European Community imposed sanctions upon Syria in a situation where it emerged during a court case in the UK that an attempt to smuggle a bomb onto an Israeli airliner in 1986 in London had been supported by Syrian intelligence: see *Keesing's Contemporary Archives*, pp. 34771–2 and 34883–4.

[152] See *US* v. *Yunis* (*No. 2*) 681 F.Supp. 896, 900–1 (1988); 82 ILR, pp. 344, 348. See also *US* v. *Yunis* (*No. 3*) 924 F.2d 1086, 1091 (1991); 88 ILR, pp. 176, 181.

[153] Note that in *Flatow* v. *Islamic Republic of Iran*, the US District Court stated that 'international terrorism is subject to universal jurisdiction', 999 F.Supp. 1, 14 (1998); 121 ILR, p. 618. See also the Convention on the Protection of All Persons from Enforced Disappearance, 2006, which requires all states parties to make enforced disappearance a criminal offence and further defines the widespread or systematic practice of enforced disappearance as a crime against humanity. States parties must take the necessary measures to establish jurisdiction on the basis of territoriality, nationality or, where the state deems it appropriate, the passive personality principle and must then either prosecute or extradite. The offence of enforced disappearance is deemed to be included as an extraditable offence in any extradition treaty existing between states parties before the entry into force of the Convention and states parties undertake to include it as an extraditable offence in future treaties, while the offence is not to be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone. Further, no person may be sent to a state where there are substantial grounds for believing that he or she may be the subject of an enforced disappearance.

[154] See e.g. General Assembly resolution 2645 (XXV) and Security Council resolution 286 (1970).

and the relevant international air organisations.[155] Like-minded states may seek to impose sanctions upon errant states. The 1978 Bonn Declaration, for example, agreed that 'in cases where a country refuses the extradition or prosecution of, those who have hijacked an aircraft and/or does not return such aircraft' action would be taken to cease all flights to and from that country and its airlines.[156] Bilateral arrangements may also be made, which provide for the return of, or prosecution of, hijackers.[157] States may also, of course, adopt legislation which enables them to prosecute alleged hijackers found in their territory,[158] or more generally seeks to combat terrorism. The 1984 US Act to Combat International Terrorism, for example, provides for rewards for information concerning a wide range of terrorist acts primarily (although not exclusively) within the territorial jurisdiction of the US.[159]

Other acts of general self-help have also been resorted to. In 1973, for example, Israeli warplanes intercepted a civil aircraft in Lebanese airspace in an unsuccessful attempt to apprehend a guerrilla leader held responsible for the killing of civilians aboard hijacked aircraft. Israel was condemned for this by the UN Security Council[160] and the International Civil Aviation Organisation.[161]

On the night of 10–11 October 1985, an Egyptian civil aircraft carrying the hijackers of the Italian cruise ship *Achille Lauro* was intercepted over the Mediterranean Sea by US Navy fighters and compelled to land in Sicily. The US justified its action generally by reference to the need to combat international terrorism, while the UK Foreign Secretary noted it was relevant to take into account the international agreements on hijacking and hostage-taking.[162] However, nothing in these Conventions, it is suggested, would appear to justify an interception of a civilian aircraft over the high

[155] See above, chapter 10, p. 542.

[156] See UKMIL, 49 BYIL, 1978, p. 423. The states making the Declaration were the UK, France, US, Canada, West Germany, Italy and Japan.

[157] See e.g. the US–Cuban Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offences, 1973.

[158] See e.g. the US Anti-Hijacking Act of 1974 and the UK Civil Aviation Act 1982 s. 92 and the Aviation Security Act 1982.

[159] See further, as to international terrorism, below, chapter 20, p. 1159.

[160] Resolution 337 (1973).

[161] ICAO Doc. 9050-LC/169-1, at p. 196 (1973).

[162] See *Keesing's Contemporary Archives*, p. 34078 and *The Times*, 6 February 1986, p. 4. In this context, one should also note the hijack of a TWA airliner in June 1985, the murder of a passenger and the prolonged detention in the Lebanon of the remaining passengers and the crew: see *Keesing's Contemporary Archives*, p. 34130. See also A. Cassese, *Violence and Law in the Modern Age*, Cambridge, 1988, chapter 4.

seas or over any area other than the territory of the intercepting state and for specified reasons. The apprehension of terrorists is to be encouraged, but the means must be legitimate. On 4 February 1986, the Israeli Air Force intercepted a Libyan civil aircraft en route from Libya to Syria in an attempt to capture terrorists, arguing that the aircraft in question was part of a terrorist operation.[163]

Nevertheless, there may be circumstances where an action taken by a state as a consequence of hostile hijacking or terrorist operations would be justifiable in the context of self-defence.[164]

### Illegal apprehension of suspects and the exercise of jurisdiction[165]

It would appear that unlawful apprehension of a suspect by state agents acting in the territory of another state is not a bar to the exercise of jurisdiction. Such apprehension would, of course, constitute a breach of international law and the norm of non-intervention involving state responsibility,[166] unless the circumstances were such that the right of self-defence could be pleaded.[167] It could be argued that the seizure, being a violation of international law, would only be compounded by permitting the abducting state to exercise jurisdiction,[168] but international practice on the whole demonstrates otherwise.[169] In most cases a distinction is clearly drawn between the apprehension and jurisdiction to prosecute and one should also distinguish situations where the apprehension has

[163] See *The Times*, 5 February 1986, p. 1.

[164] See e.g. as to the 1976 Entebbe incident, below, chapter 20, p. 1143.

[165] See e.g. F. Morgenstern, 'Jurisdiction in Seizures Effected in Violation of International Law', 29 BYIL, 1952, p. 256; P. O'Higgins, 'Unlawful Seizure and Irregular Extradition', 36 BYIL, 1960, p. 279; A. Lowenfeld, 'US Law Enforcement Abroad: The Constitution and International Law', 83 AJIL, 1989, p. 880, Lowenfeld, 'US Law Enforcement Abroad: The Constitution and International Law, Continued', 84 AJIL, 1990, p. 444, Lowenfeld, 'Kidnapping by Government Order: A Follow-Up', 84 AJIL, 1990, p. 712, and Lowenfeld, 'Still More on Kidnapping', 85 AJIL, 1991, p. 655. See also F. A. Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 407, and Higgins, *Problems and Process*, p. 69.

[166] See e.g. article 2(4) of the United Nations Charter and *Nicaragua* v. *US*, ICJ Reports, 1986, p. 110; 76 ILR, p. 349. See further below, chapter 20.

[167] Note, in particular, the view of the Legal Adviser of the US Department of State to the effect that '[w]hile international law therefore permits extraterritorial "arrests" in situations which permit a valid claim of self-defence, decisions about any extraterritorial arrest entail grave potential implications for US personnel, for the United States, and for our relations with other states', 84 AJIL, 1990, pp. 725, 727.

[168] See Mann, 'Jurisdiction', p. 415.

[169] See e.g. the *Eichmann* case, 36 ILR, pp. 5 and 277.

taken place on or over the high seas from cases where it has occurred without consent on the territory of another state. A further distinction that has been made relates to situations where the abduction has taken place from a state with which the apprehending state has an extradition treaty which governs the conditions under which movement of alleged offenders occurs between the two. A final distinction may be drawn as between cases depending upon the type of offences with which the offender is charged, so that the problem of the apprehension interfering with the prosecution may be seen as less crucial in cases where recognised international crimes are alleged.[170] Of course, any such apprehension would constitute a violation of the human rights of the person concerned, but whether that would impact upon the exercise of jurisdiction as such is the key issue here.

Variations in approaches are evident between states. The US Court of Appeals in *US* v. *Toscanino*[171] held that the rule that jurisdiction was unaffected by an illegal apprehension[172] should not be applied where the presence of the defendant has been secured by force or fraud, but this approach has, it seems, been to a large extent eroded. In *US ex rel. Lujan* v. *Gengler*[173] it was noted that the rule in *Toscanino* was limited to cases of 'torture, brutality and similar outrageous conduct'.[174] The issue came before the US Supreme Court in *Sosa* v. *Alvarez-Machain*,[175] in which the view was taken that the issue essentially revolved around a strict interpretation of the relevant extradition treaty between Mexico and the US. The Court noted that where the terms of an extradition treaty in force between the states concerned prohibited abduction then jurisdiction could not be exercised. Otherwise the rule in *Ker* would apply and the prosecution would proceed. This applied even though there were some differences between the cases, in that, unlike the situation in *Ker*, the US government had been involved in the abduction

[170] See Higgins, *Problems and Process*, p. 69.

[171] 500 F.2d 267 (1974); 61 ILR, p. 190.

[172] See, in particular, *Ker* v. *Illinois* 119 US 436 (1886) and *Frisbie* v. *Collins* 342 US 519 (1952). These cases have given rise to the reference to the Ker–Frisbie doctrine.

[173] 510 F.2d 62 (1975); 61 ILR, p. 206. See also *US* v. *Lira* 515 F.2d 68 (1975); Lowenfeld, 'Kidnapping', p. 712; *Afouneh* v. *Attorney-General* 10 AD, p. 327, and *Re Argoud* 45 ILR, p. 90.

[174] This approach was reaffirmed in *US* v. *Yunis* both by the District Court, 681 F.Supp. 909, 918–21 (1988) and by the Court of Appeals, 30 ILM, 1991, pp. 403, 408–9.

[175] 119 L Ed 2d 441 (1992); 95 ILR, p. 355. See also M. Halberstam, 'In Defence of the Supreme Court Decision in *Alvarez-Machain*', 86 AJIL, 1992, p. 736, and M. J. Glennon, 'State-Sponsored Abduction: A Comment on *United States* v. *Alvarez-Machain*', *ibid.*, p. 746.

and the state from whose territory the apprehension took place had protested.[176]

In the UK, the approach has appeared to alter somewhat. In *R* v. *Plymouth Justices, ex parte Driver*,[177] it was noted that once a person was in lawful custody within the jurisdiction, the court had no power to inquire into the circumstances in which he had been brought into the jurisdiction. However, in *R* v. *Horseferry Road Magistrates' Court, ex parte Bennett*,[178] the House of Lords declared that where an extradition treaty existed with the relevant country under which the accused could have been returned, 'our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party'.[179] The approach in this case was extended in *R* v. *Latif* to cover entrapment.[180] However, where an accused was taking legal action to quash a decision to proceed with an extradition request, the fact that he had been lured into the jurisdiction was not sufficient to vitiate the proceedings since safeguards as to due process existed in the light of the Home Secretary's discretion and under the law of the state to whom he was to be extradited.[181] Further, in *Ex parte Westfallen*, the High Court took the view that where there had been no illegality, abuse of power or

[176] 119 L Ed 2d 451; 95 ILR, p. 363. See also the Dissenting Opinion, which took the view that the abduction had in fact violated both international law and the extradition treaty, 119 L Ed 2d 456–79; 95 ILR, pp. 369–79. The accused was eventually acquitted and returned to Mexico: see *Alvarez-Machain* v. *United States* 107 F.3d 696, 699 (9th Cir. 1996). He also commenced an action for compensation. In that action the US Court of Appeals for the Ninth Circuit stated that his abduction was a violation of the law of nations in that international human rights law had been breached: see *Alvarez-Machain* v. *United States* 41 ILM, 2002, pp. 130, 133.

[177] [1986] 1 QB 95; 77 ILR, p. 351. See also *Ex parte Susannah Scott* (1829) 9 B & C 446; *Sinclair* v. *HM Advocate* (1890) 17 R (J) 38 and *R* v. *Officer Commanding Depot Battalion RASC Colchester, ex parte Elliott* [1949] 1 All ER 373. Cf. *R* v. *Bow Street Magistrates, ex parte Mackerson* (1981) 75 Cr App R 24.

[178] [1993] 3 WLR 90; 95 ILR, p. 380.

[179] [1993] 3 WLR 105; 95 ILR, p. 393, per Lord Griffiths. See also Lord Bridge, [1993] 3 WLR 110; 95 ILR, p. 399 and Lord Slynn, [1993] 3 WLR 125; 95 ILR, p. 416. The House of Lords was also influenced by the decision of the South Africa Supreme Court in *State* v. *Ebrahim*, 95 ILR, p. 417, where the conviction and sentence before a South African court of a person were set aside as a consequence of his illegal abduction by state officials from Swaziland. This view was based both on Roman-Dutch and South African common law and on international law.

[180] [1996] 1 WLR 104, see Lord Steyn, at 112–13. See also *R* v. *Mullen* [1999] 2 Cr App R 143.

[181] See *In re Schmidt* [1995] 1 AC 339; 111 ILR, p. 548 (House of Lords).