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JURISDICTION IN INTERNATIONAL LAW*

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BECAUSE the word 'jurisdiction' is used by different writers to denote a wide variety of different things, it seems advisable to start by defining the senses in which the word is used in the present article. The first three parts of the article deal with the power of one State to perform acts in the territory of another State (executive jurisdiction), the power of a State's courts to try cases involving a foreign element (judicial jurisdiction) and the power of a State to apply its laws to cases involving a foreign element (legislative jurisdiction). The fourth part represents, in effect, the other side of the coin and examines the question whether States are under a legal duty to recognize the exercise of jurisdiction by other States.

PART I. EXECUTIVE JURISDICTION

Not every act by one State in the territory of another State is contrary to international law; common sense suggests that the representative of one State who signs a commercial contract in another State is not acting contrary to international law. Even if the act is contrary to the local State's law,

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it is not necessarily contrary to international law (e.g. breach of a commercial contract).¹ The act is contrary to international law only if it represents a usurpation of the sovereign powers of the local State.

... a State ... may not exercise its *power* in any form in the territory of another State.²

Sovereignty ... in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.³

The act of one State in the territory of another may usurp the sovereign powers of the latter either because of the nature of the act or because of the purpose for which the act is done. These two aspects will be dealt with in turn.

Acts illegal by their nature

An act by one State in the territory of another is forbidden by international law if it is, by its nature, an act which only the officials of the local State are entitled to perform, as opposed to an act which private individuals may perform. For instance, collecting taxes is something which can be done only by public officials, not by private individuals, and so the officials of one State are not allowed to collect taxes in the territory of another State.⁴ For the same reasons the officials of one State may not sit as judges⁵ or recruit soldiers (even as volunteers)⁶ in another State. In countries where postal services are a government monopoly, officials of foreign governments are not allowed to provide postal services.⁷

Problems arise in connection with acts which are regarded as governmental functions in some States but not in others. For instance, in common law countries anyone may serve a writ on a defendant in civil proceedings; in civil law countries writs are served by officers of the court. Common law countries do not object to foreign consuls' serving writs;⁸ civil law countries regard such activities as a breach of international law, and common law countries have not claimed that their consuls have any right to serve writs

¹ Spying in peacetime will almost certainly be contrary to the local State's law, but it is by no means clear that it is contrary to international law. See Oppenheim, *International Law* (8th ed., by H. Lauterpacht), vol. 1 (1955), p. 862; Cohen-Jonathan and Kovar, *Annuaire français de droit international* (1960), p. 239; and the anonymous note in *Columbia Law Review*, 61 (1961), pp. 1074, 1110-11. And see below, p. 150 n. 2.

² *Lotus case*, P.C.I.J., 1927, Series A, No. 10, at p. 18 (*italics added*).

³ *Island of Palmas case* (1928), R.I.A.A., 2, pp. 829, 838.

⁴ Moore, *A Digest of International Law* (1906), (hereinafter cited as Moore), vol. 2, pp. 319 et seq.; Hackworth, *Digest of International Law* (1940-4), (hereinafter cited as Hackworth), vol. 2, pp. 315-16; *Compagnie générale des asphaltes de France claim* (1903), R.I.A.A., 9, p. 389; *British Digest of International Law* (ed. by Parry, 1965-), (hereinafter cited as *British Digest*), vol. 8, p. 156.

⁵ Hyde, *International Law* (2nd ed., 1947), vol. 1, p. 641 n. 1; McNair, *International Law Opinions* (1956), vol. 1, pp. 70-1.

⁶ Moore, vol. 2, p. 362; *British Digest*, vol. 8, pp. 65-6.

⁷ Hackworth, vol. 2, pp. 316-17.

⁸ Hyde, *op. cit.* (above, n. 5 on this page), p. 644; Hackworth, vol. 2, pp. 118-19; Whiteman, *Digest of International Law* (1963-), (hereinafter cited as Whiteman), vol. 6, pp. 187-9, 195-6.

in civil law countries.¹ The acquiescence by common law countries in the face of the protests made by civil law countries demonstrates that the classification of an act, for the purposes of determining whether it constitutes a usurpation of sovereign power, must be made in accordance with the law of the local State, and not in accordance with the law of the acting State.²

Acts illegal by their purpose

An act by one State in the territory of another State may constitute a usurpation of the sovereign powers of the latter State by reason of the purpose for which the act is done. For instance, a State is normally allowed to seek information in the territory of another State, provided that no coercion is brought to bear on the persons providing information; but if the information is sought for the *purpose* of enforcing the first State's revenue laws, the inquiry is contrary to international law. The power to tax is a sovereign power, and no State may take any step to give effect to that power in the territory of another State.³ Similarly, a State may not inspect ships in a foreign port for the purpose of enforcing its own quarantine regulations,⁴ and may not conduct inquiries into the political loyalties of its nationals in a foreign State.⁵ In all of these cases the consent of the individuals providing the information is irrelevant; the act is a usurpation of the sovereign powers of the local State, which cannot be cured by the consent of private individuals.⁶ Equally it makes no difference whether a State employs its own officials to make inquiries or whether it hires private detectives, accountants, etc.; the act is illegal regardless of the status of the State's agent.

¹ *American Journal of International Law*, 56 (1962), p. 794; Jones, *American Journal of Comparative Law*, 12 (1963), pp. 231, 234. See also the judgment of the Austrian Supreme Court of 21 February 1961, I.L.R., vol. 38, p. 133; Mann, 'The Doctrine of Jurisdiction in International Law', *Recueil des cours*, III (1964-I), p. 9, at pp. 132-6; Collins, *International and Comparative Law Quarterly*, 21 (1972), p. 656, at pp. 657-8; and *J. R. Geigy AG. v. Commission* (1972), *Recueil de la jurisprudence de la Cour de justice des Communautés européennes* (hereinafter cited as *Recueil de la jurisprudence*), p. 787, at pp. 825-6, *Common Market Law Reports* (1973), pp. 637-8.

² See also *Kämpfer v. Public Prosecutor of Zürich* (1939), *Annual Digest*, 1941-42, p. 6.

³ Whiteman, vol. 6, p. 183; Mann, loc. cit. (above, n. 1 on this page), pp. 138-41.

⁴ Moore, vol. 2, pp. 13-14, 148-51; Hyde, op. cit. (above, p. 146 n. 5), p. 644.

⁵ International Law Association (hereinafter cited as I.L.A.) (1964), pp. 362-3.

⁶ Sometimes States do consent to other States' conducting such inquiries. The United States has frequently conducted such inquiries abroad, although it is not certain whether it would consent to other States' pursuing similar inquiries on United States territory; Switzerland has always resisted such activities by foreign States on Swiss territory, out of a desire to preserve Swiss banking secrecy (and also to preserve Swiss neutrality—allowing one State to conduct such activities on Swiss territory might lead to discontent from other States which were not granted similar privileges). France has sometimes prevented such inquiries (Angell, *Columbia Law Review*, 36 (1936), pp. 908, 910), and sometimes allowed them (Kiss, *Répertoire de la pratique française en matière de droit international* (1962-9), vol. 2, pp. 197-8; Bedjaoui, *Fonction publique internationale* (1958), pp. 607-8). The fact that States sometimes permit such activities does not alter the rule that the activities are contrary to international law in the absence of permission.

Similar considerations apply to the seizure of individuals or property. There is abundant authority for the proposition that it is a breach of international law for the agents of one State to seize an individual¹ or property² in the territory of another State. But in all the reported cases the seizure was carried out for the purpose of giving effect to the sovereign powers of the seizing State (e.g. prosecution or expropriation), and that is why the seizure was illegal. Common sense suggests that no breach of international law occurs if the seizure is made for a purpose which does not constitute a usurpation of the sovereign powers of the local State, e.g. if diplomats of State *A* arrest a man whom they suspect of burgling the embassy and hand him over to the authorities of State *B* for trial; such an act may be a breach of State *B*'s law, but it is an act which could equally well have been performed by private individuals, and does not reflect any intention on the part of State *A*'s diplomats to exercise sovereign powers in State *B*.

Individuals who have been seized in the territory of another State are not usually allowed to plead this fact as a bar to their prosecution;³ and owners of property which has been seized in another State are not usually allowed to rely on this fact in subsequent proceedings concerning the disposal of the

¹ Briggs, *The Law of Nations* (2nd ed., 1952), p. 312; Morgenstern, this *Year Book* 29 (1952), p. 265; O'Higgins, *ibid.* 36 (1960), p. 279; Fawcett, *ibid.* 38 (1962), p. 181; Kiss, *op. cit.* (above, p. 147 n. 6), pp. 193-5; de Schutter, *Revue belge de droit international* (1965), p. 88; *Iseli v. Public Prosecutor of Zürich*, I.L.R. 21 (1954), p. 80; *U.S. v. Sobell*, *ibid.* 24 (1956), pp. 256, 260; McNair, *op. cit.* (above, p. 146 n. 5), pp. 74-9; *Vaccaro v. Collier* (1931), *Annual Digest*, 1929-30, p. 283. Seizure by a private individual is not a breach of international law, but the State ratifies the act and assumes responsibility for it by keeping the individual in its custody: de Schutter, *loc. cit.* (above, in this note), pp. 100-2; Mann, *loc. cit.* (above, p. 147 n. 1), p. 130; cf. the *Hiss* case (Moore, vol. 2, pp. 384-9) and Akehurst, this *Year Book*, 43 (1968-9), pp. 59-66.

Different considerations apply to seizure in *terra nullius*: Kiss, *op. cit.* (above, p. 147 n. 1), pp. 267-71; Hunnings, *International and Comparative Law Quarterly*, 14 (1965), p. 431.

The rule that seizure in foreign territory is illegal is buttressed by certain corollaries to prevent evasion: *Colunje* claim (1933), *Annual Digest*, 1933-34, p. 250 ('... the police agent of the [Panama Canal] zone, by inducing Colunje by false pretences to come with him to the zone with the intent of arresting him there, unduly exercised authority within the jurisdiction of the Republic of Panama...'). See also *Journal de droit international* (1913), p. 1340, and *Iseli v. Public Prosecutor of Zürich*, I.L.R. 21 (1954), p. 80.

It is also illegal to transport a prisoner across the territory of another State: *Foreign Relations of the U.S.* (1887), p. 838; Moore, vol. 2, p. 373; Hackworth, vol. 2, p. 389; McNair, *op. cit.* (above, p. 146 n. 5), pp. 79-82. For a possible exception, see *Attorney-General for Canada v. Cain*, [1906] A.C. 542, 546, P.C.

Forcible release of a person held in custody in a foreign State is also illegal, Moore, vol. 2, p. 376.

² Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, pp. 102-3; Oppenheim, *International Law* (7th edn., by H. Lauterpacht), vol. 2 (1952), pp. 755-7; *The Ship Richmond v. U.S.* (1815), 9 Cranch 102; Moore, vol. 2, pp. 4-5, 362-5; Hackworth, vol. 2, p. 306; *Giddings* claim (1868), Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), (hereinafter cited as Moore, *History and Digest of . . . Arbitrations*), p. 4379.

³ See the articles by Morgenstern, O'Higgins, Fawcett and de Schutter (in n. 1 on this page); *Eichmann* case (1961-2), I.L.R., vol. 36, pp. 5, 57-71, 304-8; *Argoud* case, *Revue de droit public* (1964), p. 1259 (which goes against previous French cases); *U.S. v. Sobell* (1956), I.L.R., vol. 24, pp. 256, 260; *Ramotse* case, *The Times*, 1 October 1970.

property.¹ Despite isolated assertions to the contrary,² this practice does not mean that the seizure is lawful under international law; the seizure is illegal, but this issue can be raised only in diplomatic negotiations by the State where the seizure occurred,³ and not by the individual in municipal court proceedings. This practice has its dangers; there is no certainty that the government of the seizing State will be moved by diplomatic protests, and the possibility of censure by its own courts (which might have deterred it from carrying out the seizure in the first place) is not allowed to operate. But if the State where the seizure occurred acquiesces in the seizure, the breach of international law is cured;⁴ how then can the individual assert that the seizure was a violation of international law? Perhaps the best solution, *de lege ferenda*, would be for the municipal court to allow the State where the seizure occurred to intervene in the court proceedings if it wishes, and to order the release of the seized individual or property if that State so requests.⁵

Entry into the territory of a State without permission

According to Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*, foreigners have a 'general licence . . . to enter the dominions of a friendly power', but this 'is never understood to extend to a military force'.⁶ This rule is based on obvious reasons of security—otherwise a force could enter for some apparently innocent purpose, and then turn round and overpower the State. Entry of armed forces into the territory of another State without the latter's permission is a clear breach of international law.⁷ Similarly intrusion of military aircraft into foreign air space is a breach of international law;⁸ and States which consider that foreign warships have

¹ Oppenheim, *op. cit.* (above, p. 148 n. 2), pp. 755-7; *The Ship Richmond v. U.S.* (1815), 9 Cranch 102; Moore, vol. 2, pp. 4-5, 362 et seq.; Hackworth, vol. 2, p. 306.

² *Foreign Relations of the U.S.* (1906), vol. 2, pp. 1121-2.

³ Or perhaps by the national State of the individual concerned; cf. the *Koszta* case (1853), Moore, vol. 3, pp. 820 et seq.

⁴ But in some cases the arrest may be a violation of human rights, which cannot be cured by the acquiescence of the local State; see de Schutter, *loc. cit.* (above, p. 148 n. 1), pp. 121-2.

⁵ In *Ex parte Lopez* (1934), *Annual Digest*, 1933-34, p. 190, a United States District Court refused to allow Mexico to intervene in the trial of a man allegedly abducted from Mexico. But it is common practice for a neutral State to appear before a prize court to demand the release of a ship seized in neutral waters: Oppenheim, *op. cit.* (above, p. 148 n. 2), pp. 755-7.

⁶ (1812), 7 Cranch 116, 140-1. He said that warships constituted an exception, since they were usually allowed to enter foreign ports and thus had an implied licence; but he added that a State could, by express prohibition, exclude foreign warships; in other words, the express prohibition would override the implied licence.

⁷ Moore, vol. 2, pp. 362-71; Hackworth, vol. 2, pp. 282-306. This rule cannot be evaded by a force standing on its own side of the frontier and firing across it—such acts are equally contrary to international law: *ibid.*, pp. 282 et seq.; McNair, *International Law Opinions* (1956), vol. 1, pp. 79-80.

⁸ *Documents on International Affairs* (1949-50), p. 57; Wright, *American Journal of International Law*, 54 (1960), p. 836; *Columbia Law Review*, 61 (1961), pp. 1074, 1085-86.

no right of innocent passage through the territorial sea regard the entry of foreign warships into the territorial sea as a breach of international law.¹

Nowadays this rule must be regarded as applying to civilian servants of the State as well as to military forces.² Foreigners may have had a 'general licence' to enter a State's territory in 1812, but nowadays it is clear that a State is entitled to prohibit the entry of foreigners or of any class of foreigners. If one State sends its officials into another State against the latter's wishes, it is seeking to set at nought the latter's immigration policy, and to enforce its own policy in another State in substitution for that other State's policy—and this is clearly an inadmissible exercise of sovereign power in the territory of another State. Pushed to its limit, such conduct would constitute an attempt to deny to the other State the right to decide who should form part of its population; and this would be as serious a breach of international law as an attempt to take away the other State's territory or to change its form of government (territory, population and government being the three ingredients of statehood, according to orthodox theory).

Implied consent by the local State

When one State permits people holding official positions in another State to enter its territory in their official capacity, it may expressly *or by implication* authorize them to perform acts of sovereignty in its territory. Thus no objection is taken when heads of State, visiting foreign countries, continue to perform their official functions—signing decrees, appointing members of their own administration, etc.³ Likewise, by permitting an international organization to operate in its territory, a State impliedly consents to the organization's appointing officials by an act of authority—a technique of appointment which can normally be used only by the State.⁴

¹ *Foreign Relations of the U.S.* (1924), vol. 2, pp. 681–3; Kiss, *op. cit.* (above, p. 147 n. 6), vol. 4, p. 109; cf. the *Corfu Channel* case, *I.C.J. Reports*, 1949, pp. 4, 35 (passage which is not innocent is a breach of international law).

² *British Practice in International Law* (1967), p. 82 ('the presence of South African police in Rhodesia . . . was totally illegal and a violation of United Kingdom sovereignty'); judgment of Germany's Supreme Tax Court, 27 September 1933, *Reichssteuerblatt* (1933), pp. 1188, 1190 ('without the foreign State's permission the officials of the German Tax Office may not enter foreign territory. If . . . they do enter, they commit, contrary to public international law, a violation of the territory of the foreign State'). This may be a possible reason for regarding espionage during peacetime as illegal (cf. above, p. 146 n. 1); no State would knowingly permit a foreign spy to enter, and fraud by the spy concerning the reasons for his entry vitiates the State's consent. But in many cases a State may persuade residents of the other State to spy for it, or it may make use of officials who entered the other State for different purposes some time ago. The question of entry is not therefore very important.

Article 3(c) of the Chicago Convention, 1944, prohibits unauthorized overflight by all State aircraft, not merely military aircraft.

³ Rousseau, *Droit international public* (1953), p. 317. On governments in exile, see Oppenheim, *International Law* (8th edn., by H. Lauterpacht), vol. 1 (1955), pp. 326–7; Whiteman, vol. 6, pp. 354–5, 364; *Re Amand*, [1941] 2 K.B. 239, especially the statement by the Attorney-General.

⁴ Akehurst, *The Law Governing Employment in International Organizations* (1967), pp. 29–30, 34–6; Akehurst, this *Year Book*, 40 (1964), pp. 286, 290–1, 293–5.

What particular acts of sovereignty are permitted will vary according to the status of the officials concerned; a State which permits a foreign force to enter its territory will be regarded as impliedly permitting the commander of the force to impose disciplinary sanctions on his troops, but entry into diplomatic relations will not be regarded as impliedly permitting an ambassador to impose the same disciplinary sanctions (confinement to barracks, etc.) on his subordinates. But, even when the status of the officials concerned has been ascertained, the enumeration of those acts of sovereignty which are permitted is not always clear; *a priori* arguments about implied authorization often produce an unclear answer, and there is much to be said for an express detailed agreement between the two States concerned in order to regulate the matter. For instance, permitting a foreign force to enter territory implies that the foreign general may exercise disciplinary powers over his troops;¹ but how extensive is his power? In 1964 the United States Department of Defence said: 'The right of a friendly foreign force to exercise disciplinary jurisdiction over its members by means of service courts is implicit in its permitted presence in this country',² but in 1942 the Czech Military Court of Appeal in London held that Czech military courts in England had no right to try Czech soldiers unless *expressly* authorized by British law.³ Again, does the general's power extend to soldiers who have deserted and scattered themselves across the country?⁴ *A priori* theorizing does not provide a clear answer to such questions.

Similar uncertainties which previously surrounded the position of consuls have been dispersed by the Vienna Convention of 1963. Many of a consul's functions involve no exercise of sovereign power and therefore give rise to no difficulty (e.g. arranging legal representation for nationals of the sending State before courts of the receiving State). But as regards those of his functions which do involve an exercise of sovereign power, the Convention makes a distinction. Permission to exercise some of these functions (e.g. the power to issue passports and visas, and the powers over merchant ships exercised by a flag State's consul) is implicit in the acceptance of a foreign consul's appointment.⁵ In all other cases the Convention says that such functions may not be performed if they are prohibited by the law of the receiving State.⁶

¹ *The Schooner Exchange v. McFaddon* (1812), 7 Cranch 116, 139-40; Barton, this *Year Book*, 26 (1940), p. 380. Cf. *Wright v. Cantrell* (1943), *Annual Digest*, 1943-45, pp. 133, 140: 'the local sovereign, quoad the visiting force, must be deemed to waive . . . any laws prohibiting the carriage of arms or the wearing of uniforms other than its own'.

² *American Journal of International Law*, 58 (1964), p. 994.

³ *Annual Digest*, 1941-42, p. 123.

⁴ No, according to *Tucker v. Alexandroff* (1902), 183 U.S. 425, 433-4. During the First World War the United Kingdom and the United States apparently believed that the general's power extended only to his troops' camps: Barton (above, n. 1 on this page), pp. 392-3. For warships, see Colombos, *The International Law of the Sea* (6th edn., 1967), pp. 274-5.

⁵ Article 5 (d), (k), and (l).

⁶ Article 5 (f), (j), and (m).

PART II. JUDICIAL JURISDICTION

I. CRIMINAL TRIALS

*Territorial principle*¹

One of the main functions of a State is to maintain order within its own territory, so it is not surprising that the territorial principle is the most frequently invoked ground for criminal jurisdiction; even in continental countries, which also rely on the nationality principle to a far greater extent than common law countries, prosecutions based on the territorial principle far outnumber prosecutions based on the nationality principle.²

It often happens that a crime is committed partly in one country and partly in another; the example always given in textbooks is firing a gun across a frontier. At the turn of the century some writers argued in favour of conferring jurisdiction on the State where the crime was initiated, others argued in favour of conferring jurisdiction on the State where the crime was completed. But the arguments were so evenly matched that it was eventually realized that there was no logical reason for preferring the claims of one State over the claims of the other; and the only alternative to granting jurisdiction to neither State (which would have led to intolerable results) was to grant jurisdiction to both States. In some cases jurisdiction may be shared by more than two States, e.g. if *X* writes a fraudulent letter from State *A* to *Y* in State *B*, and *Y*, relying on the letter, sends money to *X* in State *C*.³

Logically a State should be able to claim jurisdiction only if the offence has been committed, in part or in whole, in its territory; it must prove that a constituent element of the offence occurred in its territory. This is the formulation adopted in the *Lotus* case,⁴ by the Harvard Research Draft

¹ The territorial principle is sometimes expressed by saying that a State has jurisdiction over crimes committed on its territory; but this prejudices the guilt of the accused. It would be more accurate to say that a State has jurisdiction over crimes *alleged* to have been committed on its territory. As soon as the prosecution concedes that the crime was not committed on the State's territory, the court no longer has jurisdiction under the territorial principle, and, unless it can establish jurisdiction under some other principle, it must stop the trial and release the accused.

² Donnedieu de Vabres, *Les principes modernes du droit pénal international* (1928), pp. 68 et seq.; Shearer, *Extradition in International Law* (1971), pp. 122-3; Hackworth, vol. 2, pp. 181-2; Kiss, op. cit. (above, p. 147 n. 6), vol. 2, p. 190.

³ Note that in this case the crime occurs in three States although, strictly speaking, the only physical act by *X* (writing and posting the letter) occurs only in the first State.

Similarly accomplices can be tried in the State where the principal offence occurred, even though they never entered that State: *American Journal of International Law*, 29 (1935), Supplement, pp. 503 et seq.; Stimson, *Conflict of Criminal Laws* (1936), pp. 78 et seq.; Merle and Vitu, *Traité de droit criminel* (1967), p. 207; *Naim Molvan v. Attorney-General for Palestine*, [1948] A.C. 351, 370-1; Income and Corporation Taxes Act 1970, s. 482 (5); *R. v. Robert Millar (Contractors) Ltd.*, [1970] 2 Q.B. 54; *Rivard v. U.S.* (1967), 61 AJIL 1967, 1065; *Bertschmann* (1955), I.L.R., vol. 22, p. 207 (Belgium); *Novic* (1955), ibid. 515 (Switzerland). The State where the accomplice committed his acts of participation has concurrent jurisdiction.

⁴ (1927), *P.C.I.J.*, Series A, No. 10, at pp. 23, 30.

Convention on Jurisdiction with Respect to Crime,¹ by Article 18 of the American Law Institute's *Restatement of Foreign Relations Law*, by the criminal codes of many countries² and by many judicial decisions in common law countries³ and elsewhere.⁴

Sometimes this rule has been stretched by using the device of the continuing offence. A thief who steals goods in State *A* and brings them to State *B* is regarded as having committed theft in *B* as well as in *A*, because theft is a continuing offence.⁵ Similarly a couple who commit bigamy in *A* and subsequently cohabit in *B* can be prosecuted in *B* as well as in *A*, because bigamy is deemed to be a continuing offence as long as the parties bigamously cohabit.⁶ This is clearly a legal fiction and goes against the logic of the law; but it is relatively harmless.

Some States, however, go considerably further, and claim jurisdiction over offences committed abroad which merely produce effects on their territory, even though those effects were not a constituent element of the crime. The list given in the commentary on the Harvard Research Draft Convention⁷ includes many states in the United States, Argentina,⁸ Mexico,⁹ China, Cuba, and Italy. Traces of the same approach can be seen in s. 1 (5) of the [English] Perjury Act, 1911, which provides that perjury by a person giving evidence before British authorities in foreign countries for the purposes of judicial proceedings in England shall be treated as if the perjury were committed in England; on similar facts, courts in Argentina¹⁰ and the United States¹¹ have openly based jurisdiction on the doctrine of effects. Other (non-perjury) cases in the United States¹² and Switzerland¹³

¹ Article 3; *American Journal of International Law*, 29 (1935), Supplement, p. 480.

² French Code of Criminal Procedure, Art. 693; *American Journal of International Law*, 29 (1935), Supplement, pp. 496 et seq.

³ *Halsbury's Laws of England* (3rd edn.), vol. 10, p. 318; *R. v. Baxter*, [1972] 1 Q.B. 1; *Treacy v. D.P.P.*, [1971] A.C. 537; *People v. Thomas* (1954), I.L.R., vol. 22, p. 295 (Ireland); *Mobarik Ali Ahmed v. State of Bombay* (1957), *ibid.*, vol. 24, p. 156; *Salinger v. Loisel* (1924), 265 U.S. 224.

⁴ e.g. *The Netherlands* (I.L.R., vol. 26, p. 209); *Germany* (Mann, loc. cit. (above, p. 147 n. 1), p. 85); *Switzerland* (*Journal de droit international*, 34 (1907), p. 518).

⁵ *Commonwealth v. White* (1970), *American Journal of International Law*, 65 (1971), p. 614; *R. v. von Elling*, [1945] A.D. 234; Stimson, *Conflict of Criminal Laws* (1936), pp. 103-14, 124-5. This is a rule of great antiquity: Donnedieu de Vabres, *Introduction à l'étude du droit pénal international* (1922), Chapter 4 and pp. 220-1, 251, 255. Cf. for stowaways on board ships, *Robey v. Vladinier* (1936), 154 L.T. 87, and for procuring, *R. v. Mackenzie and Higginson* (1911), 6 Cr. App. Rep. 64.

⁶ *American Journal of International Law*, 29 (1935), Supplement, pp. 491-2.

⁷ *Ibid.*, pp. 493-4, 497.

⁸ See also I.L.A. (1968), pp. 353-6.

⁹ See *Re Smith* (1956), I.L.R., vol. 23, p. 150.

¹⁰ *Re Hons*, *Annual Digest*, 1935-37, p. 253.

¹¹ *U.S., ex rel. Majka v. Palmer* (1933), 67 F. 2d 146; *U.S. v. Archer* (1943), 51 F. Supp. 708.

¹² *Hanks v. State* (1882), 13 Tex. App. 289; *Strassheim v. Daily* (1911), 221 U.S. 280, 285; *Ex parte Hammond* (1932), *Annual Digest*, 1931-32, p. 137; *Rivard v. U.S.* (1967), *American Journal of International Law*, 61 (1967), p. 1065. See also antitrust cases like *Alcoa*, below, pp. 193 et seq.

¹³ *Novic* case (1955), I.L.R., vol. 22, p. 515; Article 7 of the Swiss Penal Code provides that an offence is deemed to have been committed not only in the place where it is carried out, but also in the place where it takes effect.

also talk in terms of effects. Moreover, a man can be convicted of a crime in the State where the effects of his act are felt, even though his act was not a crime in the State where it occurred.¹

Once we abandon the 'constituent elements' approach in favour of the 'effects' approach, we embark on a slippery slope which leads away from the territorial principle towards universal jurisdiction. If, for instance, a man commits arson against a factory and the company owning the factory becomes insolvent as a result, the effects may be felt all over the world—losses may be suffered by the company's suppliers, customers and creditors, not to mention the dependants of the employees of the creditors' creditors. Clearly the line must be drawn somewhere. But where?

It is submitted that jurisdiction can be claimed only by the State where the primary effect is felt.² In order to determine whether the effects are primary or secondary, it is necessary to take two factors into account: (1) Are the effects felt in one State more direct than the effects felt in other States? (2) Are the effects felt in one State more substantial than the effects felt in other States? This test fits the decided cases, in the sense that jurisdiction has been claimed in practice only by States where the primary effects of an act have been felt. This test enables jurisdiction to be exercised by one or two³ States which have a legitimate interest in exercising jurisdiction, but it prevents the exercise of jurisdiction by States with no legitimate interest. The requirement of directness would, for instance, prevent jurisdiction's being based on the economic effects of a crime on the victim's

¹ *Hanks v. State; U.S., ex rel. Majka v. Palmer*. See also *People v. Chase* (1931), *Annual Digest*, 1931-32, p. 138; and see below, p. 157, on *fraude à la loi*. *Contra*, the *amicus curiae* brief filed by the Swiss government in the *Swiss Watches* case (quoted I.L.A. (1964), p. 576).

² Or, in the case of attempts and conspiracies, where the primary effect would have been felt if the offence had been consummated. A State has jurisdiction over attempts to commit a crime on its territory, even though the *actus reus* of the attempt occurred abroad (*American Journal of International Law*, 29 (1935), Supplement, pp. 506-8; *Mexican Federal Penal Code*, Art. 2; *Swiss Criminal Code* (1937), Art. 7; I.L.A. (1964), p. 576). English courts have jurisdiction to try conspiracies, even though the constituent elements (formation of the conspiracy) occurred abroad, provided that an overt act of implementation (which is not a constituent element of the crime of conspiracy) has occurred in England: *Director of Public Prosecutions v. Doot*, [1973] A.C. 807 (see especially Lord Salmon at pp. 835-36); *British Practice in International Law* (1967), p. 60. (United States federal cases like *Ford v. U.S.* (1926), 273 U.S. 593, 620, are not helpful, because in United States law, unlike English law, an overt act of implementation is a constituent element of the crime of conspiracy: 18 U.S.C. 88. But see Stimson, *Conflict of Criminal Laws* (1936), pp. 80-4.)

Thus the 'constituent elements' approach is not followed in the case of attempts and conspiracies (although presumably concurrent jurisdiction could be exercised by the State where the *actus reus* of the attempt occurred or where the conspiracy was formed).

³ The effects felt in two or more States may be equally direct or equally substantial; or direct but insubstantial effects in one State may be counter-balanced by indirect but substantial effects in another State. In such cases jurisdiction may be exercised by two or more States, but the number of States exercising jurisdiction is likely to be very small.

It is desirable to restrict jurisdiction to as small a number of States as possible, because there is no rule of international law against double jeopardy (see below, p. 166 n. 1), and because an act which is lawful in one country may be a crime in another country—it is unfair to expose an individual to the conflicting requirements of legal systems in distant countries.

creditors, dependants or employees. The requirement that the effects must be substantial would, for instance, prevent jurisdiction's being exercised over a radio station by every State where the broadcast was heard; jurisdiction could be exercised only by the State where the majority of the listeners lived.

In borderline cases it may be relevant to take the accused's intentions and motives into account. Thus, in the case of broadcasting, it would be legitimate to examine whether the broadcast was aimed at the country claiming jurisdiction.¹ Similarly, if a man built a high building near the frontier of one State which interfered with access by aircraft to an airport on the other side of the frontier, it would be reasonable to suggest that the State in which the airport was situated would have jurisdiction only if the builder's motive was to obstruct the aircraft. But, apart from such borderline cases, intentions and motives are irrelevant; many crimes, after all, do not require *mens rea*. Thus in the *Lotus* case Turkey was allowed to assume jurisdiction under the objective territorial principle over a crime of inadvertence.²

It is submitted that the 'primary effects' approach provides a better means of keeping the jurisdiction of States within reasonable bounds than the 'constituent elements' approach does. Take the example of broadcasting. The constituent elements of broadcasting a defamatory or seditious statement include, in most legal systems, the reception of the statement by a third person. Under the 'constituent elements' approach, jurisdiction could be claimed by any State where the statement was heard, which would produce absurd results.³ (One could take other examples besides broadcasting, e.g. polluting the atmosphere.) Moreover, if a State wishes to punish someone for causing certain effects, it can evade the restrictions imposed by the 'constituent elements' approach by creating a new offence, the constituent elements of which include the effects in question. Suppose *A* kills *B* in State *X*, leaving *B*'s widow in State *Y* destitute. *Y* cannot try *A* for murder; but it could create a new offence of causing the destitution of widows by killing their husbands, and try *A* for that. This would be lawful under the 'constituent elements' approach, because one of the constituent elements of the new offence (the destitution of the widow) has occurred in State *Y*. But it would not be lawful under the 'primary effects' approach, because the destitution of *B*'s widow is only an indirect and relatively non-substantial effect of *A*'s act.

¹ Cf. *Horwitz v. U.S.* (1933), *Annual Digest*, 1933-34, p. 192, and [U.K.] Representation of the people Act, 1949, s. 80. See also below, pp. 199-201.

² (1927), *P.C.I.J.*, Series A, No. 10, p. 24; cf. Jennings, this *Year Book*, 33 (1957), pp. 160-1.

³ Cf. *Journal de droit international* (1890), p. 498 (a man shouted *Vive la France!* on the French side of the Franco-German frontier and was convicted of sedition in Germany because his statement was heard in Germany).

Finally a few words should be said about liability for omissions. If a man undertakes by contract to do something in a particular State, he can be punished for breaking his contract; if he acquires property in a particular State, he can be punished for not paying taxes on it; by marrying a wife he undertakes to support her and can therefore be punished for not supporting her by the State where she resides.¹ But these examples have one thing in common—a voluntary undertaking (making a contract, acquiring property, marrying). In the absence of such an undertaking, it is submitted that a positive duty to act can be imposed only by the State where an individual is present or carrying on business at the time when action is called for²—otherwise jurisdiction over omissions, far from being based on the territorial principle, would in practice be based on the universality principle, because an omission cannot be localized and occurs everywhere simultaneously.

Nationality principle and other personal links

A State has jurisdiction over crimes committed by its nationals abroad. Some States require proof that the act is also criminal under the *lex loci*, or restrict jurisdiction to serious crimes or cases where the injured party or his government requests prosecution (e.g. France, Turkey); others do not (e.g. India, South Korea, Austria, Poland, U.S.S.R.). It would seem that such restrictions are not required by international law; a State has an unlimited right to base jurisdiction on the nationality of the accused.³ It should be noted, however, that the nationality of each accused must be considered separately; jurisdiction over an accused national does not carry with it jurisdiction over his alien accomplices.⁴

Common law countries claim jurisdiction on this ground over a comparatively small number of offences, but they have never objected to the wider claims made by continental countries; on the contrary, the United States has (by providing evidence, etc.) aided Greece and Italy to prosecute their nationals for crimes committed in the United States.⁵

Sometimes jurisdiction is based on some other personal link between the accused and the State claiming jurisdiction. For instance, Denmark, Iceland, Liberia, Norway, and Sweden claim jurisdiction over crimes committed abroad by their permanent residents. In a few cases the United

¹ *American Journal of International Law*, 29 (1935), Supplement, p. 489; George, *Michigan Law Review*, 64 (1966), pp. 609, 623-4.

² Cf. Mann, loc. cit. (above, p. 147 n. 1), p. 137 (a foreign witness can be summoned to appear only if he is in the State at the time of the summons). However, the intentions and motives of the accused may enable the State to extend its jurisdiction, especially in antitrust cases; see below, pp. 200-1.

³ *American Journal of International Law*, 29 (1935), Supplement, pp. 523-31.

⁴ *Ibid.*, p. 534.

⁵ Hackworth, vol. 2, pp. 203-5. In one or two cases the United States requested prosecution in the State of the offender's nationality, after that State had refused to extradite the offender to the United States.

Kingdom has also based jurisdiction on residence.¹ States often claim extraterritorial jurisdiction over members of their armed forces² and (in connection with crimes committed in the course of their duties) over their civilian officials.³ The United States⁴ and the United Kingdom⁵ also claim jurisdiction over crimes committed on foreign territory by members of the crews of their merchant vessels.

Common law countries have traditionally been reluctant to base jurisdiction on the nationality principle, or indeed on any principle other than the territorial principle, and the result is that they have sometimes pushed the territorial principle to absurd lengths in order to close gaps in their system of law enforcement. For instance, several states in the United States make it a criminal offence to leave the state with the intention of committing a crime outside the state.⁶ Donnedieu de Vabres defends these laws as necessary to prevent *fraude à la loi*—if an act (e.g. duelling) is illegal inside the State but legal in a neighbouring State, the State is entitled to prevent people evading its law by going to the neighbouring State and committing the act there.⁷ That may be so, but the State surely has a legitimate interest in preventing such acts only by its own citizens or residents, not by people who have merely passed briefly through its territory. It would be better, therefore, if the law asserted jurisdiction on the basis of residence and prohibited residents from doing certain acts abroad, instead of punishing some difficult-to-prove act (formation of intention) occurring inside the State's territory.⁸

Protective principle

During the nineteenth century continental countries began to claim jurisdiction over acts committed by aliens abroad which threatened the

¹ Slave Trade Act, 1824, s. 9; Exchange Control Act, 1947, s. 1 (1); Strategic Goods (Control) Order, 1959 (cf. *International and Comparative Law Quarterly*, 9 (1960), p. 266). Residence was one of the grounds taken into account in *Joyce v. D.P.P.*, [1946] A.C. 347 and *R. v. Neumann* (1949), *Annual Digest*, 1949, p. 239 (South Africa), but it would be dangerous to base any general conclusions on these cases. See, generally, *American Journal of International Law*, 29 (1935), Supplement, p. 533.

² *Restatement, . . . Foreign Relations Law of the U.S.* (1965), s. 31.

³ *American Journal of International Law*, 29 (1935), Supplement, pp. 539–41, citing the laws of many countries.

⁴ Moore, vol. 2, pp. 605–12. Sweden also claims such jurisdiction if the accused was acting in the course of his duties at the time of the crime.

⁵ Section 687 of the Merchant Shipping Act, 1894, is unduly wide in that it confers jurisdiction over 'any . . . seaman . . . who at the time when the offence is committed is, or within three months previously has been, employed in any British ship' (italics added). The language of the section, especially if read with s. 686, suggests that it applies to aliens, but the marginal note suggests otherwise. There is apparently no record of any prosecution under s. 687.

⁶ *American Journal of International Law*, 29 (1935), Supplement, pp. 485–6.

⁷ *Les principes modernes du droit pénal international* (1928), p. 391. For other examples of *fraude à la loi*, see *Annual Digest*, 1938–40, pp. 294–7 and *ibid.*, 1919–42, p. 172.

⁸ Some of the laws in question do apply only to residents, but jurisdiction is based, not on residence, but on some act (formation of intention) occurring inside the State's territory.

State. Such claims encountered initial opposition from the United Kingdom in 1852,¹ but this opposition soon ceased. Recently the United States has also begun to claim jurisdiction on this ground.²

The principle is well established, but the range of acts covered by the principle is not free from controversy. Articles 7 and 8 of the Harvard Research Draft Convention speak of crimes against the security, territorial integrity or political independence of the State, and the counterfeiting of the seals, currency, instruments of credit, stamps, passports or public documents issued by the State. The exercise of jurisdiction over these offences is unobjectionable, but some States make wider claims to jurisdiction. Article 13 of the Ethiopian Penal Law of 1957 speaks, *inter alia*, of offences against the servants or essential interests of the State. The Hungarian Penal Code spoke of offences against 'a fundamental interest relating to the democratic, political and economic order of the Hungarian People's Republic'.³ Laws drafted as widely as this are obviously open to abuse.

The decided cases also reveal examples of abuse. A Jewish alien who had sexual intercourse with a German girl in Czechoslovakia was convicted by a German court under the protective principle, because his act threatened the racial purity of the German nation.⁴ Now that such racial ideologies are discredited, this case is unlikely to constitute a precedent for the future. But the cold war has produced other abuses of the protective principle; an American was convicted in Czechoslovakia for doing research work for Radio Free Europe in West Germany,⁵ and foreign companies which buy United States goods and undertake not to re-export them to Communist countries can be prosecuted in the United States if they break that undertaking.⁶ French and Belgian courts convicted aliens who aided Germany abroad during both world wars; such decisions are defensible in cases where the accused persons were nationals of allied powers,⁷ but not in cases where nationals of neutral countries were convicted for acts done in their own countries.⁸

¹ McNair, *International Law Opinions* (1956), vol. 2, p. 150.

² *Rocha v. U.S.* (1961), I.L.R., vol. 32, p. 112; *U.S. v. Pizzarusso*, *American Journal of International Law*, 62 (1968), p. 975 (attempts to evade immigration restrictions). Cf. *U.S. v. Bowman* (1922), 260 U.S. 94 (acts designed to defraud the government; but the accused was a United States citizen and the Court left open the position of aliens).

³ Gorove, *American Journal of Comparative Law*, 3 (1954), pp. 82, 85.

⁴ Jessup, *Transnational Law* (1956), p. 50.

⁵ *The Times*, 19 December 1970.

⁶ No prosecutions have occurred, it seems, but the threat of them has proved very effective. See Berman and Gerson, *Columbia Law Review*, 67 (1967), pp. 791, 855-9 and 866-76, and Polier, *Columbia Journal of Transnational Law*, 9 (1970), p. 109. There is an extenuating factor in this case, because the undertaking could be regarded as a voluntary submission to United States jurisdiction.

⁷ *Nusselein v. Belgian State* (1950), I.L.R., vol. 17, p. 136; *Bayot* (1923), *Annual Digest*, 1923-24, p. 109. Cf. below, p. 159, on the protection of other countries.

⁸ *Re Urios*, *Annual Digest*, 1919-22, p. 107.

A State is entitled to impose its ideology on its nationals and on all persons present in its territory; it is also entitled to oblige both categories of persons to take its side in its struggles against other States. But it is not entitled to make such demands on aliens living in foreign countries. Any such attempt would be incompatible with the political independence of the State of the aliens' nationality or residence. The protective principle of jurisdiction loses all validity when it is used, not to safeguard the political independence of the State claiming jurisdiction, but to undermine the political independence of other countries.

In addition, the protective principle needs to be limited in the same way as the 'effects' doctrine¹—a State can claim jurisdiction only if the *primary* effect of the accused's action was to threaten that State. If this were not so, a State would be able to punish the editors of all the newspapers in the world for criticizing its government.

Before leaving the protective principle, reference should be made to the tendency of member States of military alliances to try offences against the security of one another. France tried offences against the security of her wartime allies.² Communist countries claim jurisdiction over offences against the security of other Communist countries,³ and in 1958 the Supreme Court of Bavaria upheld a conviction for revealing (in a foreign country) secrets about allied forces stationed in West Germany.⁴ The rationale for this jurisdiction is that the interests of the members of an alliance are so united that an act which threatens one threatens all. There does not seem to be any reason for regarding this type of jurisdiction as any more open to objection than the ordinary type of protective jurisdiction, except that there ought to be some evidence that the State most closely affected consents to (or at least acquiesces in) its allies' exercising jurisdiction on its behalf—otherwise, not only would this type of jurisdiction cease to be protective jurisdiction and resemble universal jurisdiction; it could also lead to the situation where some States decided for themselves what was best for another State, against the wishes of the latter, which would be incompatible with that State's political independence.

¹ See above, pp. 154–5. Nevertheless, the protective principle covers ground which is not covered by the 'effects' doctrine. For instance, if the accused counterfeits the currency of State *A* in State *B*, he cannot be tried in State *A* under the 'effects' doctrine unless the counterfeit currency is put into circulation in State *A*; but the mere act of counterfeiting State *A*'s currency, even if the counterfeit currency is never put into circulation, has a potentially adverse effect on State *A*, and this threat to State *A* justifies State *A* in claiming jurisdiction under the protective principle.

² Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, p. 180; *Re van den Plas* (1955), I.L.R., vol. 22, p. 205. Similar provisions exist in Article 5 of the South Korean Criminal Code.

³ *Soviet Law on Criminal Liability for State Crimes* (1958), Art. 10; *Bulgarian Criminal Code*, Art. 98; *Hungarian Criminal Code* (1961), Arts. 5 and 133.

⁴ *American Journal of International Law*, 52 (1958), p. 799.

Universality principle

For centuries there has been universal jurisdiction to try pirates.¹

War crimes are often mentioned as another example of universal jurisdiction, but until recently universal jurisdiction to try war crimes was a matter of controversy. Courts trying war crimes often used to think that war crimes were subject to the same jurisdictional rules as ordinary crimes;² even after the Second World War the Netherlands' courts held that international law authorized a State to try war crimes only if they were committed in its territory, against its nationals or against its national interests.³ However, in other war crimes trials which resulted from the Second World War, the courts of one allied nation frequently tried war crimes committed on foreign territory by foreign nationals against the nationals of other allied nations,⁴ or even against the nationals of enemy States themselves.⁵ Several commentators explained this by saying that States have a universal jurisdiction to try war crimes,⁶ and Israeli courts relied heavily on the universality principle in the *Eichmann* case.⁷

The Geneva Conventions of 1949 are generally interpreted as permitting (and indeed obliging) the exercise of universal jurisdiction, at least in the case of grave breaches;⁸ and national legislation passed to give effect to the Conventions often provides for universal jurisdiction.⁹

It has sometimes been suggested that, where multilateral treaties provide for the suppression of acts which are of concern to the whole world, universal jurisdiction exists over such acts. Thus Article 14 of the International Penal Law Treaty of Montevideo gives the captor State jurisdiction over drug trafficking, white slavery, and destruction of (or damage to)

¹ *In re Piracy Iure Gentium*, [1934] A.C. 586, 589.

² Manner, *American Journal of International Law*, 37 (1943), p. 407; Wright, *ibid.*, 39 (1945), pp. 257, 274-6; Carnegie, this *Year Book*, 39 (1963), p. 402. This attitude is probably explained by the fact that in many Continental countries war criminals are not charged with an offence against international law (as in English-speaking countries), but with an offence against the municipal criminal law of the State exercising jurisdiction, which seldom has a universal scope. See *Annual Digest*, 1947, pp. 292-5; Baxter, this *Year Book*, 28 (1951), p. 382; Woetzel, *The Nuremberg Trial* (1960), pp. 26-7, 32-3.

Cowles, *California Law Review*, 33 (1945), p. 177, argues that even in previous centuries jurisdiction was universal.

³ Rohrig, Brunner, and Heinze (1950), *I.L.R.*, vol. 17, p. 393.

⁴ *Tesch* case (1946), *Annual Digest*, 1946, p. 250; *Klein and others* (1946), *ibid.*, p. 253. In the *Altstötter* case (1947), *ibid.* 1947, p. 278, a United States court tried an offence committed before the United States entered the war; and the International Military Tribunal at Nuremberg tried crimes against peace committed before the outbreak of the Second World War.

⁵ *Ohlendorf and others* (1948), *ibid.*, 1948, p. 656.

⁶ M. Sørensen, *Manual of Public International Law* (1968), p. 367.

⁷ (1961-2), *I.L.R.*, vol. 36, pp. 26-42, 289-304.

⁸ Draper, *The Red Cross Conventions* (1958), p. 105; Lauterpacht, this *Year Book*, 29 (1952), p. 362; Yingling and Ginnane, *American Journal of International Law*, 46 (1952), pp. 393, 426. Röling, *Recueil des cours* (1960), vol. 100, pp. 323, 357-63, questions whether the drafters of the Convention intended to allow neutral States to try war crimes.

⁹ *International and Comparative Law Quarterly*, 7 (1958), p. 133; *International Studies*, 3 (1961), pp. 76-7; *Czechoslovak Criminal Code* (1961), Art. 19.

submarine cables. However, international conventions which provide for the suppression of such activities do not normally permit universal jurisdiction;¹ for example, no provision is made for universal jurisdiction over damaging submarine cables² or genocide.³ Universal jurisdiction is provided for (subject to certain conditions) in treaties or draft treaties against counterfeiting currency,⁴ terrorism,⁵ the drug traffic⁶ and apartheid;⁷ but, except in the case of the more recent treaties or draft treaties against terrorism and apartheid, universal jurisdiction is provided for only if the accused is in the territory of a State whose legislation recognizes as a general rule the principle of the prosecution of offences committed abroad by foreigners, and, as we shall see, not many States have legislation of this sort. (The pre-war treaties against terrorism and the drug traffic provide that participation in the treaty shall not be interpreted as affecting a party's attitude on the general question of the limits of criminal jurisdiction as a question of international law.)

Article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft requires each party to take such measures as may be necessary to establish its jurisdiction over the offence in four cases, which include the case where the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board, and the case where the alleged offender is present in its territory and is not extradited.⁸ Hijacking is probably not covered by the definition of piracy in international law,⁹ but there is doctrinal authority for the view that it is subject to universal jurisdiction nevertheless;¹⁰ Japan in fact claimed universal

¹ *American Journal of International Law*, 29 (1935), pp. 476 et seq.; *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 97.

² Rousseau, *Droit international public* (1953), p. 427.

³ Briggs, *The Law of Nations* (2nd edn., 1952), pp. 579-80. Do States have universal jurisdiction over genocide under customary law? See the *Eichmann case* (1961), I.L.R., vol. 36, pp. 34-8, and the criticism by Fawcett, this *Year Book*, 38 (1962), pp. 181, 205-8, and by Carnegie, *ibid.*, 39 (1963), pp. 402, 406-9.

⁴ *League of Nations Treaty Series*, vol. 112, p. 371, Art. 9.

⁵ Hudson, *International Legislation*, vol. 7, p. 862, Art. 10; *International Legal Materials*, 10 (1971), p. 255; *ibid.* 11 (1972), p. 977 (Art. 2), and p. 1382; *ibid.*, 13 (1974), p. 41.

⁶ *League of Nations Treaty Series*, vol. 198, p. 299, Art. 8; *United Nations Treaty Series*, vol. 520, p. 151, Art. 36. See also *Director of Public Prosecutions v. Doot*, [1973] A.C. 807, 817, *per* Lord Wilberforce.

⁷ *International Legal Materials*, 13 (1974), p. 50.

⁸ *Ibid.*, 10 (1971), p. 133. Article 5 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (*American Journal of International Law*, 66 (1972), p. 455) contains the same provisions.

⁹ Shubber, this *Year Book*, 43 (1968-9), p. 193; but see Johnson, I.L.A. (1970), p. 732. Definitions of piracy in municipal law (e.g. *ibid.*, pp. 740-1) have little value (cf. Moore, vol. 2, p. 952); in the United States, Public Law 87-197, passed in 1961, creates an offence of aerial piracy (i.e. hijacking), but this offence is subject to the same jurisdictional limits as other crimes on board aircraft (see next paragraph of main text).

¹⁰ See the resolution passed by the Institute of International Law at its Zagreb meeting, 1971 and the Report of the International Law Association's Committee on Piracy (54th Conference, 1970), p. 737.

jurisdiction even before the Hague Convention.¹ Hijacking threatens international communications to the same extent as piracy; it is an attack on international order and injures the international community as a whole, which means that all States have a legitimate interest in repressing it. The policy reasons which justify universal jurisdiction over piracy justify it equally in the case of hijacking.

It is not only in the case of hijacking that States make wide claims to jurisdiction over crimes committed on board aircraft. Argentina, Belgium, Bolivia, Brazil, France, Lebanon, Luxembourg, Spain, and Turkey claim jurisdiction over crimes committed on board every aircraft which makes its first landing on their territory after the commission of the crime;² Argentina, Belgium, Bolivia, Chile, France, Lebanon, Luxembourg and Spain claim jurisdiction over crimes committed against their nationals on foreign aircraft.³ The [United States] Federal Aviation Act, 1958, as amended in 1961 and 1970, gives federal courts jurisdiction over crimes committed on board a foreign aircraft outside the United States 'which has its next scheduled destination or last point of departure in the United States, provided that in either case it next actually lands in the United States'. Article 4 of the Tokyo Convention on Offences and Certain Other Acts on Board Aircraft⁴ allows the exercise of jurisdiction on the basis of the effects doctrine, the passive personality principle and the protective principle.⁵

A number of States claim jurisdiction over crimes committed by foreigners in foreign countries, although some of them limit this jurisdic-

¹ *Japanese Annual of International Law*, 15 (1971), p. 70. The Australian law of 1963 (text in *Annuaire français de droit international*, 15 (1969), pp. 484-5) applies to all aircraft which started, ended, or should have ended their flight in Australia. Sweden tried a Greek for hijacking a Greek aircraft (flying from Crete to Athens) to Cairo: *The Times*, 1 July 1970. The Netherlands government, however, doubts whether universal jurisdiction applies to hijacking: *Netherlands Yearbook of International Law*, 3 (1972), pp. 209-10.

² *Annuaire français de droit international*, 4 (1958), pp. 129, 135. It is possible that the French law was intended to apply only to crimes committed while the aircraft was overflying France, but there are no cases interpreting the law. In 1972 the Canadian Criminal Code was amended to give Canadian courts universal jurisdiction over crimes committed on aircraft, provided that the accused is found in Canada (*International and Comparative Law Quarterly*, 22 (1973), p. 183).

³ I.C.A.O. Doc. 8111-LC/146-2, p. 165. Some of these States claim jurisdiction over crimes committed against their nationals on foreign territory (see below, pp. 163-6), but others do not.

⁴ The Tokyo Convention applies only to acts done on board aircraft registered in a High Contracting Party. The Hague and Montreal Conventions are not limited in this way—which, incidentally, strengthens the view that the Hague and Montreal Conventions are evidence of customary law (on this latter point, see Shubber in *International and Comparative Law Quarterly*, 22 (1973), pp. 687, 699-703, and on the relationship between treaties and custom in general, see D'Amato, *The Concept of Custom in International Law* (1971), chapter 5).

⁵ Text in *American Journal of International Law*, 58 (1964), p. 566. Shubber, *Jurisdiction over Crimes on Board Aircraft* (unpublished Ph.D. thesis, Cambridge, 1968), pp. 197-206, argues convincingly that Article 4 confers rights only on the subjacent State, because Article 4 regulates the right of a State to 'interfere with an aircraft in flight in order to exercise its criminal jurisdiction', and only the subjacent State can interfere with an aircraft in any case; but he overlooks the fact that the State over which the aircraft was flying when the offence was committed may not be the State over which the aircraft was flying when the interference occurred.

tion to cases where the victim of the crime was one of their nationals.¹ Courts in English-speaking countries do not claim such jurisdiction and describe it as contrary to international law,² and the governments of English-speaking countries have protested against the exercise of such jurisdiction by other countries on the grounds that it is not permitted by international law.³

The territorial principle is very deep-rooted in English-speaking countries, because originally the members of the jury were supposed to decide cases on the basis of their own knowledge of the facts, which meant that they could only try crimes committed in the place where they lived; jurisdiction based on other factors, such as the nationality of the accused, was adopted in English-speaking countries at a much later date and to a very small extent, while jurisdiction based on the universality and passive personality principles has always been regarded as totally unacceptable in English-speaking countries. Some writers from English-speaking countries imagine that the criminal law of all countries was originally based on the territorial principle, and that other bases of jurisdiction are recent (and usually questionable) innovations.⁴ But in many continental countries the universality principle is as ancient as the territoriality principle in England. It existed in medieval Italy,⁵ sixteenth-century Brittany,⁶ seventeenth- and eighteenth-century France until 1782,⁷ and seventeenth- and eighteenth-century Germany.⁸ It was supported by Grotius,⁹ Vattel,¹⁰ Paul Voet,¹¹ Huber¹² and Bynkershoek,¹³ not to mention lesser-known writers in sixteenth- and seventeenth-century Belgium.¹⁴ Countries claiming jurisdiction under

¹ The passive personality principle and the universality principle are often regarded as separate, but it seems more convenient to consider them together. States which object to one will also object to the other, while States which adopt the universality principle are unlikely to apply it in practice except when one of their nationals is the victim of the crime—in other cases their interest in punishing the offender will probably be too slight to justify the effort of prosecution.

² *U.S. v. Baker* (1955), I.L.R., vol. 22, p. 203; *Mortensen v. Peters* (1906), 8 F. (J.C.) 93; *R. v. Jameson*, [1896] 2 Q.B. 425, 430; and see below, p. 183. Contra, *Giles v. Tumminello* (1963), I.L.R., vol. 38, pp. 120, 123. In the early nineteenth century English courts claimed universal jurisdiction over slave traders, but this was soon abandoned: Fischer, *International Law Quarterly*, 3 (1950), p. 28.

³ *Foreign Relations of the U.S.* (1875), p. 123 and (1887), pp. 751–867, especially pp. 835–9; Hackworth, vol. 2, pp. 187–8; McNair, *International Law Opinions* (1956), vol. 2, pp. 149–54, 173–8; Whiteman, vol. 6, pp. 103–5.

⁴ e.g. Beckett, this *Year Book*, 6 (1925), p. 50.

⁵ Donnedieu de Vabres, *Introduction à l'étude du droit pénal international* (1922), pp. 130–1, 179–80, 182–4. Some Italian city States applied the passive personality principle (*ibid.*, pp. 127, 175–6).

⁶ *Ibid.*, pp. 251–4, 364–7, 385 (only if the prosecution was brought by the injured party). The passive personality principle was applied from 1577 until some time in the eighteenth century: *ibid.*, pp. 233–5, 250, 363–4.

⁸ *Ibid.*, pp. 327–49.

⁹ *De iure belli ac pacis*, Book 2, ch. 21, paras. 3–6.

¹⁰ *Le droit des gens* (1758), book 1, ch. 19, sections 232–3.

¹¹ Donnedieu de Vabres, *op. cit.* (above, n. 5 on this page), p. 302.

¹² *Ibid.*, p. 306.

¹³ *Ibid.*, p. 307.

¹⁴ *Ibid.*, pp. 269, 270, 274–5.

the universality and/or passive personality principles in modern times include Argentina,¹ Austria,² Belgium,³ Bulgaria,⁴ Colombia,⁵ Czechoslovakia,⁶ Finland,⁷ Germany,⁸ Greece,⁹ Guatemala,¹⁰ Hungary,¹¹ Italy,¹² Japan,¹³ Mexico,¹⁴ Monaco,¹⁵ Peru,¹⁶ Roumania,¹⁷ San Marino,¹⁸ South Korea,¹⁹ Switzerland,²⁰ Turkey,²¹ Uruguay,²² Venezuela²³ and Yugoslavia.²⁴

On the other hand the English-speaking countries are not alone in regarding such jurisdiction as contrary to international law.²⁵ France is of the same opinion,²⁶ which was shared by individual judges in the *Lotus* case and by the arbitrator in the *Costa Rica Packet* case.²⁷ It is also significant that many countries believe that international law prohibits a State from trying crimes committed by foreigners on foreign ships within its ports, unless the crime disturbs the peace of the port,²⁸ which suggests *a fortiori* that a State cannot try crimes committed by foreigners on foreign territory (unless perhaps the effects of the crime are felt in the State claiming jurisdiction).

In a situation like this, where different States have different ideas about the content of the relevant rules of international law, there are two possible solutions. One is to fall back on the Soviet idea of custom as an implied agreement and to say that there are different rules of customary law in force between different groups of States. The other solution is to try to find some common ground between the two groups of States; and this common

¹ Extradition Law No. 1612 (1885), Art. 5.

² *Penal Code* (1852), s. 40. Universal jurisdiction has existed in Austria since at least 1803.

³ Law of 17 April 1878, Art. 10 (4) (which applies only in wartime).

⁴ *Criminal Code* (1951), Art. 67.

⁵ *Penal Code* (1936), Art. 7 (3).

⁶ *Criminal Code* (1961), Art. 20.

⁷ *Criminal Code* (1889), Ch. 1, s. 2.

⁸ *Criminal Code*, Art. 4; *Hrenecek* case, *University of Chicago Law Review*, 22 (1955), p. 797.

⁹ *Criminal Code* (1950), Art. 7.

¹⁰ *Penal Code* (1889), Art. 6 (6).

¹¹ *Criminal Code* (1950), Art. 4.

¹² *Criminal Code* (1930), Art. 10.

¹³ *Crown v. Yerizano* (1926), *Annual Digest*, 1925-26, p. 150.

¹⁴ *Federal Penal Code* (1931), Art. 4.

¹⁵ *Code of Criminal Procedure* (1904), Art. 8.

¹⁶ *Penal Code* (1924), Art. 5 (3).

¹⁷ *Criminal Code* (1968), Art. 6.

¹⁸ *Criminal Code* (1865), Art. 3 (3).

¹⁹ *Criminal Code* (1953), Art. 3.

²⁰ *Penal Code* (1937), Art. 5.

²¹ *Criminal Code* (1926), Art. 6.

²² *Penal Code* (1889), Art. 7.

²³ *Penal Code* (1926), Art. 4 (2).

²⁴ *Criminal Code* (1951), Art. 94.

²⁵ Many States refrain from claiming such jurisdiction, but it is dangerous to rely on such abstention in the absence of evidence of *opinio juris* on their part.

²⁶ France was, of course, the claimant State in the *Lotus* case. See also Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, pp. 184-5. But France applies the passive personality principle to crimes committed *in terra nullius*: Kiss, *ibid.*, vol. 1, p. 8 and vol. 2, p. 267 (an attempt to exercise jurisdiction on the universality principle over crimes committed *in terra nullius* was later abandoned); and cf. *American Journal of International Law*, 29 (1935), Supplement, pp. 586-91 and M. Sørensen, *Manual of Public International Law* (1968), pp. 371-2. France also applies the passive personality principle to crimes committed on board aircraft: Merle and Vitu, *Traité de droit criminel* (1967), p. 203.

²⁷ *Journal de droit international* (1897), p. 624.

²⁸ Particularly Spain (*Foreign Relations of the U.S.* (1923), vol. 1, p. 134), Netherlands (*ibid.* 142-3), Portugal (*ibid.* 170) and Italy (*Public Prosecutor v. Tarasco*, *Annual Digest*, 1929-30, p. 105).

ground may be easier to find if we examine the reasons why some States oppose the universality and passive personality principles and why others support them.

One suspects that the unstated reason for the attitude adopted by the United States, United Kingdom and French Governments is that they fear that in some other countries courts are biased and punishments inhuman. However, there are other rules of international law which guarantee a minimum international standard for the treatment of aliens, so one cannot invoke the possibility of jurisdiction's being abused as a reason for denying jurisdiction altogether. A stronger argument is contained in Brierly's famous statement: 'The suggestion that every individual is or may be subject to the laws of every State at all times and in all places is intolerable.'¹ But surely it is intolerable only if the laws vary from place to place; if they are the same in all countries the individual suffers little hardship.

Supporters of the universality and passive personality principles argue that States should work together for the punishment of crime and that the presence within a State of an unpunished criminal is socially dangerous.² But these arguments (particularly the first) presuppose that the act in question *is* a crime in all countries (or at least in the State where it was committed as well as in the State claiming jurisdiction); indeed, this is an assumption on which Grotius's whole argument is expressly based.

One solution would be for the State claiming jurisdiction to try the accused under the law of the State where the crime was committed.³ No State has applied this solution in modern times, but a number of States, while applying their own law, do require proof that the act in question was a crime under the law of the State where the act was performed.⁴ It is necessary to add a number of corollaries, to make sure that the accused is in the same position as he would have been if he had been tried in the State where the crime was committed. Thus periods of limitation laid down by the *lex loci* should be respected, and the penalty imposed should not be greater than the penalty imposed by the *lex loci*.⁵ The accused should also

¹ *Law Quarterly Review*, 44 (1928), pp. 154, 161.

² One would have thought that these ends would have been met more effectively by extradition or deportation, but there may be various reasons why extradition or deportation are not possible in a given case.

³ This happened in seventeenth- and eighteenth-century Germany; see Lipstein in *Jus Privatum Gentium, Festschrift für Max Rheinstein*, vol. 1, p. 411, at p. 413 n. 18. Sarkar advocates *de lege ferenda* the application of the 'proper law of the crime', which will often produce the same result; see *International and Comparative Law Quarterly*, 11 (1962), p. 446.

⁴ Knieriem, *Nürnberg, rechtliche und menschliche Probleme* (1953), p. 96, argues that the war crimes trials were illegal because they did not respect this principle. But if the prosecution can prove that an act is contrary to international law, this is surely an adequate alternative to proving that it is contrary to the *lex loci*.

⁵ These two requirements, like the requirement of double criminality, are set out in Article 10 of the Harvard Research Draft Convention, which also requires that the surrender of the alien should have been offered to the State where the crime occurred and that that State should not

be able to plead, as a bar to prosecution, the fact that he has already been tried in the State where the crime was committed.¹

The compromise outlined in the previous paragraph is a statement of what the author considers the law ought to be, rather than a statement of what the law is. However, in areas of international law where States disagree as to the content of the *lex lata*, statements of what the law ought to be can sometimes influence the actual content of the *lex lata*, especially when such statements take a middle course between two opposing views adopted by different groups of States. Admittedly it would be optimistic to suggest that the compromise outlined in the previous paragraph bridges the gap between the States which apply the universality and passive personality principles and the States which condemn those principles. The United States, the United Kingdom and France have opposed those principles even when they were applied subject to the restrictions set out in the last paragraph. Conversely, such restrictions² are accepted to a greater or lesser degree only by some of the States claiming jurisdiction under those principles (Austria, Czechoslovakia, Germany, Greece, Hungary, Mexico, Peru, South Korea, Switzerland, Uruguay) and not by others (Belgium, Colombia, Finland, Italy, San Marino, Turkey).³ However, it is to be hoped that greater understanding of one another's attitudes will in the future lead States to abandon their more extreme positions and to accept the compromise outlined in the previous paragraph as an acceptable rule of international law.

have accepted it. This last requirement, which exists in the laws of some countries and has a very ancient pedigree, reflects a belief that the universality principle should be used only when all other means of punishment are lacking.

¹ This is necessary to prevent his being in a worse position than he would have been if he had been prosecuted twice in the State where the crime was committed. It is an exception to the general rule of international law which allows a State to prosecute an individual even though he has already been prosecuted in another State. (In many States such prosecutions are impossible (*American Journal of International Law*, 29 (1935), Supplement, pp. 602-16; *New York University Law Review*, 34 (1959), pp. 1099-101), but not in all (*Annual Digest*, 1943-45, pp. 435-6; *ibid.*, 1949, p. 480; *I.L.R.*, vol. 26, pp. 704, 707, 712; *Rivista di diritto internazionale* (1967), p. 692; *Recueil de la jurisprudence* (1972), pp. 1281, 1296-8; *Common Market Law Reports* (1973), p. 190). The European Convention on the International Validity of Criminal Judgments (*International Legal Materials*, 9 (1970), p. 450), Arts. 53-5, prohibits such prosecutions (with certain exceptions), and the Council of Europe's Explanatory Report on the Convention says that the prohibition is laid down by treaty precisely because it is not adequately safeguarded in existing practice.)

² These restrictions make the prosecutor's task much more difficult, so that prosecutions are likely to be less frequent. But, even when these restrictions are not applied, prosecutions under the universality and passive personality principles are rare—the absence of witnesses and other evidence makes it difficult to try people for crimes committed abroad. See also the authorities cited above, p. 152 n. 2.

³ Most laws claiming jurisdiction under the universality principle expressly mention some or all of these restrictions, and most laws claiming jurisdiction under the passive personality principle do not expressly mention them, but there are a number of exceptions to these tendencies (*American Journal of International Law*, 29 (1935), Supplement, pp. 574-6, 578-9, 582). One suspects that States seldom transgress these restrictions in practice, even though the restrictions may not be expressly mentioned in their laws.

Presumptions for or against jurisdiction

This may be an appropriate point to discuss an issue which assumed great importance in the *Lotus* case—does the onus of proof lie on the State which claims that it is entitled to exercise a particular kind of jurisdiction, or does it lie on the State claiming that such jurisdiction is illegal? The Permanent Court of International Justice held that it fell on the latter State.¹ This view has been attacked by several writers, particularly Beckett,² although Beckett's arguments are weakened by an inaccurate analysis of the history of international law.³ The fact that States are often sparing in their claims to jurisdiction is not particularly significant, because their failure to claim certain types of jurisdiction may be due to reasons other than a belief that such jurisdiction is contrary to international law (e.g. the functions of the jury in early English criminal law). What *is* significant is the fact that writers almost always list specific heads of jurisdiction, thereby implying that all other types of jurisdiction are illegal, instead of simply stating the general presumption that all types of jurisdiction are legal and then listing specific heads of jurisdiction which are proved to be illegal.

In fact the number of cases where the question of onus of proof has been raised is remarkably small; even the Israeli Supreme Court in the *Eichmann* case, which relied heavily on the *Lotus* ruling about onus of proof,⁴ also invoked more positive arguments to establish Israeli jurisdiction. The question of onus of proof hardly arises in cases where State practice is more or less uniform, or where there are relevant analogies or arguments of principle which point clearly in one direction. In other words, the question only arises in specialized or unusual situations where the authorities are few and/or contradictory—such as the situation which gave rise to the *Lotus* case itself.⁵

*Conflicts of jurisdiction*⁶

Since several States can exercise concurrent jurisdiction in many cases, it can happen that an individual is forbidden by one law to do an act which

¹ (1927), *P.C.I.J.*, Series A, No. 10. Jennings, *Recueil des cours*, 121 (1967), pp. 517–18, rightly points out that many people have read too much into the *Lotus* case, but he does not quote the Court's ruling on the question of the onus of proof in criminal cases, which appears on pp. 36 (fourth and fifth paragraphs) and 37 of the judgment.

² *This Year Book*, 6 (1925), p. 50. See also *I.L.A.* (1964), p. xxviii.

³ See above, p. 163.

⁴ (1962), *I.L.R.*, vol. 36, pp. 283–7.

⁵ The question of the onus of proof of customary law can, of course, arise in many areas of international law and not only in the context of jurisdiction. Since the question is not of great practical importance in the context of jurisdiction, it would appear that the *P.C.I.J.*'s dictum in the *Lotus* case ((1927), Series A, No. 10, at p. 18) that 'restrictions upon the independence of states cannot . . . be presumed' is likely to be more influential in other areas of international law. Whether this dictum holds true of customary international law as a whole raises issues which are too vast to be explored in the present study.

⁶ Similar problems can arise in antitrust law; see below, pp. 207–8.

is permitted or even required by another law. In extreme cases the actual content of the law of one of the States concerned may be contrary to international law, or it may be possible to show that the law in question represents an abuse of legislative power and thus a breach of international law.¹ But, apart from such extreme cases, there is probably no way of resolving the conflict, because 'international law . . . does not provide for choosing among competing bases of jurisdiction to prescribe rules of conduct'.² United States courts have traditionally refrained from ordering defendants to perform acts which would violate foreign law, but there is no evidence that they regard such restraint as being required by international law.³

Some writers have suggested that it is contrary to international law to forbid an individual to behave in a way which is required by the law of the place where the act is performed;⁴ a few writers extend this principle to acts which are merely permitted by the *lex loci*.⁵ The result of this suggestion is that the territorial principle would always override the nationality principle and other principles of extraterritorial jurisdiction in the event of conflict.⁶ But the idea that a State may not forbid an individual to behave in a way which is required by the *lex loci* (or vice versa) is supported only by one statement made by the British Government, which dealt with anti-trust law rather than criminal law.⁷ As for the idea that a State may not forbid an individual to behave in a way which is permitted by the *lex loci*, there is no judicial authority or State practice to support it, and quite a lot to contradict it.⁸ One of the reasons why States claim jurisdiction under

¹ See below, pp. 188-90.

² *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 112. The *Restatement* suggests factors which States should take into account to avoid conflicts (s. 40), but it is doubtful whether s. 40 represents the existing law (Metzger, *New York University Law Review*, 41 (1966), pp. 7, 18-20. In *U.S. v. First National City Bank* (*International Legal Materials*, 7 (1968), p. 1133) a United States Court of Appeals quoted s. 40 with approval, but without suggesting that it represented international law.

³ *Columbia Law Review*, 63 (1963), p. 1441.

⁴ *American Journal of International Law*, 29 (1935), Supplement, p. 616 (limited to aliens and apparently stated *de lege ferenda*); Jennings, this *Year Book*, 33 (1957), pp. 151-2; Oppenheim, *International Law* (8th ed., by Lauterpacht), vol. 1 (1955), pp. 295-6. *Contra* Sørensen, *Manual of Public International Law* (1968), pp. 359-60; Mann, loc. cit. (above, p. 147 n. 1), pp. 153, 156.

⁵ Jennings, loc. cit. (in the preceding note). The commentary on the Harvard Research Draft Convention contradicts itself by making a jurisprudentially unsound distinction between acts which are permitted and acts which are not forbidden (*American Journal*, p. 557; and Sørensen, pp. 363-5, both cited in the preceding note).

⁶ This cannot be so in all cases; for instance, if the law of State *A* punished people who forged its currency abroad and if the law of State *B* required or permitted someone in State *B* to forge State *A*'s currency, *A*'s law ought to prevail because *B*'s is contrary to international law: *U.S. v. Arjona* (1887), 120 U.S. 479.

⁷ *British Practice in International Law* (1967), p. 60. See below, pp. 206-8. A man who is required by his national law to act in a manner contrary to the law of another State can avoid the difficulty by keeping out of a country whose laws are in conflict with those of his own. This solution may appear harsh, but it does respect the interests of both States, instead of requiring one to yield to the other.

⁸ *Foreign Relations of the U.S.* (1887), pp. 754, 770, 779; *Re di Lisi* (1933), *Annual Digest*, 1933-34, p. 193; *Trial of Earl Russell*, [1901] A.C. 446; *American Journal of International Law*, 29 (1935), Supplement, pp. 551, 553.

the protective principle is precisely because acts which threaten a foreign State are often not illegal in the State where they are performed. The United States requires United States companies operating in foreign countries to obey United States laws which prohibit certain kinds of trade with communist countries, even when the law of the country in which the company is operating permits such trade. (A different issue arises when the United States requires United States companies to order their foreign subsidiaries not to trade with communist countries—the subsidiary does not possess United States nationality, and such attempts by the United States to control the conduct of aliens abroad have been condemned by the Canadian Government as ‘an infringement of Canadian sovereignty’.¹)

Consequences of an excess of jurisdiction

The normal result of an excess of jurisdiction is a protest by the national State of the accused.² No example is known of protests being made by any other State, so it would seem that a State could claim jurisdiction over a stateless person with impunity.³ In fact the Soviet Union does claim jurisdiction over crimes committed by stateless persons in foreign countries, without requiring any proof that such acts were criminal under the *lex loci*.⁴

¹ H.C. Deb. (Canada) (1959), vol. 1, col. 618 (this statement arose out of an antitrust case, but the principle is equally applicable to legislation prohibiting trade with communist countries). The British Government apparently does not share the Canadian Government's opinion: *British Practice in International Law* (1962), pp. 31–2, (1966), p. 20, (1967), pp. 24–7; but see *Hansard*, H.L. (1964), vol. 260, cols. 825–7, 1081, 1319.

The United States is sometimes prepared to refrain from enforcing these rules, at the invitation of the foreign government concerned: Brewster, *Law and United States Business in Canada* (1960), pp. 25–6.

Craig, *Harvard Law Review*, 83 (1970), p. 859, argues that the fact that the shares in the foreign subsidiaries are owned by United States nationals justifies the United States in treating the subsidiaries as possessing United States nationality. But he was writing before the *Barcelona Traction* case (*I.C.J. Reports*, 1970, p. 3) which defined the nationality of companies differently and showed a hostile spirit to piercing the corporate veil.

See, generally, Fugate, *Foreign Commerce and the Antitrust Laws* (1958), pp. 77–9; Berman and Gerson, *Columbia Law Review*, 67 (1967), p. 791 (especially 867–76); Stokes, *Proceedings of the Am. Soc. of International Law*, 64 (1970), p. 146. And see below, pp. 188–90.

² On the measure of compensation which the national State may claim, see the *Costa Rica Packet* case, *Journal de droit international* (1897), pp. 624, 625; McNair, *International Law Opinions* (1956), vol. 1, p. 248; Beckett, this *Year Book*, 6 (1925), pp. 44, 59–60. Any action (e.g. imprisonment, seizure of property) taken to enforce a judgment given without jurisdiction is also illegal and increases the amount of compensation which the wrongdoing State must pay.

³ But the United Kingdom Government would presumably argue that no State could punish even a stateless person for doing something in the United Kingdom which was required by the law of the United Kingdom: see above, p. 168 at n. 7.

⁴ Grzybowski, *Soviet Public International Law* (1970), p. 273. Article 10 (d) of the Harvard Research Draft Convention allows such jurisdiction to be exercised only in respect of crimes committed in a place not subject to the authority of any State.

2. CIVIL TRIALS

A State which denies foreigners access to its courts may be guilty of denial of justice. Conversely a State's jurisdiction is limited by rules about sovereign, diplomatic and other immunities. But, apart from that, are there any rules of public international law which limit the jurisdiction of a State's courts in civil trials?

Some writers have answered this question in the affirmative.¹ Brownlie even says that 'there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens'.² This is rather an extreme view; as John Bassett Moore argued *à propos* of the *Cutting* incident, 'the rules governing the jurisdiction in civil and in criminal cases are founded in many respects on radically different principles, and . . . an assumption of jurisdiction over an alien in the one case is not to be made a precedent for a like assumption in the other';³ and one might add conversely that limitations in criminal cases cannot be cited as authority for the existence of like limitations in civil cases. Of course, rejection of analogies drawn from criminal trials does not necessarily mean that international law imposes no limitations whatever on jurisdiction in civil cases—the limitations might simply be of a different kind. But it is worth remembering that Dicey believed that the only limitation on jurisdiction in civil trials was contained in the principle of effectiveness;⁴ and when one examines the practice of States, as will be done in the pages which follow, one finds that States claim jurisdiction over all sorts of cases and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic protests.

Temporary presence of the defendant

At common law the court of a State acquired jurisdiction *in personam* if (and only if) a writ was served on the defendant while he was in the State concerned. Although other bases of jurisdiction have been added by statute, this remains the main basis of jurisdiction in common law countries.⁵ What is remarkable is that the court's jurisdiction is not affected by the brevity of the defendant's stay in the country concerned;⁶ in theory a visit lasting

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 73-4; Bartin, *Principes de droit international privé* (1930), vol. 1, p. 113; Parry, *Transactions of the Grotius Society*, 44 (1958), pp. 109, 117-20.

² *Principles of Public International Law* (2nd ed., 1973), p. 292.

³ *Foreign Relations of the U.S.* (1887), pp. 757, 806.

⁴ *Conflict of Laws* (2nd ed., 1908), p. xxxi.

⁵ A company is regarded as present within the State if it transacts business in the State; but the business done in the State may be very slight and brief, and need not be connected with the subject-matter of the litigation.

⁶ This development may be historically unsound (Ehrenzweig, *Yale Law Journal*, 65 (1956), p. 289), but it represents the modern law.

a few seconds would be sufficient. It is true that an English court can halt proceedings when this is necessary to prevent injustice to the defendant;¹ but the fact that a writ has been served on a foreigner temporarily present in England is not necessarily regarded as a source of injustice.²

Service on someone who is present for only a few hours has been held to be sufficient to give jurisdiction in the United States, and the courts have made it clear that this rule applies 'when the party is in the State, however transiently'.³ In *Grace v. MacArthur* the defendant was served with process on board an aircraft flying over Arkansas, and this was held to give jurisdiction to the District Court in Arkansas.⁴ Recently, however, United States courts have often dismissed such cases on the grounds of *forum non conveniens*.⁵

In continental countries service of process is often required to give the defendant notice of proceedings, but it does not create jurisdiction; jurisdiction must exist already before a writ can be served (the most common basis of jurisdiction being the habitual residence of the defendant). The practice followed by common law countries is virtually unknown in other countries,⁶ and a judgment given by a court which based its jurisdiction solely on the temporary presence of the defendant would almost certainly be refused recognition outside the common law world. However, no State appears to have protested that such jurisdiction is contrary to international law, even though it is obvious that the practice followed in common law countries enables a State to exercise jurisdiction over cases and parties having no real connection with that State.

Forum patrimonii

A number of countries claim jurisdiction whenever the defendant has assets within the State concerned. In some States (the Netherlands, South Africa, many states in the United States⁷) jurisdiction is limited to the

¹ *Egbert v. Short*, [1907] 2 Ch. 205.

² *Colt Industries, Inc. v. Sarlie*, [1966] 1 W.L.R. 440, C.A.; *Baroda (Maharaneef) v. Wildenstein*, [1972] 2 Q.B. 283, C.A.

³ Rheinstein, *University of Chicago Law Review*, 22 (1955), pp. 775, 790; *Peabody v. Hamilton* (1870), 106 Mass. 217; *Darrah v. Watson* (1872), 36 Iowa 116; *Fisher v. Fielding* (1895), 67 Conn. 91 (enforcement of an English judgment—writ served on an American on the last day of his visit to England deliberately to embarrass him by making him stay or pay).

⁴ *American Journal of International Law*, 53 (1959), p. 696.

⁵ Cheatham and others, *Conflict of Laws* (5th ed., 1964), pp. 235 et seq. McClean, *International and Comparative Law Quarterly*, 18 (1969), pp. 931, 946–7, argues in favour of the same approach in England, but his argument is concerned with what the law ought to be, rather than what it is; see Collier, [1973] *Cambridge Law Journal*, p. 49, and *The Atlantic Star*, [1973] 2 W.L.R. 795.

⁶ Although Portugal appears to follow this practice in contract cases: *Recueil des cours*, 104 (1961), p. 217.

⁷ In the United States jurisdiction is limited to the value of the assets unless the defendant appears in order to challenge the claim on the merits—but this confronts the defendant with a harsh dilemma. See Cavers, *ibid.* 131 (1970), pp. 75, 295 et seq.

value of the assets; in other States (Austria, Belgium, Denmark, Germany, Scotland, Sweden, Japan, parts of Switzerland) it is not so limited.¹ As a result, a tourist who left his slippers behind in a hotel bedroom might find the local court claiming jurisdiction over all sorts of unrelated claims against him, running into millions of pounds. It is obvious that this rule enables a State to exercise jurisdiction over cases and parties having no real connection with that State, but no State seems to have protested that such jurisdiction is contrary to international law.

In *Pennoyer v. Neff* the United States Supreme Court said that public international law allowed such jurisdiction only if it was limited to the value of the assets; but the Court's reasoning is based in part on the absence of notice given to the defendant, and this is a separate issue.² Besides, presence of assets in the United States is enough to found United States bankruptcy jurisdiction, and jurisdiction is not limited to the value of the assets in the United States.³

The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, signed at Brussels on 10 May 1952, allows actions arising out of the collisions of ships (whether the collision occurred on the high seas or in the waters of a foreign State) to be brought where the defendant ship or a sister ship has been arrested; jurisdiction is not limited to the value of the ship. The Convention is in accordance with previous British and American practice.⁴

Nationality, domicile or residence of the plaintiff

Article 14 of the French Civil Code gives French courts jurisdiction if the plaintiff has French nationality.⁵ A similar rule existed in medieval

¹ Cavers, *Recueil des cours*, 131 (1970), p. 300; Mann, loc. cit. (above, p. 147 n. 1), p. 81; de Winter, *International and Comparative Law Quarterly*, 17 (1968), pp. 707, 708, 713. In Germany the defendant's assets include a claim for which the defendant could sue the plaintiff in German court: de Vries and Lowenfeld, *Iowa Law Review*, 44 (1959), pp. 306, 332-9.

² (1871), 95 U.S. 714. The French *Cour de Cassation* held in a divorce case on 11 November 1908 that public international law required notice to be given to the defendant: Sirey (1909), vol. 1, p. 572.

³ Nadelmann, *International and Comparative Law Quarterly*, 12 (1963), p. 684. See also *In re Compania Merabello San Nicholas S.A.*, [1973] Ch. 75.

⁴ C. J. Colombos, *The International Law of the Sea* (6th ed., 1967), pp. 343-5. The jurisdiction of English courts is equally wide in other fields of Admiralty law: *The Mecca*, [1895] P. 95. See also *The Windhuk* (1940), *Annual Digest*, 1938-40, p. 167 (Brazil); A. Ehrenzweig, *Private International Law: General Part* (1967), pp. 200-1; 17 and 18 Vict. c. 104, ss. 527-8.

In 1965 the Attorney-General of England said that 'the exercise of jurisdiction [*in rem*] based solely on the seizure of a foreign aircraft would not have any secure basis in international law in the absence of international agreement' (*British Practice in International Law* (1965), p. 31); but English courts exercise jurisdiction against ship-owners on this basis, and there seems to be no reason for not applying the same rule to aircraft. Seizure of an aircraft can cause inconvenience (a point which strongly influenced the Attorney-General), but so can seizure of a ship.

⁵ Mann, loc. cit. (above, p. 147 n. 1), pp. 79-81.

Belgium,¹ in the Netherlands until 1940² and in Greece until 1946.³ At the present day such rules exist in Haiti,⁴ Luxembourg,⁵ Quebec⁶ and Roumania.⁷ Courts in Portugal⁸ and the Netherlands⁹ claim jurisdiction on the grounds of the plaintiff's domicile.

Judgments given on the basis of such provisions are unlikely to be recognized in other countries. In 1883 an Italian court held that Article 14 of the French Civil Code was contrary to the law of nations,¹⁰ but Italian courts usually hold that it is merely contrary to Italian public policy, as a reason for not recognizing such French judgments.¹¹ There is no record of diplomatic protests concerning such grounds of jurisdiction.

Such jurisdiction may be unusual in proceedings *in personam*, but in the case of matrimonial proceedings it is normal. The traditional rule, not only in England but also throughout western Europe, was that jurisdiction was vested in the court of the husband's domicile.¹² This meant that, after the husband and wife had separated, the husband might acquire a new domicile in a country where his wife had never set foot and institute proceedings there against his wife. The tendency of modern legislation is to extend this privilege to the wife,¹³ instead of insisting that proceedings must be brought in the court of the defendant's domicile. At the present day the plaintiff's domicile or residence is a basis of jurisdiction in the majority of countries,¹⁴ and this has been accepted by the Hague Convention on the Recognition of Divorces and Legal Separations, 1970.¹⁵ Jurisdiction is claimed on the

¹ Defacqz, *Ancien droit belge* (1846), vol. 1, p. 237.

² *Journal de droit international* (1903), p. 690; *International and Comparative Law Quarterly*, 17 (1968), p. 707.

³ *Journal de droit international* (1911), p. 662; *Recueil des cours*, 104 (1961), pp. 208-9.

⁴ Mann, loc. cit. (above, p. 147 n. 1), p. 80.

⁵ Ibid.

⁶ Castel, *Conflict of Laws* (2nd ed., 1968), pp. 951, 953.

⁷ *Journal de droit international* (1887), p. 565.

⁸ T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 170.

⁹ Ibid., pp. 33, 39.

¹⁰ *Journal de droit international* (1885), p. 464. On the meaning of the 'law of nations' see below, pp. 212-14.

¹¹ *Journal de droit international* (1889), p. 338; *ibid.* (1926), p. 1091. Similarly in Belgium: *Nederlands Tijdschrift voor Internationaal Recht* (1964), p. 26.

¹² Rabel, *The Conflict of Laws* (2nd ed., 1958), vol. 1, pp. 429-30.

¹³ In *Worth v. Worth*, [1931] N.Z.L.R. 1109 the New Zealand Court of Appeal suggested that jurisdiction based on anything other than the husband's domicile was contrary to international law, and the same approach can be seen in *Niboyet v. Niboyet* (1878), 4 P.D. 1, 20, in *Shaw v. Gould* (1868), L.R. 3 H.L. Cas. 55, 81-3, and in *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 527. This seems to show a confusion between public international law and the traditional English ideas of private international law; cf. below, pp. 212-14, 226-7, 232.

¹⁴ T. M. C. Asser Instituut, *Statutory Private International Law* (1971), pp. 36, 119, 131, 170, 190, 199; Rabel, op. cit. (above, n. 12 on this page), pp. 429, 432, 434, 453; A.L.I., *Restatement, Second, Conflict of Laws*, s. 71; *American Journal of Comparative Law*, 20 (1972), pp. 1, 16, 22-3; *Journal de droit international* (1966), pp. 783, 796; [English] Domicile and Matrimonial Proceedings Act 1973, s. 5; *Nederlands Tijdschrift voor Internationaal Recht*, 19 (1972), pp. 218, 227, 311, 332.

¹⁵ *International and Comparative Law Quarterly*, 18 (1969), p. 658; Cmnd. 4542. The Recognition of Divorces and Legal Separations Act 1971 gives effect to the Convention in English law.

basis of the plaintiff's nationality in a number of Eastern European countries, including Greece and Yugoslavia;¹ nationality of either spouse is a ground for recognition under the [English] Recognition of Divorces and Legal Separations Act 1971.

Title to foreign land

It has sometimes been suggested that it would be contrary to international law for a municipal court to decide title to foreign land.² But courts in Austria, Germany and Italy have done precisely this, without provoking diplomatic protests.³ English courts refrain from exercising such jurisdiction, probably because they realize the futility of giving a judgment which cannot be enforced against the wishes of the local State, but they circumvent this rule by means of the equitable jurisdiction *in personam*⁴ (French courts have also sometimes dealt indirectly with title to foreign land by exercising jurisdiction *in personam*).⁵

The idea that international law prohibits a municipal court from deciding title to foreign land probably arises from confusing ownership of land with sovereignty over territory.⁶ The fallacy in this reasoning is too obvious to require demonstration.

Jurisdiction based on subject-matter

One might imagine that it would be perfectly reasonable for a State to exercise jurisdiction over a case if the subject-matter of the case had a close connection with that State; if a State's courts can try crimes committed on the State's territory, why should they not try torts and breaches of contract committed on the State's territory? But Joseph Story⁷ argued, early in the nineteenth century, that jurisdiction *in personam* must be based on the

¹ I. Szászy, *Private International Law in the European People's Democracies* (1964), pp. 88, 352-3; *Journal de droit international* (1966), pp. 783, 796; *Recueil des cours*, 131 (1970), pp. 475-7; T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 143. A similar rule exists in Swiss law: *Nederlands Tijdschrift voor Internationaal Recht*, 19 (1972), p. 333.

² Vattel, *The Law of Nations*, Book 2, s. 103; *Bhattacharjee v. Bhattacharjee* (1955), I.L.R., vol. 22, p. 197; L. van Praag, *Jurisdiction et droit international public* (1915), pp. 113-31 (this is the only limitation on jurisdiction in civil cases which van Praag recognizes, apart from sovereign and diplomatic immunity, etc.). Cf. the equivocal dicta in *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, 624.

³ A. Nussbaum, *Principles of Private International Law* (1943), p. 206; Hackworth, vol. 2, pp. 81-2; *Journal de droit international* (1894), p. 893, (1932), p. 318; *Rivista di diritto internazionale*, 11 (1932), p. 234.

⁴ G. C. Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), pp. 477 et seq., 497 et seq.

⁵ *Sirey* 1848. 2. 625; *Journal de droit international* (1877), p. 422. Van Praag, op. cit. (above, n. 2 on this page), p. 131, accepts this as lawful.

⁶ Van Praag, *ibid.*, pp. 113-31, makes this mistake.

⁷ *Commentaries on the Conflict of Laws*, Sections 539 et seq. See also Vattel, *The Law of Nations*, Book 2, s. 103.

physical presence of the defendant within the State's territory when proceedings are started. Certain passages in Story suggest that any other type of jurisdiction *in personam* is contrary to international law, although, on the whole, Story seems to have been more concerned with the question whether the judgment would be treated as a nullity in foreign courts, rather than with questions of international law.¹ Story's influence is reflected in a number of English and American judgments, which held that the subject-matter of a case was, by itself, insufficient to confer jurisdiction *in personam*,² and in the *Daylight* case the United States Government argued that public international law prevented Mexico's hearing a case involving an absent United States citizen whose ship had collided with a Mexican Government ship off the coast of Mexico.³

Story's attitude clearly does not represent modern international law, because at the present day a very large number of States claim jurisdiction founded on the subject-matter of cases (e.g. torts committed on the territory of the State concerned, contracts governed by its law, etc.).⁴ Moreover, there are obvious advantages in attributing jurisdiction to the State where the facts occurred, and whose law has the closest connection with those facts.

¹ Non-recognition of a foreign judgment does not necessarily indicate that the foreign court lacked jurisdiction according to public international law; foreign criminal judgments are hardly ever recognized, regardless of whether public international law permitted the foreign court to hear the case.

² Rheinstein, *University of Chicago Law Review*, 22 (1955), pp. 775, 793; *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670; *Phillips v. Batho*, [1913] 3 K.B. 25, 29-30; *Schibbsy v. Westenholz* (1870), L.R. 6 Q.B. 155. The interpretation of these judgments is not free from doubt; when they say (as some of them do) that such jurisdiction is contrary to international law, are they thinking of public international law or of traditional common law ideas of private international law? Cf. below, pp. 212-14, 226-7, 232.

³ *Foreign Relations of the U.S.* (1884), p. 359. The United States was trying to present a claim on the international plane on behalf of the shipowner, and Mexico was arguing that he ought to exhaust local remedies in Mexico first. If the Mexican contention had prevailed, the United States shipowner would have appeared in the Mexican court as plaintiff, and not (as the United States argument appears to suggest) as defendant—which only confirms the total illogicality of the attitude adopted by the United States Government.

In 1853 Attorney-General Cushing advised that Texas committed 'a usurpation of general sovereignty' by trying a case against a United States army officer who was not domiciled in Texas, had never been personally served, had never appeared before the court and had no property in the State (6 Opinions of the Attorneys-General, p. 75). The case concerned a tort which had been committed, at least in part, in Texas.

It was said in the *Idler* case (*U.S. v. Venezuela* (1885), Moore, *History and Digest of the International Arbitrations*, pp. 3491, 3511-12), that a judgment will be void unless the defendant in an action *in personam* is domiciled or served with process in the State claiming jurisdiction. But the question at issue was whether *Idler's* dispute with Venezuela (concerning goods shipped by *Idler* to Venezuela) was *res judicata*, not whether Venezuela had broken public international law by instituting proceedings against *Idler* in its own courts.

⁴ Smit, *International and Comparative Law Quarterly*, 21 (1972), pp. 335, 344-50; Cavers, *Recueil des cours*, 131 (1970), pp. 75, 286-95; Hague Convention on the Recognition and Enforcement of Foreign Judgments, 1966 (*International Legal Materials*, 5 (1966), p. 636), Art. 10 (4) (tort); T.M.C. Asser Instituut, *Statutory Private International Law* (1971), pp. 47, 79-80, 94, 96-7, 119, 152, 170, 189, 275, 307.

Conclusion

Story's attitude shows the danger of relying on *a priori* arguments. Indeed, such arguments can be used to justify opposite conclusions; for instance, the principle of sovereignty, which was interpreted by the Spanish Supreme Court to give the courts of each State jurisdiction over all civil actions brought in that State,¹ was interpreted by the Cuban Supreme Court to debar courts from hearing disputes between foreigners.² There are a number of examples of authors and municipal courts using *a priori* arguments to support alleged limitations on a State's jurisdiction in civil cases—limitations which are contradicted by the actual practice of States.³

The acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests. Protests in civil cases are not as frequent or as well known as they are in criminal cases,⁴ but they do exist. However, when they are examined closely it will be seen that some of them are isolated protests against practices which are so general that the law must be taken to follow the general practice rather than the isolated protest;⁵ the other recorded protests seem to be directed more against the reasoning adopted by the foreign court than against the assumption of jurisdiction by the foreign court. For instance, Hackworth quotes a protest by the United States Government against a Panamanian judgment granting a divorce to a resident of the Panama Canal Zone;⁶ when one examines the text of the Panamanian judgment⁷ it becomes clear that what the United States was really objecting to was the Court's reasoning to the effect that the rights of the United States over the Canal Zone were limited to ensuring the operation of the Canal. If the Panamanian court had based its judgment on reasoning which did not call in doubt the status of the

¹ *Harry Winston Inc. v. Tuduri* (1961), I.L.R., vol. 34, p. 49.

² *Journal de droit international* (1906), pp. 226, 230.

³ See above, pp. 170 at n. 2, 172 at n. 2, 173 at nn. 10, 13 and 174 at nn. 2, 6. The Italian Court of Cassation held that it would violate the sovereignty of foreign States for an Italian court to hear a case concerning a collision between foreign ships in foreign territorial waters (*Annual Digest*, 1938-40, p. 298); but the courts of other countries would claim jurisdiction in such circumstances (see above, p. 172, and below p. 183 n. 11).

⁴ A possible reason for this disparity is suggested in Akehurst, *A Modern Introduction to International Law* (2nd ed., 1971), pp. 130-1.

⁵ In addition to the *Daylight* case, mentioned above, p. 175, reference should be made to an incident in 1865 when the Italian Government, invoking Mancini's nationality principle, protested that foreign courts had no power to appoint guardians for Italian children (except as a temporary measure): *La prassi italiana di diritto internazionale*, 1st series (1970), vol. 1, pp. 9-10. But in England and the United States the mere presence of the child within the territory of the State concerned is enough to give the court jurisdiction to appoint a guardian (Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), Chapter 13; I.L.R., vol. 42, pp. 26, 29; A.L.I., *Restatement, Second, Conflict of Laws*, s. 79); many other countries will probably claim such jurisdiction on the basis of domicile or residence, even over children possessing foreign nationality.

⁶ Hackworth, vol. 2, pp. 172-3. A Canal Zone court refused to recognize a similar Panamanian judgment in *Lucas v. Lucas* (1964), *American Journal of International Law*, 59 (1965), p. 163.

⁷ *Registro judicial*, 22 (March 1936), pp. 404-5.

Panama Canal Zone the United States would probably not have protested; it is notorious that many United States citizens have obtained 'mail order' divorces in Mexico, but the United States has never protested to Mexico.

A similar case¹ arose in 1879 when a tort action *in personam* was brought in Portugal against certain British subjects for a collision ten miles off the Portuguese coast; Portugal claimed jurisdiction on the grounds that the collision had occurred in Portuguese waters. The British Government protested against 'the assumption of jurisdiction by Portuguese courts to deal with a suit *in personam* beyond the limit which could properly appertain to the Portuguese courts'. But the protest was dropped when it appeared that Portugal had an alternative ground for claiming jurisdiction—Portuguese law gave Portuguese courts jurisdiction over persons committing torts outside Portugal against Portuguese subjects. What the United Kingdom objected to was really not the assumption of jurisdiction by Portuguese courts, but the implication that the Portuguese territorial sea extended ten miles.

In practice the assumption of jurisdiction by a State does not seem to be subject to any requirement that the defendant or the facts of the case need have any connection with that State;² and this practice seems to have met with acquiescence by other States. (The very few protests which have been made were either misconceived or addressed to unrelated issues.) It is hard to resist the conclusion that (apart from the well-known rules of immunity³ for foreign States, diplomats, international organizations, etc.) customary⁴ international law imposes no limits on the jurisdiction of municipal courts in civil trials.

3. DISCOVERY OF DOCUMENTS

When attempting to enforce antitrust laws and to regulate the rates charged for shipping goods into or out of the United States, United States courts and administrative authorities have frequently ordered foreign defendants to produce documents situated abroad. Such orders have produced protests from foreign governments.⁵ Some of these protests argue that international law forbids the United States to order foreigners to produce documents situated abroad;⁶ others maintain that the order for discovery is contrary to international law because the United States had

¹ Cited by Parry, *Transactions of the Grotius Society*, 44 (1958), pp. 109, 119.

² See above, pp. 170–4. Other examples could be given; for instance, Austrian law allows a plaintiff to choose a forum unilaterally in an invoice.

³ In many cases all servants or agents of a foreign State are immune from suit in respect of acts done by them in the course of their duty; see below, pp. 240–4.

⁴ Treaties sometimes impose limits on jurisdiction; see in particular the E.E.C. Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments: *Journal officiel* (1972), L 299/32.

⁵ See, generally, Mann, loc. cit. (above, p. 147 n. 1), pp. 154–8.

⁶ I.L.A. (1964), pp. 403–5, 580–1; I.L.R., vol. 33, pp. 159–61.

no right to initiate the proceedings in the first place.¹ Other protests rely on both of these arguments² or equivocate between them.³

It is submitted that the first ground stated for the protests is misconceived. When a court or administrative authority has jurisdiction over a case, it must have power to order defendants to produce documents relevant to the case, even though the defendants are foreigners and the documents are situated abroad.⁴ The fact that the law or the government of the State where the documents are situated forbids discovery makes no difference in international law, although municipal courts often refrain from ordering discovery in such circumstances. If this were not so, a foreign corporation could transact business within a State and defeat all attempts by the authorities of that State to investigate whether the business was being carried on in accordance with local law by keeping its business records in another State whose law prohibited discovery. This applies not only to antitrust law, but to tax law and to laws enacted to protect the consumer—indeed, to the whole range of public and private law. When a court has the right to hear a case, it also has the right to compel discovery of all relevant documents; as in the constitutional law of the United States and the law of international organizations, the existence of an express power carries with it such implied powers as are necessary in order to enable the express power to be effectively exercised.⁵

The second ground stated for the protests is unexceptionable. When a court or administrative authority has no jurisdiction over a case in the eyes of international law, an order for discovery of documents or any other step taken to render the usurped jurisdiction more effective is equally illegal because it aggravates the initial illegality of assuming jurisdiction.⁶

¹ I.L.A. (1964), pp. 404, 579–81, 590; *British Practice in International Law* (1962), p. 17; Chayes, Ehrlich and Lowenfeld, *International Legal Process* (1968), p. 419; *University of Pennsylvania Law Review*, 111 (1963), pp. 1135–6.

² I.L.A. (1964), pp. 404–5, 569–70, 579–80, 584.

³ Mann, loc. cit. (above, p. 147 n. 1), p. 155.

⁴ The same rule applies when the foreigner appears as plaintiff: *The Consul Corfitzon*, [1917] A.C. 550, 555; *Société Internationale v. Rogers* (1958), 357 U.S. 197. It is uncertain whether the same rule applies to witnesses; service of a subpoena abroad may give rise to difficulties (Mann, loc. cit. (above, p. 147 n. 1), pp. 134–6), but that relates to the method of communicating the court's order and not to the legality of making the order. In any case, a subpoena can be served on the local branch of a foreign corporation; Mann, *ibid.*, cites *Ings v. Ferguson* as authority against this view, but, although the court did not order discovery in *Ings v. Ferguson*, it hinted that in other similar cases it might make such an order (I.L.R., vol. 31, pp. 219, 225). Probably a foreign witness can be ordered to produce documents only if either the witness or the documents are in the State at the time when the order is made; cf. above p. 156, on criminal liability for omissions.

⁵ Mann, loc. cit. (above, p. 147 n. 1), pp. 154–8; *Re Mitsui Steamship Co. Ltd.* (1962), I.L.R., vol. 33, pp. 158, 162; *Montship Lines Ltd. v. Federal Maritime Board* (1961), *ibid.*, vol. 32, p. 100; *Fontaine v. Securities and Exchange Commission* (1966), *International Legal Materials*, 5 (1966), p. 1003. See also above, pp. 167–9, and below, pp. 207–8.

⁶ On the substantive jurisdiction of the United States in antitrust cases, see below, pp. 190–212, especially pp. 203–6 on shipping rates.

PART III. LEGISLATIVE JURISDICTION

I. GENERAL PRINCIPLES

In criminal law legislative jurisdiction and judicial jurisdiction are one and the same. States do not apply foreign criminal law; even in those few cases where criminality under the *lex loci* is made a condition precedent for the extraterritorial application of the criminal law of the forum, the accused is acquitted or convicted of an offence under the *lex fori*. If the court has jurisdiction, it applies its own law; if the *lex fori* applies, then the court has jurisdiction (apart from cases of immunity, statutes of limitation, etc.).

In civil law legislative jurisdiction and judicial jurisdiction do not necessarily coincide. A court may have jurisdiction and yet apply foreign law; a State may legislate for cases which fall beyond the jurisdiction of its courts. Consequently the absence of limitations imposed by public international law on the judicial jurisdiction of States in civil cases does not necessarily indicate that there is a similar absence of limitations on legislative jurisdiction.

Limitations clearly exist as regards legislation in certain fields of what might loosely be described as public law, such as laws governing the methods of operating of public bodies. Only the State to which the body belongs can legislate for it. We may refuse to enforce a foreign judgment because we disapprove of the procedure followed by the foreign court, but we do not pass laws ordering the foreign court to follow a different procedure—to do so would be an intervention in the foreign State's domestic jurisdiction and a denial of its sovereignty and independence.¹ For the same reasons, a State may not apply its law to the employment relationship between foreign States and their officials.²

Limitations also apply to laws conferring sovereign or prerogative rights on the State, i.e. rights which cannot be exercised by private individuals in the State concerned. Tax is a good example; the power to tax can only be exercised by States, not by private individuals. Such laws can be applied only against people who have a close connection with the State concerned. What counts as a close connection will vary from context to context; if a foreigner visits a State for a couple of days, the State would be entitled to require him to register with the police, but not entitled to conscript him into the army.

Customary international law permits a State to levy taxes only if there is a genuine connection between the State and the taxpayer (nationality,

¹ See below, p. 250.

² Seyersted, *International and Comparative Law Quarterly*, 14 (1965), p. 31. The same rule applies to international organizations: Akehurst, *The Law Governing Employment in International Organizations* (1967), p. 12.

domicile, long residence, etc.), or between the State and the transaction or property in respect of which the tax is levied.¹ This rule is necessary to protect States against one another; if a man is forced to pay taxes to a State with which he has little connection, this means that he may not have enough money left to pay taxes to a State with which he has a real connection. The rule does not prevent double taxation (that can only be prevented by treaty), but it does restrict the number of States which may lawfully levy taxes.

The Supreme Court of Pakistan has held that international law prohibited Pakistan from taxing an Indian company resident in India in respect of its profits earned in India.² In the *Weil* case (1875) it was held that a forced loan levied on an alien in transit was illegal.³ Hyde says that a State breaks international law if it attempts 'to impose a tax on the person of an alien who has no actual residence within its domain' or 'to tax tangible property as such which happens to be merely temporarily therein and which belongs elsewhere'.⁴ At one time it was thought that international law prevented a State's taxing land held by its nationals abroad,⁵ but this view is no longer followed in practice.⁶

Expropriation is another example of a sovereign power. A State may expropriate property situated in its own territory; it may also expropriate property held by its citizens abroad,⁷ although such legislation is unlikely to be enforced by the courts of other countries.⁸ But it would clearly be contrary to international law for a State to pass such legislation concerning property held by foreigners abroad (the fact that such legislation will not be enforced abroad does not diminish its illegality); fortunately there seems to be no recorded example of such legislation.

Recently problems have arisen in connection with the Securities Exchange Act in the United States. This Act provides for criminal liability as well as civil liability; it also gives the Securities and Exchange Commission regulatory powers which are of a sovereign character, since they

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 109-19; O'Connell, *International Law* (2nd ed., 1970), vol. 2, pp. 715-18; Albrecht, this *Year Book*, 29 (1952), pp. 145, 153-4, 156, 160; Rolin, *Recueil des cours*, 77 (1950), pp. 307, 370-1. *Contra*, Wurzel, *Columbia Law Review*, 38 (1938), p. 809; but he seems to confuse the absence of rules of customary international law against double taxation with the question whether international law puts any limits at all on a State's right to tax (pp. 815-16). He cites cases of abusive tax practices in various countries (pp. 835-43), but these reflect a questionable interpretation of sound connecting factors (especially residence) rather than an abandonment of reasonable connecting factors altogether.

² *Imperial Tobacco Co. of India v. Commissioners of Income Tax* (1958), I.L.R., vol. 27, p. 103.

³ Moore, *History and Digest of International Arbitrations*, p. 3424.

⁴ Hyde, *International Law* (2nd ed., 1947), vol. 1, p. 665. The first of these propositions is supported by Wharton, *International Law Digest* (1887), vol. 2, p. 514, and by Moore, vol. 4, p. 22.

⁵ *Foreign Relations of the U.S.* (1906), vol. 2, p. 1408.

⁶ Wurzel, *Columbia Law Review*, 38 (1938), pp. 809, 815, n. 28; Whiteman, vol. 8, p. 537.

⁷ *Amsterdam v. Minister of Finance* (1952), I.L.R., vol. 19, p. 229; Kiss, op. cit. (above, p. 147 n. 6), vol. 4, pp. 59-60. Such legislation may be enforced by sanctions against nationals, but not by seizure of the property in another State's territory: see above, p. 148.

⁸ See below, pp. 251-2.

can be exercised only by the Commission and not by private individuals. It is submitted that '... the extension of the regulatory and penal provisions of the Securities Exchange Act . . . to foreign corporations which have neither publicly listed securities in the United States nor publicly offered securities within the United States is a violation of international law'.¹ The Act was amended in 1964 in violation of this principle. Following protests by foreign governments,² the Securities and Exchange Commission made new rules which in practice more or less eliminated the violation of international law caused by the 1964 amendments.³

What about those areas of municipal law which may loosely be described as 'private law', i.e. those areas of law which are not concerned with the functioning of public bodies or with the sovereign rights of the State? Does international law limit the legislative jurisdiction of States in these areas?

It has sometimes been suggested that *all* extraterritorial legislation is contrary to international law. In this connection a tag from Justinian's *Digest* is often quoted: *extra territorium ius dicenti impune non paretur*.⁴ What this tag means is that a man can disobey a judge with impunity outside the territory over which the judge has jurisdiction. This is not the same as saying that the judge (or the legislator) breaks international law if he asserts extraterritorial jurisdiction; ineffectiveness is not the same as illegality. In any case, the limits on the jurisdiction of Roman courts were imposed by municipal law, not by international law.⁵ The view that

¹ *Barcelona Traction case, I.C.J. Reports*, 1970, p. 167, *per* Judge Jessup, quoting the Committee on International Law of the Association of the Bar of the City of New York. See also Stevenson in *International Financing and Investment* (ed. McDaniels, 1964), pp. 432-6.

By listing or issuing securities in the United States, the foreign corporation is apparently presumed to submit to United States law. This presumption is often justified, but not always: see *Schoenbaum v. Firstbrook* (1968), *American Journal of International Law*, 64 (1970), p. 175, and the criticism by Bator, *Proceedings of the American Society of International Law*, 64 (1970), pp. 141, 144.

When a transaction in securities has occurred in whole or in part in the United States, application of United States law is justified under the territorial principle: *Columbia Law Review* 69 (1969), p. 94; *Columbia Journal of Transnational Law*, 10 (1971), p. 150. Where stock is issued simultaneously in the United States and abroad, the foreign underwriters can be regarded as accessories to the acts of the United States underwriters, and thus subject to United States jurisdiction: Stevenson, *op. cit.*, pp. 455-9.

² *Canadian Year Book of International Law*, 5 (1967), pp. 317-18.

³ Bator, *ibid.*, p. 141; *Columbia Law Review*, 69 (1969), pp. 109-11; Stevenson, *American Journal of International Law*, 63 (1969), p. 278; *Harvard Law Review*, 83 (1969), p. 404; Buxbaum, *Securities Law Review*, 1 (1969), p. 677; Goldman and Magrino, *ibid.*, 2 (1970), p. 831.

⁴ D. 2. 1. 20. This tag is often quoted without thinking, e.g. the misquotation *extra territorium ius dicenti non impune paretur* in *Cooke v. Charles A. Vogeler*, [1901] A.C. 102, 108. If rules of Roman law limiting the powers of courts are regarded as a source of rules of international law limiting the powers of legislators, one could quote tags pointing in a very different direction, e.g. *Codex*, 3. 15. 1: *Quaestiones . . . criminum . . . ubi reperiuntur qui rei esse perhibentur criminis, perfici debere satis notum est*.

⁵ In the same way the medieval statisticians thought that legislative power was limited because it was delegated by the Holy Roman Emperor (de Nova, *Recueil des cours*, 118 (1966), pp. 441, 444 et seq.). It is thus dangerous to rely on medieval writers, as Mann does, *loc. cit.* (above, p. 147 n. 1), pp. 24-5.

extraterritorial legislation is *invariably* contrary to international law was rejected by the Permanent Court of International Justice in the *Lotus* case.¹

Story says that a State may legislate for its subjects abroad, but that all other forms of extraterritorial legislation infringe the sovereignty of other States.² This view is supported by a number of other writers,³ although it should be pointed out that many writers who appear to agree with Story are really concerned only with defining the circumstances in which the laws of one State will be denied enforcement in other States,⁴ and a refusal to enforce foreign laws does not necessarily indicate that those laws are contrary to international law; States seldom enforce the criminal or revenue laws of other States, even when such laws are in accordance with international law.

Mann adopts a more sophisticated approach, since he considers that the principle of territoriality is too crude to be applicable to modern conditions. He argues that a State may not apply its law unless there is a close connection between the State and the person, thing or event to which the law is to be applied; two or more States may sometimes have concurrent legislative jurisdiction, but the *lex fori* should not apply where it has no substantial connection with the facts.⁵ This view is supported by a number of authors,⁶ although others maintain that international law imposes no limits on the legislative jurisdiction of States over 'private law' relationships.⁷

Mann attributes significance to the principle of interpretation followed by English and American courts, whereby a statute, in the absence of clear words to the contrary, will be presumed not to apply extraterritorially.⁸ But this principle goes much further than international law requires; there is a presumption that British statutes do not apply to United Kingdom citizens abroad, to British colonies or to British ships, although clearly nothing in international law requires the United Kingdom to limit the reach of its legislation in this way.⁹ Again, many of the cases are not concerned with international law, but with *constitutional* limitations on the

¹ (1927), *P.C.I.J.*, Series A, No. 10, p. 19.

² Joseph Story, *Commentaries on the Conflict of Laws*, s. 20.

³ Rolin, *Recueil des cours*, 77 (1950), pp. 307, 370, 373; Mann, loc. cit. (above, p. 147 n. 1), pp. 28-30, 63; Beale, *Harvard Law Review*, 36 (1923), p. 241.

⁴ Dicey, *Conflict of Laws* (2nd ed., 1908), p. 28. Huber (translated in this *Year Book*, 18 (1937), pp. 49, 64), probably meant the same. In *Amsterdam v. Minister of Finance* (1952), I.L.R., vol. 19, pp. 229, 232-4, 243, the Supreme Court of Israel said that Story's theory was a rule of Anglo-American private international law, not of public international law.

⁵ Mann, loc. cit. (above, p. 147 n. 1), pp. 36-62.

⁶ Wolff, *Private International Law* (2nd ed., 1950), pp. 12 et seq.; H. Lauterpacht, *International Law* (collected papers ed. by E. Lauterpacht, 1970), vol. 1, p. 38.

⁷ Cook, *The Logical and Legal Bases of the Conflict of Laws* (1949), pp. 41, 71 et seq.; Lorenzen, *Columbia Law Review*, 20 (1920), pp. 247, 269.

⁸ Mann, loc. cit. (above, p. 147 n. 1), pp. 63-72. He admits (p. 63) that this principle of interpretation is seldom followed on the Continent.

⁹ *Maxwell on the Interpretation of Statutes* (12th ed., 1969), pp. 169-83.

legislative powers of colonies or of member-states of a federation.¹ The 'full faith and credit' clause and the 'due process' clause in the United States Constitution limit the legislative powers of states to a degree which is manifestly not required by international law.²

It is true that many English and American cases contain dicta that international law does not allow a State to apply its laws to the activities of aliens abroad. But in most cases the dicta are too wide, since the cases concerned criminal law,³ or taxation,⁴ or the seizure by warships of foreign vessels on the high seas;⁵ so they are of little relevance to cases of 'private law'. Some of the cases which do deal with 'private law', and which hold that various statutes are not applicable to foreigners abroad, turn on the interpretation of the statute and not on rules of international law.⁶ Others do profess to lay down rules of international law, but are contradicted by other authorities.

For instance, in *The Zollverein* it was said to be beyond the power of the legislature to pass a statute governing the civil liability of a foreign ship involved in a collision on the high seas.⁷ But English courts have no hesitation about applying rules of the common law to foreign ships involved in collisions on the high seas; these rules are supposed to be part of the 'general maritime law' common to all countries, but the English version of them differs from the version adopted in many other countries,⁸ and many writers say that there is no such thing as a general maritime law.⁹ Some English Acts of Parliament clearly do govern the civil liability of foreign ships for collisions on the high seas,¹⁰ and many other countries apply their *lex fori* to collisions involving foreign ships on the high seas.¹¹

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 45-6; *Trustees and Executors Agency Co. v. Federal Commissioner of Taxation* (1933), 49 C.L.R. 220, 235-6.

² *Home Insurance Co. v. Dick* (1930), 281 U.S. 397 (especially 407-8).

³ *The Annapolis* (1861), 167 E.R. 128, 134; *R. v. Anderson* (1868), L.R. 1 C.C.R. 161, 170; *R. v. Keyn* (1876), 2 Ex. D. 63, 160; *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455, 457, 458; *R. v. Jameson*, [1896] 2 Q.B. 425, 430; *Trustees and Executors Agency Co. v. Federal Commissioners of Taxation* (1933), 49 C.L.R. 220, 239; *U.S. v. Palmer* (1818), 3 Wheaton 610, 631; *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347, 355-7 (this was an action in tort, but the court said 'the law begins by making criminal the acts for which it gives a right to sue'). See also *British Practice in International Law* (1965), p. 127.

⁴ *Colquhoun v. Heddon* (1890), 25 Q.B.D. 129, 135; *State of Minnesota v. Karp* (1948), *Annual Digest*, 1948, p. 10 (Ohio).

⁵ *Rose v. Himely* (1808), 4 Cranch 241, 279; *The Apollon* (1824), 9 Wheaton 362, 370; *Lopez v. Burslem* (1842), 13 F.R. 318, 320; *Croft v. Dunphy*, [1933] A.C. 156, 162.

⁶ *Maxwell on the Interpretation of Statutes* (12th ed., 1969), pp. 171-3, 177 et seq.; *New York Central Rail Road Co. v. Chisholm* (1925), 268 U.S. 29; *Vanity Fair Mills v. T. Eaton Co. Ltd.* (1956), I.L.R., vol. 23, p. 276. In *Jefferys v. Boosey* (1854), 10 E.R. 681, 725, Parke, B., talked about 'the power of the legislature', which may perhaps indicate that he was thinking in terms of international law, but the other judges did not use such language (730, 736, 742).

⁷ (1856), 166 E.R. 1038, 1039-40, followed in *Cope v. Doherty* (1858), 70 E.R. 154.

⁸ *Restatement, Second, Foreign Relations Law of the U.S.* (1965), pp. 98-100.

⁹ Rabel, *The Conflict of Laws* (2nd ed., 1960), vol. 2, p. 338. Treaties concluded for the unification of laws on collisions would be unnecessary if uniformity existed.

¹⁰ Merchant Shipping Act Amendment Act, 1862, s. 54; *The Amalia* (1863), 15 F.R. 778.

¹¹ Rabel, op. cit. (n. 9 on this page), pp. 340, 351; *Nederlands Tijdschrift voor Internationaal Recht*, 18 (1971), p. 345; T.M.C. Asser Instituut, *Statutory Private International Law* (1971),

In the United States the Jones Act gives seamen the right to sue their employers for service-incurred injury, and the Supreme Court held in *Lauritzen v. Larsen* that various factors (the place of the wrongful act, the nationality of the ship, the nationality and domicile of the plaintiff, the nationality of the defendant, the place where the contract was made, the inaccessibility of the foreign forum, the *lex fori*) had to be weighed against one another to determine whether the Jones Act applied; application of the Jones Act to cases which had no real connection with the United States would be contrary to international law.¹ But the United States' Death on the High Seas Act (which creates a right to compensation under United States law) applies to all deaths, regardless of the nationality of the ship (or aircraft) or parties;² and United States statutes forbid carriers by sea to exempt themselves from liability, even though the facts of the case have little real connection with the United States.³ United States laws prescribing the time at which seamen's wages should be paid have been applied to foreign ships calling at United States ports.⁴

In *Ex parte Blain*, it was said that it would be contrary to international law if English bankruptcy law were applied by an English court to a

pp. 128 and 286; Dalloz (1966), p. 577; *The Scotland* (1881), 105 U.S. 24, 29-31; *The Titanic* (1914), 233 U.S. 718, 733; *Black Diamond Steamship Co. v. Robert Stewart and Sons* (1949), 336 U.S. 386; *British Transport Commission v. U.S.* (1957), 354 U.S. 129. German courts apply German law to collisions between foreign vessels in foreign territorial waters: Ehrenzweig *Private International Law: General Part* (1967), p. 205. In the Soviet Union, Soviet law applies to all collisions and claims for salvage: Merchant Shipping Code, 1968, Art. 14 (7); (Art. 4 (d) of the 1929 Code also added towage contracts).

In 1899 the British Government protested that Italian courts had broken international law by applying Italian law to determine the tortious liability of British ship-owners for a collision between a British merchant ship and a British warship in the territorial sea of Gibraltar (quoted by Parry in *Annali della Facoltà di Giurisprudenza dell'Università di Bari*, 16 (1960), pp. 7-9); the proceedings had been brought in an Italian court by relatives of Italian passengers on the British merchant ship. But this appears to be an isolated protest against a practice which is followed not only by Italy, but also (as we have seen) by Germany and the Soviet Union.

¹ (1953), 345 U.S. 571, 577-8. There is a similar dictum in *McCulloch v. Sociedad Nacional de Marineros de Honduras* (1963), 372 U.S. 10, 21, but this involved the supervisory powers of the National Labour Relations Board and is not therefore a case of 'private law'; see also *Foreign Relations of the U.S.* (1924), vol. 1, pp. 683-5 and 689-90 and *R. v. Foster* (1959), 1 L.R., vol. 30, p. 112.

² *Fernandez v. Línía Aeropostal Venezolana* (1957), *ibid.*, vol. 24, p. 267. See also Ehrenzweig, *op. cit.* (above, p. 183 n. 11), pp. 200-1; *The Esso Malaysia*, [1974] 2 All E.R. 705.

³ Other countries have similar statutes: Rabel, *The Conflict of Laws* (2nd ed., 1960), vol. 2, pp. 417-29. The Yugoslav law on contracts concerning the use of sea-going ships applies whenever application of another law would be less favourable to the passenger (s. 130 (3)). See also below, p. 205.

⁴ Briggs, *The Law of Nations* (2nd ed., 1952), pp. 352-3; *Lakos v. Saliaris* (1940), *Annual Digest*, 1941-42, p. 155. In *Sandberg v. McDonald* (1918), 248 U.S. 185, and *Jackson v. S.S. Archimedes* (1928), 275 U.S. 463, the Supreme Court refused to apply United States law, partly because the law imposed criminal as well as civil liability on the shipowner and the Court did not want to apply United States criminal law to acts done by foreigners abroad. Proposals in Congress (which were never carried out) to extend United States law (minus the criminal sanctions) in a way which would have reversed the effect of these decisions gave rise to protests from other States that such a move would be contrary to international law (Briggs, *op. cit.*, p. 353). But these protests can be explained on a different ground: see below, pp. 189-90.

foreigner who had never set foot in England.¹ (The foreigner was a member of an English firm which had traded in England and contracted debts in England.) The effect of this decision was reversed by Act of Parliament in 1913, apparently without causing protests by foreign governments.² It is true that Judge Fitzmaurice, in his separate opinion in the *Barcelona Traction* case, said that international law did impose some limits on the bankruptcy jurisdiction of States.³ But this is a statement of one judge out of sixteen, and he did not say what the limits were (apart from declaring that they had been exceeded in the case before him), nor did he cite any authority for his view. He also said that the bankruptcy proceedings were a disguised expropriation (i.e. carried out by the authorities in bad faith); and this by itself would be enough to make the Spanish Government liable, without making it necessary to consider the question of jurisdiction.

At one time English courts said that Parliament had no power to legislate for foreign companies, even if they carried on business in England.⁴ This view is no longer tenable; Part X of the Companies Act, 1948, lays down many rules relating to foreign companies which have branches in England. No rule of international law forbids a State to wind up a foreign company doing business in its territory;⁵ English courts even claim the power to wind up a foreign company which has never done business in England, provided that it has assets in England.⁶

Private international lawyers are familiar with the tendency of courts to follow a "homeward trend", a tendency to arrive, if possible, at the application of domestic law'.⁷ In many cases the homeward trend is achieved by making exceptions to the normal choice of law rules; the courts will normally apply foreign law, but will apply the *lex fori* instead if the parties do not invoke foreign law, if the content of foreign law is not proved, if its content is contrary to public policy, if the substantive rule of foreign law is closely tied to a particular judicial or administrative procedure which does not exist in the *lex fori*, or if the normal connecting factor is missing (e.g. the choice of law rule refers to the *lex patriae* but the *de cuius* is stateless). Simply because these cases are exceptions to the normal practice, they hardly justify the conclusion that systematic application of the *lex fori* in all cases would be in accordance with public international law.

¹ (1879), 12 Ch. D. 522, 527. See also *Re A.B. & Co.*, [1900] 1 Q.B. 541, 544.

² Bankruptcy jurisdiction in the United States is equally wide: Nadelmann, *International and Comparative Law Quarterly*, 12 (1963), p. 685.

³ *I.C.J. Reports*, 1970, 104-6.

⁴ *Colquhoun v. Heddon* (1890), 25 Q.B.D. 129, 134-5, 140, 142; *Bulkeley v. Schutz* (1871), L.R. 3 P.C. 764, 769.

⁵ In the *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 104, Judge Fitzmaurice admitted that this was so as a general rule.

⁶ *In re Compania Merabello San Nicholas S.A.*, [1973] Ch. 75; *Halsbury's Laws of England* (3rd ed.), vol. 6, pp. 843-5.

⁷ Nussbaum, *Principles of Private International Law* (1943), p. 37.

But in other cases there is a systematic application of the *lex fori*. In nineteenth-century Germany tort was assimilated to crime in the sense of being governed by the *lex fori*.¹ Even today tortious liability is still governed by the *lex fori* in several countries; in some countries the plaintiff must also prove that the act was a tort (or at least 'not justifiable') under the *lex loci delicti*, but the fact remains that the plaintiff will lose his case if he cannot prove that the act is a tort under the *lex fori*.² In modern Germany liability is normally governed by the *lex loci delicti*, but the liability of a German national for a tort committed abroad cannot be greater than it would have been under the German law of tort.³ Breach of promise to marry, which is classified as a tort in some countries and as a breach of contract in others, is governed by the *lex fori* in a number of countries.⁴ In Communist countries, especially the U.S.S.R., the essential validity of a contract is governed by the *lex fori* if a nationalized enterprise of the State of the forum is a party to the contract.⁵ Some Latin American countries require contracts to be made in accordance with the forms prescribed by the *lex fori* if the contract is to be enforced in the forum.⁶ As regards form generally, compliance with the forms prescribed by the *lex fori* is considered in a few countries as an alternative to compliance with the forms prescribed by the *lex loci* (or other systems).⁷

Lauterpacht suggests that the systematic application of the *lex fori* to questions of family law would be contrary to public international law.⁸ However, Communist countries have come close to doing precisely this in many areas of family law, without provoking protests from other States.⁹ In the United States and under the Montevideo Convention the relations between a mother and her illegitimate child are governed by the *lex fori*.¹⁰ In France the question whether a foreigner is old enough to join the Foreign Legion without parental consent is governed by French law and

¹ Wolff, *Private International Law* (2nd ed., 1950), p. 405. Fornication was regarded as similar to crimes and torts, and the illegitimate child's right to maintenance against the father was governed by the *lex fori* for the same reason.

² Rabel, *The Conflict of Laws* (2nd ed., 1960), vol. 2, pp. 237, 244; Szászy, *International and Comparative Law Quarterly*, 18 (1969), pp. 103, 125; Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 195; Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), Chapter 10.

³ E.G.B.G.B., Art. 12. The rule is the same in Japan.

⁴ Rabel, op. cit. (above, n. 2 on this page), pp. 217, 219-20.

⁵ Szászy, loc. cit. (above, n. 2 on this page), pp. 105-6, 119.

⁶ Rabel, op. cit. (above, n. 2 on this page), Chapter 31.

⁷ T.M.C. Asser Instituut, *Statutory Private International Law* (1971), pp. 304-5 (U.S.S.R.—general) and 250 (Israel—wills). See below, p. 223.

⁸ H. Lauterpacht, *International Law* (collected papers ed. by E. Lauterpacht, 1970), vol. 1, p. 38.

⁹ De Lapradelle and Niboyet, *Répertoire de droit international* (1930), vol. 7, pp. 114-17; Szászy, *Private International Law in the European People's Democracies* (1964), pp. 345-6, 348, 350-2, 360; Grzybowski, *Soviet Private International Law (Law in Eastern Europe, No. 10, 1965)*, pp. 125 et seq.

¹⁰ Rabel, *The Conflict of Laws*, vol. 1 (2nd ed., 1958), p. 654.

not by the personal law.¹ Courts in common law countries often apply the *lex fori* in cases involving family law (for instance, an English court, unlike a French court, never applies foreign law in a divorce case), but the jurisdiction of courts in common law countries is usually limited in such a way that the application of the *lex fori* seems natural; however, in cases involving the guardianship of children, the jurisdiction of the court can be based on (*inter alia*) the mere presence of the child within the territory,² and application of the *lex fori* in these circumstances is much more startling. The present position in England with regard to affiliation proceedings is not dissimilar.³

In the Soviet Union the *lex fori* applies to most questions of inheritance.⁴ In France, Belgium, the Netherlands, and many Latin American countries a *droit de prélèvement* exists; if part of the estate is situated in the State of the forum and if a national of that State would have been entitled to succeed to part of the estate if the *lex fori* had been applicable, his share in the inheritance cannot be less than that which he would inherit from the whole estate under the *lex fori*—consequently he is allowed to take the whole of his share out of that part of the estate which is situated in the State of the forum.⁵

These cases in which the *lex fori* is applied to facts which have little or no real connection with the State of the forum may not be very frequent or desirable, but they are too numerous to be disregarded. They are certainly far more numerous than the very rare instances of other States protesting against the application of the *lex fori*. The overwhelming preponderance of the relevant State practice therefore suggests that there are no rules of international law limiting the legislative jurisdiction of States in questions of what might loosely be described as 'private law' (i.e. those areas of municipal law which are not concerned with crimes, the functioning of public bodies or the sovereign rights of the State).

Locus standi to protest

As in the case of criminal trials,⁶ the sanction for an excess of legislative jurisdiction is a protest and/or claim for compensation by the national State of the individual adversely affected. The mere enactment of legislation, before it is enforced, will not normally create a right to compensation,⁷ but it is permissible to protest as soon as the legislation is enacted or even when

¹ Kiss, *op. cit.* (above, p. 147 n. 6), vol. 2, p. 120; *Annuaire français de droit international* (1965), p. 953, (1967), p. 830.

² See above, p. 176 n. 5.

³ *R. v. Bow Road Justices, Ex parte Adedigba*, [1968] 2 Q.B. 572.

⁴ Rabel, *The Conflict of Laws* (1st ed., 1958), vol. 4, p. 261.

⁵ *Ibid.*, p. 263. See also Art. 25 of the German E.G.B.G.B.

⁶ See above, p. 169.
⁷ But there can be exceptions. See the *Mariposa* claim (1933), *Annual Digest*, 1933-34, pp. 255, 257; Bin Cheng, *General Principles of Law* (1953), pp. 174-5.

official proposals for such legislation are made.¹ As for the question whether the mere enactment of legislation, before it is enforced, entitles a State to resort to arbitration, the law is unclear.²

2. THE CONTENT OF LEGISLATION AND ABUSE OF RIGHTS

Even when a State has legislative jurisdiction, the State will break international law if the content of its legislation is contrary to international law. For instance, a State can punish foreigners for crimes committed within its territory, but its law will fall below the minimum international standard if it prescribes a barbarous punishment; a State can pass a law expropriating foreign-owned property situated within its territory, but the law must provide for compensation.³ Again, it follows from what was said at the end of the previous section⁴ that a State is entitled to attribute a universal scope to its rules of family law; but if the content of that law prescribes that all marriages between aliens in foreign countries are void, the State is in breach of international law, at least if one takes the view that respect for basic human rights is now required by international law, because Article 16 (1) of the Universal Declaration of Human Rights provides that 'men and women of full age . . . have the right to marry and to found a family . . .'.⁵ Similarly, although a State is entitled to legislate for its nationals abroad, even in the field of criminal law, it would break international law if it required them to commit acts of subversion against another State within the latter's territory.⁶ More generally, a State may not legislate so as to oblige foreigners resident abroad to adopt its own ideology or to take its side in its quarrels with other States, for that would be contrary to the political independence of the State where the foreigners reside.⁷ The laws of a State which obliged or even permitted people inside that State to counterfeit the currency of another State would be contrary to international law.⁸

A more controversial situation arises where nationals of State *A* own industries in State *B*. Although a State is normally entitled to legislate for its nationals abroad, it is submitted that State *A* is not entitled to use such

¹ MacGibbon, this *Year Book*, 30 (1953), pp. 293, 299-305; B. A. Wortley, *Expropriation in International Law* (1959), pp. 72, 74-5.

² The United Kingdom and the United States adopted opposite attitudes on this question in the Panama Tolls controversy, 1912-14: McNair, *The Law of Treaties* (1961), pp. 547-9. As stated above, there will normally be no right to claim compensation, but does the claimant State have *locus standi* to ask for a declaratory judgment?

³ See also below, p. 225.

⁴ See above, pp. 186-7.

⁵ See also below, p. 230.

⁶ United States courts sometimes say that the United States is entitled to regulate the conduct of its nationals abroad 'when the rights of other nations or their nationals are not infringed': *Skiriotes v. Florida* (1941), 313 U.S. 69, 73.

⁷ See above, pp. 158-9.

⁸ *U.S. v. Arjona* (1887), 120 U.S. 479.

legislative power in a way which would mean imposing its own economic policy on State *B*. One of the General Assembly resolutions on permanent sovereignty over natural resources 'confirms that the exploitation of the natural resources in each country shall always be conducted in accordance with its national laws and regulations';¹ and the United Kingdom Government has stated that States may apply their antitrust laws to the activities of their nationals abroad 'only provided that this does not involve interference with the legitimate affairs of other States'.² The economic policy of State *B* may be expressed in rules of law which require or forbid enterprises to do certain things, or it may be expressed in rules of law which merely leave enterprises free to act as they think best. It does not matter whether State *B* adopts a dirigiste policy or a liberal policy; in either case other States would break international law if they required their nationals in State *B* to act in a way which would thwart State *B*'s economic policy.

Even when the content of legislation does not infringe a specific rule of international law, it may nevertheless be contrary to international law if it constitutes an abuse of rights.³ This will be so if the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating State. For instance, if the United Kingdom required its citizens to drive on the left-hand side of the road in foreign countries, this would cause havoc in foreign countries where the rule of the road was different, without advancing any legitimate interest of the United Kingdom; indeed, it would be difficult to imagine what motive other than a desire to cause mischief could produce such legislation. Although the United Kingdom has jurisdiction to legislate for its citizens abroad, the content of this particular piece of legislation is an abuse of rights and therefore contrary to international law, and it makes no difference whether the legislation is framed in terms of criminal law or in terms of tortious liability.

There will also be an abuse of rights if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States. For instance, during the 1920s proposals were made in the United States Congress to alter United States law in order to give foreign seamen (serving on foreign ships) a contractual right to demand half their wages when the ship arrived in a United States port, even though the law of the

¹ Resolution 2158 (XXI) of 25 November 1966, para. 4.

² *British Practice in International Law* (1967), p. 60.

³ Verzijl, *International Law in Historical Perspective* (1968), vol. 1, pp. 316–20, argues that there is no such thing as abuse of rights, because in all cases the State concerned did not have the alleged right in the first place, so that the question whether the right was abused did not arise. This may be true in most cases (Schwarzenberger, *International Law and Order* (1971), Chapter 6), but not in all (Whiteman, vol. 5, pp. 224–30). At all events, it is submitted that legislative jurisdiction (which is not mentioned by Verzijl and Schwarzenberger) can give rise to genuine examples of abuse of rights—the State has a right to legislate and acts illegally only because it abuses that right.

flag State postponed the time for payment; in calculating the wages due to the seamen, advances paid in foreign countries were to be disregarded (i.e. the employer would have to pay again). Wages on United States ships were higher than wages on foreign ships, and the purpose of the proposed legislation (which was never passed) was to encourage foreign seamen to desert from foreign ships and to take up work on United States ships, thereby reducing labour costs and rectifying a shortage of labour on United States ships and increasing labour costs and causing general inconvenience on foreign ships.¹ It is not surprising that foreign States protested that the proposed legislation was contrary to international law.²

3. ANTITRUST LAW

The law against restrictive business practices (or, to use the convenient American term, antitrust law) is a source of great controversy and many problems concerning jurisdiction in international law. A preliminary problem concerns the classification of antitrust law. It has been suggested in the previous sections of this study that international law imposes limits on the legislative jurisdiction of States as regards criminal law and laws concerned with the functioning of public bodies or with the sovereign rights of States, but not (at least as a general rule) as regards other areas of municipal law. Antitrust law is difficult to fit into this system, because breaches of its rules are usually sanctioned both by criminal proceedings and by civil proceedings. It is submitted, therefore, that the internationally permissible reach of antitrust law varies according to the nature of the proceedings instituted in any given case.³

When breaches of antitrust law are punished by criminal proceedings, the jurisdiction of States is subject to the same limits as in other cases of criminal law. Similar limits apply when the sanction takes the form of a fine or penalty payment imposed by a public authority (as under E.E.C. Regulation 17) or of confiscation of property acquired as a result of breach of antitrust laws (this is a sanction in the United States, but is seldom used)

¹ *Foreign Relations of the U.S.* (1931), vol. 1, pp. 811-14.

² Briggs, *The Law of Nations* (2nd ed., 1952), p. 353.

³ Van Hecke, *Recueil des cours*, 106 (1962), pp. 302-3, agrees. A similar problem arises when antitrust law is enforced in a foreign court. Thus Mann, *ibid.*, 132 (1971), pp. 107, 180, argues that a private plaintiff could bring a triple damage claim under the Sherman Act in a foreign court, but that attempts by the United States authorities to enforce the Sherman Act in foreign courts would fail because of the rule that courts of one State do not enforce the criminal or public laws of another. On the machinery for enforcing antitrust laws in the United States, see *International and Comparative Law Quarterly* (1963), Supplement No. 6, pp. 40 et seq.

It may seem formalistic and technical to make the reach of antitrust law vary according to the nature of the proceedings. But similar variations occur in the case of many acts which are both crimes and torts. For instance, a State may apply its law of tort to acts of conversion committed abroad in circumstances where it would not be entitled to apply its criminal law of theft to the same acts.

—fines and confiscations are an assertion of sovereign power. Cease and desist orders issued by the United States Federal Trade Commission fall into the same category; the Federal Trade Commission does not adjudicate claims by a private complainant (like an English rent tribunal) but acts on its own motion to enforce the law in the interests of the public; only the Federal Trade Commission may apply to civil courts for the enforcement of its orders. In other words, the Federal Trade Commission's powers are sovereign powers because they are not shared by private individuals.

Conversely, where a plaintiff in a tort action seeks damages for loss caused to him by a restrictive business practice,¹ or where a defendant in an action for breach of contract pleads that the alleged contract is void because it is contrary to antitrust law, there are normally no limits to the extraterritorial reach of the forum's antitrust law. (But even here an exception exists when application of the forum's antitrust law to events occurring in another State would thwart the economic policy of the latter State.²)

More difficult is the civil suit for injunctive or other equitable relief in the United States, which can be brought either by the injured party or by the Department of Justice. For the purposes of determining the limits of jurisdiction permitted by international law, it is submitted that a suit by the injured party is similar to a private action in tort for damages, and that a suit by the Department of Justice is similar to a criminal prosecution. In form a suit by the Department of Justice resembles a suit by the injured party, but 'in substance it is a public prosecution . . . for vindication of public right and for redress and prevention of public injury'.³ The Department of Justice is not subject to the rules which limit the *locus standi* of private plaintiffs,⁴ and some of the orders made by courts in proceedings brought by the Department are orders which would never be made in proceedings brought by a private party (e.g. an order to the defendant to sell goods on non-discriminatory terms to *any* applicant).⁵ In other words, the Department, when bringing such a suit, is exercising sovereign powers, powers which are not shared by private litigants.

When breach of the law is subject to a 'private' remedy and to a 'sovereign' sanction, there are two possibilities—either the legislator can attribute a wider extraterritorial scope to 'private' actions than to criminal

¹ The fact that the damages payable exceed the loss suffered (as in the triple damage suit in United States law) makes no difference. Cf. *Huntington v. Attrill*, [1893] A.C. 150, 156; *Chattanooga Foundry v. Atlanta* (1906), 203 U.S. 390; Stimson, *Conflict of Criminal Laws* (1936), pp. 39-46; Dicey and Morris on the *Conflict of Laws* (8th edn., 1967), p. 161.

² See above, pp. 188-9.

³ *Hartford Empire Co. v. U.S.* (1945), 323 U.S. 386, 441.

⁴ Clayton Act, 1914, 38 Stat. 730, sections 15 and 16; *U.S. v. Borden Co.* (1954), 347 U.S. 514, 518-19.

⁵ *International Salt Co. v. U.S.* (1947), 332 U.S. 392; *U.S. v. National Lead Co.* (1947), 332 U.S. 319, 328-35; Haight in *Legal Problems of Foreign Investment* (Report of a conference at the Yale Law School 1962), p. 104.

or other 'sovereign' proceedings, or he can limit the scope of the former to bring it into line with the scope of the latter. United States law seems to follow the second course; one of the reasons why the Supreme Court held, in *American Banana Co. v. United Fruit Co.*, that the Sherman Act gave no cause of action in tort for acts done abroad was that the Act 'begins by making criminal the acts for which it gives a right to sue'.¹ But the number of 'private' actions in which the extraterritorial reach of antitrust laws has been tested is small, both in the United States and elsewhere. The *causes célèbres* which have given rise to controversy have almost all arisen out of 'sovereign' proceedings (usually suits for equitable relief by the United States Department of Justice). It seems to be generally agreed that the limits applicable to a State's jurisdiction in such cases are the same as (or very similar to) the limits governing a State's jurisdiction in criminal law. The application of this principle, however, causes unexpected difficulties.

Territorial principle

It is often difficult to localize restrictive business practices for the purposes of the territorial principle of jurisdiction; unlike ordinary crimes, they frequently take the form of complicated patterns of conduct, extending over a long period of time and over a wide geographical area. But the effort must be made. At a time when fears are often expressed that 'international' companies are above the law and are becoming more powerful than States,² it would be intolerable if the transnational character of a restrictive business practice removed it from the ambit of *any* State's law.³ It would also be intolerable if a large number of States claimed concurrent jurisdiction; the content of antitrust law varies enormously from one State to another, and business cannot be carried on efficiently if it is subject to conflicting requirements from different States. As far as possible, therefore, restrictive business practices should be subject to municipal law but the number of States claiming jurisdiction should be as small as possible. In some cases this principle can be applied easily. For instance, if a company requires its distributors to follow a policy of retail price maintenance, the legality of retail price maintenance in State *A* will be tested by the law of State *A*, the legality of retail price maintenance in State *B* will be tested by the law of State *B*, and so on. In other cases such solutions are impracticable; if two companies allocate markets, so that a producer in State *A* agrees to sell only in State *A* and a producer in State *B* agrees to sell only in State *B*, it is impossible for State *A* to determine the legality of what has happened

¹ (1909), 213 U.S. 347, 357.

² Wayland Kennet and others, *Sovereignty and the Multinational Company* (Fabian Tract No. 409, 1971).

³ *U.S. v. Pacific and Arctic Railway* (1913), 228 U.S. 87, 106.

in its own territory without taking into account what has happened in State *B*'s territory—the result is that both States have concurrent jurisdiction over the whole arrangement.¹

In order to claim jurisdiction under the territorial principle,² is it necessary to prove that the defendant has done something on the State's territory, or is it sufficient to show that the effect of his actions has been felt on the State's territory? This question has given rise to considerable controversy, but the controversy is of fairly recent origin; until recently the United States was the only State in which this question had arisen, and until 1945 almost all the United States cases involved acts which had both been performed (at least in part) on United States territory and produced effects on United States territory.³

U.S. v. Aluminium Company of America and others (the *Alcoa* case),⁴ decided in 1945, raised for the first time the question of effects felt within the United States as a result of acts done by foreigners abroad. In this case foreign companies had agreed among themselves that each company would pay royalties to the other companies if its production of aluminium exceeded a certain level; the result was to discourage the production of aluminium beyond that level, and it was possible that the resulting shortage of aluminium had affected the levels of imports into the United States. The Court said:

It is settled law—as 'Limited' [the main foreign defendant] itself agrees—that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders . . . Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade

¹ State *A* has jurisdiction not only over the producer in its own territory, but also over the producer in State *B*'s territory, since the two producers are accessories to one another's acts: cf. above, p. 153 n. 3, and p. 181 n. 1. Many United States antitrust cases can be explained on this ground: Mann, loc. cit. (above, p. 147 n. 1), pp. 98–9.

² Or, more precisely, the objective territorial principle. In view of the controversy over the range of the objective territorial principle, it is remarkable how little use has been made of the subjective territorial principle in antitrust law. United States antitrust law does not apply to agreements made in the United States and performed abroad (*American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347, 359; Molloy, *Yale Law Journal*, 49 (1940), pp. 1312, 1316), and the laws of other countries seem to show similar restraint. Indeed, it is possible that application of the subjective territorial principle in these circumstances would be contrary to international law because it might constitute an attempt to impose an alien economic policy on the State where the agreement was performed; see above, pp. 188–9. But see below, p. 204 n. 2.

³ Jennings, this *Year Book*, 33 (1957), pp. 146, 163–4; the same is true of *U.S. v. National Lead Co.* (1945), 63 F. Supp. 513 (affirmed (1947), 332 U.S. 319). However, s. 4 of the Webb-Pomerene Act, 1918, provides that s. 5 of the Federal Trade Commission Act shall apply to acts 'done without the territorial jurisdiction of the United States' if such acts constitute 'unfair methods of competition used in export trade against competitors engaged in export trade'; this provision was applied in *Branch v. Federal Trade Commission* (1944), 141 F. 2d 31; *Annual Digest*, 1943–45, p. 169. See below, p. 207 n. 2.

⁴ 44 F. Supp. 97; 148 F. 2d 416.

between the two. Yet when one considers the international complications likely to arise from an effort in the country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they have had no effect upon them.

The Court was not certain whether Congress intended the Act to apply to this second situation, but assumed for sake of argument that it did not. However, the Court held that, when intention to produce effects in the United States was proved, the burden of proof shifted to the defendant to prove that his acts had not had that effect in fact. Judgment was given against the foreign defendants because the Court held that they had intended to affect imports into the United States and because they had not succeeded in proving that imports had not been affected in fact.

Some commentators have pointed out that there is more to this case than meets the eye, since there were close ties between the American company (Alcoa) and the Canadian company (Limited)—they were controlled by the same shareholders and the two chairmen were brothers.¹ It might therefore be supposed that Limited had joined the cartel at Alcoa's suggestion and that the limitation of imports into the United States, which was the indirect effect of the cartel, was deliberately designed to maintain Alcoa's dominance over the United States market—in other words, the cartel was a disguised allocation of markets, covering the United States as well as Europe and Canada. But, far from deciding the case on this ground, the Court held expressly that Limited's acts could not be attributed to Alcoa and that there was insufficient evidence that Alcoa had encouraged the formation of the cartel.

Moreover, the 'effects doctrine' has been restated in subsequent United States antitrust cases, such as *U.S. v. Timken Roller Bearing Co.*,² *U.S. v. General Electric Co.*³ and *U.S. v. The Watchmakers of Switzerland Information Centre*.⁴ The first and third of these cases concerned acts done partly within the United States,⁵ so that reference to the effects doctrine was, strictly speaking, unnecessary for the decision. In the *General Electric* case, foreign companies had made an agreement allocating foreign markets among themselves; one of them (Philips) had also agreed with General Electric (a United States company) that it would not export to the United

¹ Stocking and Watkins, *Cartels or Competition* (1948), p. 77; Kronstein, Miller and Schwartz, *Modern American Antitrust Law* (1958), p. 272; Brewster, *Antitrust and American Business Abroad* (1958), p. 73; Haight, *University of Pennsylvania Law Review*, 111 (1963), p. 1122; Barnard, *International and Comparative Law Quarterly* (1963), Supplement No. 6, p. 101.

² (1949), 83 F. Supp. 284, affirmed (1951), 341 U.S. 593.

³ (1949), 82 F. Supp. 753; (1953), 115 F. Supp. 835.

⁴ (1963), Trade Cases 77, 414.

⁵ This is true of most of the acts in question in the *Swiss Watches* case, but not of all; see below, p. 199 n. 3.

States and that General Electric would not export to Philips' territories. Only the second agreement was held to be contrary to United States law, a decision which is unexceptionable; but, once again, the reference to 'effects' was perhaps wider than the facts of the case required.

In *Hazeltine Research, Inc. v. Zenith Radio Corp.* the Court said: 'It is well established that a conspiracy to restrain the domestic or foreign commerce of the United States to which any American company is a party violates the Sherman Act irrespective of the fact that the conduct complained of occurs in whole or in part in foreign countries.'¹ Here the conduct complained of seems to have occurred wholly in Canada, Australia and the United Kingdom.

The 'effects doctrine' has been criticized by a number of writers,² who invoke the analogy of criminal law to argue that a State has no jurisdiction unless a *constituent element* of an *act* forbidden by antitrust law has occurred on that State's territory.³ Only in this way, they say, can the jurisdiction of States be kept within reasonable bounds, because many acts done by a large company in a single country will have effects all over the world and it would be absurd to allow a virtually universal jurisdiction in such circumstances. Such criticisms have occasionally been supported by government statements,⁴ although protests by foreign governments have usually been against the type of orders made by United States courts, not against the initial assumption of jurisdiction on the basis of the effects doctrine.⁵ The Netherlands antitrust law applies only to acts done on Netherlands territory,⁶ and the Japanese Anti-Monopoly Act applies only to acts done on Japanese territory.⁷

It is doubtful, however, whether the criminal law analogy really does support the 'constituent elements' approach.⁸ Moreover, it is often difficult to say what the constituent elements of a breach of antitrust law are. Restrictive practices can take so many different forms that laws do not attempt to list and define the constituent elements of every kind of forbidden practice in detail; instead, antitrust laws usually consist of a general prohibition of restrictive business practices (e.g. the Sherman Act and the opening words of Article 85 of the E.E.C. Treaty), supplemented by a more explicit condemnation and definition of specific practices (e.g. the Clayton Act and the examples listed in Article 85 (1) of the E.E.C. Treaty). The general prohibition (and also, but less frequently, the explicit condemnation of specific practices) define the forbidden practices by reference to

¹ (1965), 239 F. Supp. 51, 78; affirmed (1969), 395 U.S. 100. See below, pp. 202-3 and 207 n. 2.

² Mann, loc. cit. (above, p. 147 n. 1), pp. 102-6, and the authors cited by him.

³ See above, pp. 152-3.

⁴ *British Practice in International Law* (1967), p. 60. But see below, p. 199 n. 5.

⁵ See below, pp. 210-12.

⁶ Smit, *Nederlands Tijdschrift voor Internationaal Recht*, 5 (1958), pp. 274, 294-5.

⁷ I.L.A. (1964), pp. 453-4.

⁸ See above, pp. 153-5.

their economic effects;¹ in other words, such effects are a constituent element of the offence, so that the difference between the 'constituent elements' approach and the 'effects' approach is non-existent. For instance, the Sherman Act prohibits agreements in restraint of trade; the existence of such restraint is a constituent element of the offence. Article 85 of the E.E.C. Treaty prohibits agreements, decisions and concerted practices which have the effect of preventing, restricting or distorting competition; the existence of that effect is a constituent element of the offence. Such effects are also a constituent element of an offence in France,² Denmark,³ Belgium,³ Argentina⁴ and many other countries.⁵

It may be that supporters of the 'constituent elements' approach wish to confine the jurisdiction of a State to cases where the defendant has performed some physical act in that State's territory.⁶ But criminal law analogies do not justify this limitation (a man who posts a libellous letter from State *A* to an address in State *B* has performed a physical act only in State *A*, but it is settled law that State *B* also has jurisdiction, even under the constituent elements approach);⁷ and there is no convincing reason for adopting a stricter approach in antitrust law.⁸ Moreover, acceptance of this limitation would lead to serious gaps in the law. For instance, no State would be able to claim jurisdiction over omissions, despite the fact that many types of restrictive business practices, particularly boycotts and allocation of markets, can be implemented by means of omissions without positive acts.⁹ Other types of evasion would also be facilitated; for instance,

¹ It is true that sometimes the mere existence of a prohibited practice constitutes an offence, without any need to prove that it has undesirable effects. But these *per se* violations, as they are called in the United States, represent an exception which is more apparent than real. They are based on a belief, founded on economic theory or experience, that such practices will always lead to undesirable results, so that it is unnecessary to prove such effects in each case.

Sometimes intention to produce effects constitutes an alternative basis of liability, even though those effects are not produced in fact. Such cases bear the same relationship to acts causing such effects as attempts to commit a crime bear to the principal crime. Note that in the criminal law relating to attempts it does not matter that the *actus reus* of the attempt was committed abroad, provided that the accused intended to commit the principal offence within the territory of the State claiming jurisdiction; see above, p. 154 n. 2.

² Goldman, *Recueil des cours*, 128 (1969), pp. 631, 666-7.

³ Quoted by van Hecke, *ibid.* 106 (1962), p. 289.

⁴ I.L.A. (1968), pp. 353-6.

⁵ See below, pp. 198-9, 201; and see Goldman, *loc. cit.* (above, n. 2), pp. 651-88, 701.

⁶ Jennings, *Recueil des cours*, 121 (1967), pp. 327, 521.

⁷ See above, p. 152 n. 3.

⁸ It is true that rules of antitrust law vary far more from State to State than rules of criminal law do (and far more than the Advocate-General Mayras apparently realized in the *Dyestuffs* case, *Recueil de la jurisprudence* (1972), pp. 619, 700), but that does not justify any distinction; see above, p. 154 n. 1.

⁹ A company boycotting a potential customer need not expressly reject the potential customer's offer to buy; it can simply remain silent.

Similarly the essential feature of an allocation of markets is that the parties refrain from selling in one another's markets. This omission may be accompanied by positive acts (e.g. a company in State *A* which receives offers to buy from potential customers in State *B* may write and advise them to address their offers to a company in State *B*, and it may also instruct its distributors not to export to State *B*), but such positive acts are not always necessary (e.g. the company could

exporters in State *A* who rigged the price of the goods which they sold in State *B* could escape the jurisdiction of State *B* by selling to a middleman in State *C* and leaving him to resell the goods in State *B*. Businessmen could escape the jurisdiction of the State where the real effects of the transaction were felt, by making their contracts, taking delivery of goods and making payments in some 'antitrust haven'.

The United States is not the only State which claims jurisdiction over the effects of acts done abroad. Article 85 of the E.E.C. Treaty prohibits agreements, decisions and concerted practices which have the effect of preventing, restricting or distorting competition.¹ It might be rash to conclude as a matter of textual exegesis that Article 85 was intended to cover the effects of acts done outside the E.E.C., but that is how it is applied in practice. A number of decisions by the Commission and by the Court of Justice of the European Communities claim jurisdiction on the basis of effects, but these cases are not very clear because they are concerned either with distributorship agreements between foreign manufacturers and E.E.C. distributors,² or with agreements whereby a foreign company agreed with an E.E.C. company not to compete in the E.E.C.,³ and there can hardly be any dispute about the right of the E.E.C. to apply Article 85 to such agreements. The question arose in a more acute form in *Imperial Chemical Industries, Ltd. v. Commission of the European Communities*, where it was alleged that I.C.I. had participated in a price-ring to raise the price of dyestuffs which it exported from the United Kingdom to the E.E.C. (this was before the United Kingdom joined the E.E.C.). I.C.I. argued that the sales must be regarded as taking place in the United Kingdom; although such sales had effects in the E.E.C., it was contrary to international law for the E.E.C. to claim jurisdiction solely on the basis of such effects.⁴ The Commission maintained that international law did permit jurisdiction to be based on effects felt within the territory as a result of acts done abroad; it also argued that I.C.I. had actually committed acts within the E.E.C.⁵ The Court found for the Commission on the latter point and therefore found it unnecessary to consider the former point,⁶ but the Advocate-General

simply refrain from replying to letters from potential customers in State *B*, and there would be no need to forbid its distributors to export to State *B* if such exports would for one reason or another be unprofitable for the distributors in any case).

¹ This wording has been imitated in Article 15 (1) of the E.F.T.A. Convention and in Article 1 (2) of the Spanish law of 1963 (I.L.A. (1964), p. 466).

² *Martens and Straet/Bendix*, *Common Market Law Reports* 3 (1964), p. 416; *Béguelin Import Co. v. S.A.G.L. Import Export* (1971), *Recueil de la jurisprudence* (1971), pp. 949, 959; *Common Market Law Reports* (1972), pp. 81, 95.

³ *Grosfillex/Fillistorff*, *International Legal Materials*, 3 (1964), p. 418.

⁴ *Recueil de la jurisprudence* (1972), pp. 619, 624-7, 631-2.

⁵ *Ibid.*, pp. 627-30, 633-5.

⁶ *Ibid.*, pp. 665-7; *Common Market Law Reports* (1972), pp. 557, 628-9. See also below, pp. 452 and 455 w. 8.

Mayras advised that international law permitted jurisdiction to be based on effects felt within the territory as a result of acts done abroad.¹

Municipal laws often have little to say about international aspects of antitrust; any provisions which they may contain about their territorial or extraterritorial scope of application are frequently so loosely drafted that it would be dangerous to base any conclusions on them in the absence of decided cases.² But a few municipal laws do make a fairly clear claim to jurisdiction on the basis of the 'effects doctrine'. For instance, Article 98(2) of the West German Act against Restraints on Competition (1957) provides that the Act applies 'to all restraints on competition which have effect [literally, which work themselves out] in the area to which this Act applies, even if they result from acts done outside such area'. Swiss case-law speaks in similar terms.³

Clearly it would be intolerable if jurisdiction could be exercised by every State where effects were felt, no matter how remote and slight those effects might be. Equally it would be intolerable if jurisdictional rules were so stringent that some restrictive practices lay outside the jurisdiction of any State.⁴ It is submitted that the best way of resolving *conflits de compétence positifs et négatifs* is to limit jurisdiction to the State where the primary effect of the act is felt. In order to determine whether the effects are primary or secondary, two factors should be considered: (1) are the effects felt in one State more direct than the effects felt in other States?⁵ (2) are the effects felt in one State more substantial than the effects felt in other States?⁶

This approach is supported by a good deal of authority. In the *Alcoa* case Judge Hand was clearly aware of the absurd results and 'international complications' which would be caused by applying the Sherman Act to slight and remote effects of acts done abroad.⁷ In the *General Electric* case

¹ *Recueil de la jurisprudence* (1972), pp. 692-703; *Common Market Law Reports* (1972), pp. 593-608.

² On the difficulties of interpreting the [U.K.] Restrictive Trade Practices Act, 1956, see Lever in *International and Comparative Law Quarterly* (1963), Supplement No. 6, pp. 117-30.

³ Federal Tribunal, 21 March 1967 (*Recueil officiel du Tribunal fédéral* 93, II, p. 192; quoted in *Recueil de la jurisprudence* (1972), pp. 619, 695-6, and *Common Market Law Reports* (1972), pp. 557, 598). See also the *Librairie Hachette* case, *Journal de droit international*, 97 (1970), p. 434.

⁴ See above, p. 192.

⁵ The reference in Article 66 of the E.C.S.C. Treaty to direct or indirect effects is not in reality incompatible with this approach; see Prieur, *Journal de droit international* (1955), pp. 806, 810.

⁶ Cf. above, pp. 154-5. This double approach is somewhat similar to those adopted by Goldman, *Recueil des cours*, 128 (1969), p. 631, by the Advocate-General Mayras in the *Dyestuffs* case, *Recueil de la jurisprudence* (1972), pp. 619, 699-702, and by s. 18 of the *Restatement, Second, Foreign Relations Law of the U.S.* (1965). Stokes, *Proceedings of the American Society of International Law*, 64 (1970), pp. 135, 138, gives examples illustrating the difference between direct and indirect effects.

⁷ See the passage quoted from his judgment above, pp. 193-4, and cf. his judgment in *Marienelli v. United Booking Offices of America* (1914), 227 Fed. 165, 168-9.

the Court spoke of 'direct and substantial effects on trade'.¹ In *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.* United States courts held that the Sherman Act did not apply to restraints on production in the United Kingdom when only a small percentage of the goods produced were sold in the United States.² In the *Swiss Watches* case Judge Cashin said: 'A United States court may exercise its jurisdiction as to acts and contracts abroad if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.'³ It is the policy of the United States Department of Justice not to take action against mere incidental restraints only indirectly affecting the United States economy;⁴ the Sherman Act prohibits acts 'in restraint of trade . . . with foreign nations', not *in* foreign nations.

In the past the British Government has conceded that jurisdiction may be based on substantial effects felt within the territory as a result of acts done abroad.⁵ The laws of Belgium, the Netherlands and Denmark apply to acts which exercise a predominant or substantial influence on the domestic market.⁵ The general opinion in Germany is that Article 98 (2) of the German Act covers only acts which have a direct effect in Germany.⁵

In some cases it may be relevant to take account of the parties' intentions and motives.⁶ In particular, effects which would normally be too indirect to fall within a State's jurisdiction may be brought within its jurisdiction by virtue of the parties' intentions and motives. This is obviously necessary in order to prevent evasion of the law (*fraude à la loi*).⁷

¹ (1949), 82 F. Supp. 753; (1953), 115 F. Supp. 835. See also J. A. Rahl (ed.), *Common Market and American Antitrust: Overlap and Conflict* (1970), pp. 61-7.

² (1947), 74 F. Supp. 973, 977; (1951), 191 F. 2d 99, 106.

³ (1963), *Trade cases*, § 77, pp. 414, 457. Cf. the *amicus curiae* brief for the Swiss Government: 'The judgment . . . raises the likelihood of infringement upon its [Swiss] sovereignty' because 'certain provisions in the final judgment may be interpreted as regulating commerce between Switzerland and third countries, where such commerce does not *directly* affect the . . . commerce of the United States' (italics added). This criticism is justified; some of the acts which were held to be contrary to United States law (e.g. agreements between Swiss associations and British, German and French associations, whereby the latter agreed not to buy watch parts from persons who were not members of the Swiss associations) produced only indirect effects in the United States: *Trade cases*, § 77, 435-6, 454. The *Swiss Watches* case is discussed at length in Rahl, *op. cit.* (above, n. 1 on this page), Chapter 6.

⁴ Van Cise, *Antitrust Bulletin*, 6 (1961), pp. 145, 147; Jennings, this *Year Book*, 33 (1957), pp. 146, 172.

⁵ *Hansard*, H.C. Deb., vol. 698, col. 1280, quoted in *International and Comparative Law Quarterly*, 13 (1964), p. 146. Cf. above, p. 195 n. 4; Van Hecke, *Recueil des cours*, 106 (1962), p. 289; Goldman, *ibid.* 128 (1969), pp. 631, 660.

⁶ Cf. above, p. 155. Other scholars are divided on this point (see I.L.A. (1966), pp. 55, 110, 141-2), but municipal laws sometimes prohibit acts which are intended to produce a certain effect, even when that effect is not produced in fact; this is so in the E.E.C. (Art. 85), the United States (*Fugate, Foreign Commerce and the Antitrust Laws* (1958), p. 47), Austria (Mann, *loc. cit.* (above, p. 147 n. 1), p. 103), Norway (van Hecke, *Recueil des cours*, 106 (1962), pp. 287-8), E.F.T.A. (Art. 15 (1) (a)) and France (Goldman, *ibid.* 128 (1969), pp. 631, 666-7). See above, pp. 154 n. 2 and 196 n. 1.

⁷ See the examples mentioned above, pp. 196-7.

But this rule is not limited to preventing evasion of the law. It has been applied in a number of United States cases which had nothing to do with evasion of the law.¹ Indeed, it is only in this way that the decision in *Alcoa* can be justified.² Reductions in exports to the United States as a result of restrictions on production outside the United States would normally have been too indirect an effect to justify United States jurisdiction,³ but the Court held that the Sherman Act applied because the parties *intended* to affect exports to the United States. The only cause for misgivings about the case is the excessive ease with which the Court found that such an intention existed; in the *General Electric* case the Court went even further by relying on the maxim that a man must be deemed to intend the natural consequences of his acts—the alien defendant knew or should have known that its conduct would have anticompetitive effects on United States commerce, and proof of specific intent was therefore unnecessary.⁴ However, the general rule is that conduct abroad which has only indirect effects on the United States is not subject to United States law unless there is proof of specific intent to affect the United States.⁵

It is only by reference to motives that one can explain the exercise of jurisdiction over omissions.⁶ As a general rule, no State is entitled to pass a law obliging people in other States to trade with it;⁷ such people may have legitimate reasons for not wishing to trade (for instance, in the *Swiss*

¹ Intention is not normally a necessary condition for liability in the United States (*Yale Law Journal*, 70 (1957), pp. 259, 262–3, although cf. Jennings, this *Year Book*, 33 (1957), pp. 146, 172), but a party's intention can bring his acts within the reach of United States law in circumstances where they would otherwise have been outside United States jurisdiction.

² See above, pp. 193–4. The same is true of *Occidental Petroleum Co. v. Buttes Gas and Oil Co.* (1971), *American Journal of International Law*, 65 (1971), p. 815, where the plaintiff alleged that the defendant had interfered with the plaintiff's production of oil in the Persian Gulf, thereby restricting the plaintiff's exports of oil to the United States. The Court held that United States antitrust law applied, but held that it had no jurisdiction for other reasons.

³ If the defendants had specifically agreed to restrict exports as such, the United States would probably have had jurisdiction (see below, pp. 202–3). The economic effect on the United States is the same in both cases, but the United States has jurisdiction in the one case because the effect is the direct result of the defendants' acts, but not in the other case because the effect is an indirect result of acts which have produced their direct effects elsewhere. Economists may call this position illogical (Hale and Hale, *Texas Law Review*, 31 (1953), pp. 493, 533), but it is no more illogical than other distinctions made by the law; for instance, if a thief steals money from a man in State *A* with the result that the victim has no money to pay his creditor in State *B* for goods which the creditor has sent him from State *B* to State *A*, *B* has no jurisdiction, but *B* would have jurisdiction if a man in State *A* fraudulently induced the creditor to send him goods from State *B* to State *A* and never paid for them—yet the loss suffered by the creditor is the same in both cases.

⁴ (1949), 82 F. Supp. 753, 891.

⁵ Brewster, *Antitrust and American Business Abroad* (1958), pp. 83–4.

⁶ But even here some effects may be too indirect to justify jurisdiction, whatever the motives. For instance, if customers in State *A* refused to buy from a factory in State *A* owned by nationals of State *B* because they wanted to prevent remittance of profits to State *B*, it is submitted that the effect on *B* would be too indirect to justify jurisdiction, despite the customers' motives.

⁷ But it could punish its own producers if they made no effort to sell abroad (cf. Oliver, *American Journal of International Law*, 51 (1957), pp. 380 et seq.), and it could also punish its own businessmen if they refused to buy from abroad; here jurisdiction can be based on the nationality (or residence) principle. See also below, pp. 202–3.

Watches case the defendants tried to restrict the export of Swiss watch parts for assembly abroad, because assembly of such parts abroad might cause unemployment in Switzerland and—if they were incompetently assembled—harm the reputation of the Swiss industry).¹ But a State would be entitled to claim jurisdiction if it could show that the refusal to trade was intended to implement a scheme for allocating markets or to punish a would-be customer for not joining a cartel.² Allocation of markets clearly falls within the jurisdiction of every State whose territory is the object of such allocation,³ and a State is also entitled to claim jurisdiction over traders in foreign countries who boycott one of its own traders.⁴ Probably any agreement between foreign manufacturers to limit their exports to another State raises a suspicion of improper motives and is thus *prima facie* subject to the jurisdiction of that other State, unless the suspicion of improper motives can be rebutted. West Germany and the E.E.C. have claimed jurisdiction over agreements among Japanese manufacturers to limit exports to West Germany and the E.E.C.⁵

The 'primary effects' approach enables jurisdiction to be exercised by States which have a legitimate interest and prevents its being exercised by States which have no legitimate interest in exercising jurisdiction. But it does not altogether eliminate concurrent jurisdiction; the effects felt in two or more States may be equally direct or equally substantial, or direct but insubstantial effects in one State may be counter-balanced by indirect but substantial effects in another State. Taking the defendants' motives and intentions into account may also add to the number of States entitled to exercise jurisdiction. However, even in such cases the number of States entitled to exercise jurisdiction will usually be small.

Concurrent jurisdiction exists whenever a company carrying on business in one State merges with or acquires a company carrying on business in another State.⁶ Even so, in accordance with the 'primary effects' approach,

¹ In so far as the judgment in the *Swiss Watches* case tried to strike down such restrictions, it constituted an excess of jurisdiction; compare sections IV (c) and XI (E) (3) of the revised final judgment.

² Van Hecke, I.L.A. (1966), p. 55; and see above, p. 196 n. 9. *Contra*, Raymond, *American Journal of International Law*, 61 (1967), p. 558.

³ See above, pp. 192-3, 196-7. For German law, see Baruch, *Wirtschaft und Wettbewerb* (1961), p. 537.

⁴ France claims such jurisdiction, according to Mezger, *Revue critique de droit international privé* (1963), p. 43, but Mezger's opinion is contradicted in H. M. Blake (ed.), *Business Regulation in the Common Market Nations* (1969), vol. 2, pp. 310-11. The United States exercised such jurisdiction in the *Swiss Watches* case (1963), *Trade cases*, § 77, p. 414.

⁵ *The Times*, 12 July 1972, p. 18; *ibid.*, 14 July 1972, p. 21; *Journal officiel des Communautés européennes* (No. C-111, 21 October 1972). It is arguable that the *Swiss Watches* case can be justified on this ground, but the better view is that the United States should have dropped the charges concerning prohibitions on the export of watch parts when it became clear that there were legitimate reasons for such prohibitions (cf. above, n. 1 on this page).

⁶ *U.S. v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (affirmed (1966), 385 U.S. 37); 4 *Canadian Year Book of International Law*, 4 (1966), pp. 266-7; *ibid.*, 5 (1967), p. 310; *International Bar*

it is submitted that jurisdiction can be exercised only by a State in which one of the companies carries on the greatest part of its business; it would be intolerable if a merger which was regarded as economically desirable by the States primarily concerned could be prevented by a State in which one of the companies transacted a very small amount of business. In *U.S. v. CIBA Corporation* the United States attacked the proposed merger of two Swiss chemical corporations, which appears at first sight to be an excess of jurisdiction; but the ground of complaint was that the resulting merger of their *United States subsidiaries* would lessen competition in the United States.¹

Concurrent jurisdiction also exists over agreements regulating the quantities or prices of goods exported from one State to another.² The exporting State and the importing State are equally affected by such agreements.³ It is true that exporting States often exempt cartels from their antitrust laws, but such exemptions are based, not on a belief that States are not entitled to regulate export cartels, but on a cynical belief that it is in the State's interests to allow its businessmen to combine against foreign buyers and competitors. Besides, such exemptions are seldom complete; States reserve the power to intervene if the cartel has the effect of reducing the total volume of exports.⁴ In *Zenith Radio Corp. v. Hazeltine Research Co.* the United States exercised jurisdiction over a Canadian cartel which prevented the appellant's exporting television sets from the United States to Canada; the members of the cartel refused to grant the appellant Canadian patent-licences and sued the appellant for infringing their Canadian

Journal (November 1971), p. 28 (German law); [U.K.] Fair Trading Act, 1973, s. 64; *Common Market Law Reports* (1972), D11; E.C.S.C. Treaty, Art. 66.

Jurisdiction may also be exercised by each of the States whose nationality any of the companies possesses (see below, pp. 206-7), but jurisdiction founded on nationality cannot be exclusive—a company may have the nationality of one State and yet carry on almost all of its business in another State.

¹ (1970), *Trade cases*, § 73, p. 269.

² Van Hecke, *Recueil des cours* 106 (1962), p. 321; Markert, *Virginia Journal of International Law*, 7 (1967), pp. 47, 53-4.

³ Attempts to confer jurisdiction on one State to the exclusion of the other, based on the law governing the contract of sale, on the place where delivery takes place, or on the difference between c.i.f. and f.o.b. contracts (cf. *I.C.I. v. Commission of the European Communities*, *Recueil de la jurisprudence* (1972), pp. 619, 626, 631) cannot be accepted as stating the law; they would cause artificiality and complexity, and open up ways of evading the laws of the States concerned (cf. above, pp. 196-7).

Schwartz, in *Kartell und Monopolie im modernen Recht* (1961), vol. 2, pp. 709, 717, argues that the importing State has jurisdiction and that the exporting State has not. His view seems to be based on the idea that antitrust law exists for the benefit of the consumer; but the exporting State also has an interest in protecting its balance of payments and the good reputation of its manufacturers in general (both of which could be jeopardized if manufacturers of a particular product raised their export prices too high and priced themselves out of the market).

⁴ [Canadian] Combines Investigation Act, 1952, s. 32; *U.S. v. Learner Co.* (1963), 215 F. Supp. 603; Brewster, *Antitrust and American Business Abroad* (1958), Chapter 6; [U.K.] Fair Trading Act 1973, s. 8.

patents whenever the appellant exported television sets to Canada.¹ Importing States also claim jurisdiction over certain kinds of practices which restrict exports to them from other countries;² and in *U.S. v. R. P. Oldham Co.* the United States exercised jurisdiction over an agreement between Japanese exporters and United States importers which provided that the Japanese exporters should not sell to other United States importers who were not parties to the agreement.³ In the *Swiss Watches* case the United States exercised jurisdiction over an agreement between Swiss and United States companies fixing the prices of watches exported from Switzerland to the United States.⁴ In *Imperial Chemical Industries, Ltd. v. Commission of the European Communities* the Advocate-General Mayras considered that I.C.I. could be punished by the Commission for rigging the prices of its exports to the E.E.C.⁵

Similar considerations apply to the carriage of goods by sea. Ship-owners often form 'conferences' and grant preferential treatment to shippers who promise to use only ships belonging to conference-members. This reduces competition, but unlimited competition would probably lead to enormous fluctuations in shipping rates which would be in nobody's interests in the long run. The United States Government has traditionally been hostile to shipping conferences, but its right to regulate the activities of shipping conferences has been challenged by other States.⁶

The level of shipping rates obviously affects the State from which the goods are exported (high shipping rates might price its goods out of the export markets), the State into which the goods are imported (high shipping rates increase the cost of living) and the State whose nationality the ship possesses (low shipping rates would drive the ship-owner out of business).⁷ Since the effects on one of these States cannot be said to be more direct or more substantial than the effects on the other two, all three have concurrent jurisdiction.⁸ On the other hand, the United States would have no right to

¹ (1969), 395 U.S. 100. The respondent, one of the members of the cartel, was a United States corporation; see below, p. 207 n. 2. See also *Continental Ore Co. v. Union Carbide and Carbon Corporation* (1962), 370 U.S. 690.

² See above, p. 201. United States companies break United States law if they agree not to import into (or export from) the United States: Fugate, *Foreign Commerce and the Antitrust Laws* (1958), Chapter 4. For foreign companies see *Common Market Law Reports* (1974), p. 489.

³ (1957), I.L.R., vol. 24, p. 673; (1960), *Trade cases*, § 69, p. 763.

⁴ (1963), *ibid.*, § 77, p. 414.

⁵ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 692-703; *Common Market Law Reports* (1972), pp. 557, 593-608. And see above, pp. 197-8.

⁶ For a good account of the legal and economic issues involved, see Chayes, Ehrlich and Lowenfeld, *International Legal Process* (1968), vol. 1, pp. 384-488.

⁷ It is debatable whether the nationality of the ship should be determined by reference to registration or to ultimate beneficial ownership. But that does not affect the basic point, which is that concurrent jurisdiction is exercised not only by the State whose nationality the ship possesses (however nationality is defined) but also by the exporting State and the importing State.

⁸ The situation might be different if two of the three connecting factors pointed to only one State, e.g. if a Japanese ship carried goods from Britain to Hong Kong, or if a British ship carried

regulate the carriage of goods between Mexico and Europe on foreign ships (even though such carriage may have indirect effects on the United States),¹ unless the contract was made in the United States.²

In this context the 'constituent elements' approach produces the same results as the 'primary effects' approach.³ Foreign governments have protested that the United States has no right to regulate contracts made and performed abroad,⁴ but, as a United States court pointed out in *Armement Deppe v. United States*, a contract for the carriage of goods to the United States on a foreign ship is performed in part in the United States, because it is not 'consummated' until the ship arrives in a United States port.⁵ Even when the United States claims jurisdiction, not over a contract between shipper and ship-owner, but over an agreement between foreign ship-owners fixing the rates which they are going to charge, the result is the same, because the agreement is not performed until the ship-owners carry goods to the United States at the rates fixed; the United States can therefore rely on the rule that a State has jurisdiction over a conspiracy formed abroad when any overt act implementing the conspiracy occurs within its territory.⁶

goods from Britain to Japan. Here it might be argued that the contacts with one State outweighed the contacts with the other, so as to give the first State exclusive jurisdiction. Cf. *Lauritzen v. Larsen*, above, p. 184.

¹ See the protest of the United Kingdom government reported in I.L.A. (1964), p. 404. In fact the United States does not seek to apply its law in such circumstances, although it claims the right to exclude from United States ports foreign ships which have carried goods between foreign ports at rates which the United States regards as objectionable (46 U.S.C. 813).

It is controversial whether a State may exclude foreign ships from its ports (Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 276-7; Greig, *International Law* (1970), pp. 228-9; Colombos, *The International Law of the Sea* (6th ed., 1967), pp. 176-7; *Foreign Relations of the U.S.* (1932), vol. 1, pp. 920, 922-3, 925, 932; *ibid.* (1934), vol. 1, p. 685; *ibid.* (1935), vol. 1, p. 469; *ibid.* (1936), vol. 1, pp. 609 et seq.); United States practice is inconsistent (Moore, vol. 2, pp. 269-70, and vol. 5, p. 740; Hyde, *International Law* (2nd ed., 1947), vol. 1, pp. 577-8, 581-2). But the United Kingdom Government admits that a State is entitled to exclude foreign ships (McNair, *International Law Opinions* (1956), vol. 2, p. 162; *Hansard*, H.C. Deb. (1964), vol. 688, cols. 1243, 1279-80). See also *Institut de Droit International*, resolution of 1957.

² *In re Grand Jury Investigation of the Shipping Industry* (1960), I.L.R., vol. 31, pp. 209, 211-14. Jurisdiction here is justified under the subjective territorial principle. But see above, p. 193 n. 2.

³ If anything, the 'primary effects' approach limits jurisdiction more than the 'constituent elements' approach, because it could be argued that the 'constituent elements' approach, unlike the 'primary effects' approach, would enable jurisdiction to be exercised by any State whose waters were traversed during the journey.

⁴ I.L.A. (1964), pp. 579-81; *Annuaire français de droit international* (1964), p. 701.

⁵ (1968), 399 F. 2d 794; c.d. (1969), 393 U.S. 1094. Previous cases had merely spoken of effects on United States commerce.

In reality, the contract is performed in all three States (the ship being treated as if it were the territory of the flag State for this purpose). For an example of jurisdiction being exercised by the flag State, see *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.* (1968), *American Journal of International Law*, 63 (1969), p. 825. At one time the United States and Danish Governments seem to have thought that the flag State had exclusive jurisdiction (*Foreign Relations of the U.S.* (1934), vol. 1, pp. 685, 701; *ibid.* (1935), vol. 1, pp. 469, 474-5, 478-80), but no State takes that view nowadays.

⁶ See above, p. 154 n. 2.

One cannot evade this conclusion by invoking the rule that the flag State has exclusive jurisdiction over crimes committed on board a merchant ship in a foreign port. For a start, it is disputed whether this rule is based on international law or on comity. Even States which say that it is based on international law¹ admit that there is an exception when the effects of the crime extend to the coastal State. The effects of the price charged for carrying goods from one State to another obviously extend to the exporting State and to the importing State.

Moreover, in other fields United States law has been applied to the carriage of goods or persons on foreign ships to or from United States ports, without provoking protests from other States.² This is true of laws prescribing humane standards for the transportation of cattle,³ invalidating exemption clauses⁴ or requiring steamship companies which had brought ineligible immigrants to the United States to take them back without charge to their country of origin.⁵ It is unlawful for foreign ships to leave a United States port overloaded⁶ or without an efficient radio installation in operating condition.⁷ Foreign ships embarking passengers at United States ports are required to provide evidence that they will be able to meet claims for injury to the passengers.⁸ The United Kingdom claims power to detain foreign ships entering United Kingdom ports if they do not comply with United Kingdom standards of seaworthiness;⁹ it is contrary to Belgian criminal law for foreign ships to leave a Belgian port or sail in Belgian territorial waters without a certificate of seaworthiness.¹⁰ The United Kingdom admits that a foreign State may impose fines for trifling errors in the manifest of cargo aboard a British ship.¹¹

¹ Some States argued that *Cunard v. Mellon* (1923), 262 U.S. 100, was contrary to international law on this ground: *Foreign Relations of the U.S.* (1923), vol. 1, pp. 134, 142-3, 170.

² See also above, p. 184.

³ Hackworth, vol. 2, p. 222 ('the offence, assuming that it originated at the port of departure in Formosa, was a continuing one, and every element necessary to constitute it existed during the voyage across the territorial waters. The completed forbidden act was done within American waters . . .').

⁴ *Knott v. Botany Mills* (1900), 179 U.S. 69, where the plaintiff recovered damages for an injury occurring on a foreign ship in a foreign port. The Harter Act provides that fines may be imposed for breach of the Act, but there are apparently no recorded cases where this has happened. See generally Ehrenzweig, *Private International Law: General Part* (1967), pp. 211-15.

⁵ *U.S. v. Norddeutscher Lloyd* (1912), 223 U.S. 512.

⁶ Hyde, *International Law* (2nd ed., 1947), vol. 1, p. 738. United Kingdom law is the same (*ibid.*); see also Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 177-8, and Hsiung, *Law and Policy in China's Foreign Relations* (1972), p. 116.

⁷ 47 U.S.C. 351.

⁸ Whiteman, vol. 9, pp. 243-7.

⁹ *British Practice in International Law* (1964), p. 59. When the Plimsoll Act was passed in the United Kingdom in 1876, the United States doubted whether the United Kingdom was entitled to act in this way (Moore, vol. 2, pp. 282-3), but no more has been heard of these doubts for almost a century.

¹⁰ Law of 25 August 1920 on the safety of ships, Art. 1.

¹¹ McNair, *International Law Opinions* (1956), vol. 2, p. 162; *Hansard*, H.C. Deb. (1964), vol. 688, cols. 1244, 1279-80.

The concurrent jurisdiction exercised by the exporting State, the importing State and the flag State creates a risk that the laws of one State will conflict with the laws of another; but the same is true whenever an act is committed partly in one country and partly in another, or causes equal effects in more than one State. Indeed, the very possibility of retorsion inherent in such a situation provides some deterrent against arbitrary action by each of the States concerned. However, arbitrary action is not synonymous with lack of jurisdiction; a State would act arbitrarily if it required resident foreigners to wear a hat all the time and one might criticize such a law on many grounds, but one cannot argue that the State lacked jurisdiction to make the law. If there is a conflict between the laws of States having concurrent jurisdiction, the only solution is an international agreement.

Nationality principle

Mann argues that the nationality principle is not a valid basis of jurisdiction in antitrust cases, partly because 'a restrictive practice is not necessarily a heinous practice'.¹ But there is no evidence that jurisdiction over ordinary crimes committed by nationals abroad is subject to any requirement that the offence charged need contain any element of moral wickedness, and there is no logical reason for adding such a requirement in antitrust cases. Besides, not everyone would agree that restrictive practices are not necessarily heinous; for instance, Robert Kennedy, when Attorney-General of the United States, said:

We are talking about clear-cut questions of right and wrong. I view the businessman who engages in such conspiracies in the same light as I regard the racketeer who siphons off money from the public in crooked gambling or the union official who betrays his union members.

Yugoslav anti-monopoly legislation applies to all acts of Yugoslav corporations, regardless of where they occur.² In other countries nationality is not a basis of jurisdiction as such,³ but it is not altogether irrelevant. For instance, United States authorities show much greater zeal in pursuing United States corporations than in pursuing foreign corporations, because one of the 'basic objectives of United States policy in the application of the Sherman Act to foreign arrangements' is 'to prevent national boundaries from providing a safe haven from which it is possible for *Americans* to flout laws designed for the protection of domestic competition in the United

¹ Mann, loc. cit. (above, p. 147 n. 1), pp. 97-8. Jennings, this *Year Book*, 33 (1957), pp. 146, 153-4, seems to admit that jurisdiction may be based on the nationality principle; so does the *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 88.

² *Jugoslovenska Revija za Medunarodno Pravo*, 11 (1964), pp. 113-14.

³ But there is no evidence that failure to use nationality as a basis of jurisdiction reflects an *opinio juris* that it is not a valid basis of jurisdiction. There would be nothing startling about jurisdiction over mergers being based on the nationality principle; see above, pp. 201-2.

States'.¹ While ostensibly claiming jurisdiction on the territorial principle, United States courts have sometimes emphasized the United States nationality of the parties, as if to imply that this could compensate for the tenuousness of the territorial nexus between the offence and the United States.² And the nationality of the defendant makes a difference to the type of orders issued at the conclusion of an antitrust case.³

Other bases of jurisdiction

It is uncertain whether the protective principle is a valid basis of jurisdiction in antitrust cases.⁴ In *Imperial Chemical Industries, Ltd. v. Commission of the European Communities* the Commission invoked the protective principle, but only as an argument in favour of the 'effects doctrine', not as a separate head of jurisdiction;⁵ the point was not discussed by the Advocate-General or the court. There is no known example of a State claiming jurisdiction on this ground. The distinguishing feature of the protective principle is that it covers only offences against the State, not offences against individuals; otherwise the protective principle would be indistinguishable from the passive personality principle, which is a much more doubtful basis of jurisdiction. It is therefore submitted that Verzijl is right in saying that the protective principle could only be used against restrictive practices which threaten the whole economic structure of the State;⁶ and restrictive practices of this degree of gravity are hard to imagine.

As for the passive personality and universality principles, it has been suggested⁷ that these principles can only be applied where the offence is also contrary to international law or the *lex loci*; restrictive business practices are not prohibited by international law, and the law relating to them varies so much from State to State that it would be very difficult to comply with the double 'criminality' requirement. At all events, no State has ever claimed jurisdiction on these grounds.

Conflicts of jurisdiction

The general rule of international law relating to criminal jurisdiction is that the existence of concurrent jurisdiction does not, by itself, oblige one

¹ Brewster, *Law and United States Business in Canada* (1960), p. 15 (italics added).

² *Branch v. Federal Trade Commission* (1944), 141 F. 2d 31; *Annual Digest*, 1943-45, p. 169. Nationality, like the defendant's intentions and motives (cf. above, pp. 199-201), may perhaps give a State jurisdiction under the territorial principle over effects which would otherwise have been too remote to justify jurisdiction. See also *Hazeltine Research, Inc. v. Zenith Radio Corp.*, above, pp. 195, 202-3.

³ *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 123.

⁴ Brewster, *Antitrust and American Business Abroad* (1958), pp. 295-9; Martin, I.L.A. (1964), p. 333; Rahl (ed.), *Common Market and American Antitrust: Overlap and Conflict* (1970), pp. 397-401.

⁵ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 629.

⁶ *Nederlands Tijdschrift voor Internationaal Recht*, 8 (1961), pp. 29-30.

⁷ Above, pp. 162-6.

State to give way to the other, even when the act forbidden by one State's law is permitted or even required by the other's.¹ Since so many of the rules governing jurisdiction in antitrust cases have been based on criminal law analogies, there seems to be no valid reason for not adopting this rule also. However, there are a number of exceptions to the general rule which may not be relevant in many criminal cases, but which are frequently extremely relevant in antitrust cases. This is particularly true of the rule that a State may not exercise jurisdiction over acts done abroad if the exercise of such jurisdiction would obstruct the economic policy of the State where the acts were performed.² Exercise of such jurisdiction would also constitute an illegal abuse of rights if the State claiming jurisdiction had no legitimate interest in enforcing its own law³ and if the enforcement of its law would cause serious mischief in another State.⁴

It must be admitted that these suggestions are based mainly on reason rather than on evidence of State practice, although it is significant that the United Kingdom Government has declared that a State may apply its antitrust law to the activities of its nationals abroad 'only provided that this does not involve interference with the legitimate affairs of other States'.⁵ United States courts do not usually stay their hand when application of United States law would run counter to the policy of the State where the acts in question occurred.⁶ All the same, they do refrain (albeit without suggesting that such restraint is required by international law) from applying United States law if the acts forbidden by United States law were required by the *lex loci*⁷ or by an order of the local government.⁸ A number of States have exploited this rule by enacting laws forbidding compliance with United States law in circumstances where United States law runs counter to local economic policy.⁹

¹ See above, pp. 154 at n. 1, 167-9, 178.

² See above, pp. 188-9. Americans sometimes claim that application of United States antitrust law to foreign cartels benefits foreign consumers; but it is surely for the foreign government to decide what is best for its own people—that is what sovereignty and independence mean.

³ A State does have a legitimate interest if an act done abroad produces effects on its own territory. But would a State have a legitimate interest in applying its antitrust law to acts done abroad (even by its own nationals) which produce no such effects? Probably not.

⁴ See above, pp. 189-90.

⁵ *British Practice in International Law* (1967), p. 60.

⁶ Graziano, *Virginia Journal of International Law*, 7 (1967), pp. 100, 113-16; *U.S. v. The Watchmakers of Switzerland Information Centre* (1963), *Trade cases*, § 77, pp. 414, 456-7 (but the judgment was subsequently altered; see Jennings, *Recueil des cours*, 121 (1967), pp. 327, 523, and below, p. 211). *Contra*, *U.S. v. Standard Oil of New Jersey* (1960), *Trade cases*, § 69, p. 894.

⁷ Mann, *loc. cit.* (above 147 n. 1), p. 152; *Restatement, Second, Foreign Relations Law of the U.S.* (1965), pp. 114-15, 119-20, 123. The defendant is often required to make bona fide efforts to get the foreign State to relax its attitude, in order to prevent defendants procuring legislation from a foreign State to suit their own interests.

⁸ *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.* (1970), *American Journal of International Law*, 64 (1970), p. 962, which also held that United States courts will not investigate the legality of such an order under the *lex loci*.

⁹ [Netherlands] Economic Competition Act, 1956, s. 39 (1); Jennings, *Recueil des cours*, 121 (1967), pp. 327, 523.

Parent and subsidiary companies

A number of questions concerning the relationship between parent and subsidiary companies have arisen in antitrust law.

Under section 12 of the Clayton Act antitrust proceedings can be brought against a company only in a district where it carries on business.¹ When a foreign company which does not carry on business in the United States participates in a restrictive practice which causes effects in the United States, courts tend to surmount the obstacle of venue by arguing that the foreign company is so closely identified with its United States subsidiary (or parent) company that jurisdiction over the one is the same as jurisdiction over the other. Some of the cases push this argument to startling lengths,² but there is no breach of international law, because there is no rule of international law subordinating the exercise of jurisdiction to a requirement that the company carry on business in the State concerned;³ provided that jurisdiction can be based on some valid ground (such as the territorial principle, nationality principle, etc.) it cannot be defeated by the absence of the defendant individual or company outside the State at the time when proceedings are instituted, because there is no rule of international law against trials *in absentia*, provided that the accused somehow receives notice of the charge.⁴

A problem of a rather different type arose in *Imperial Chemical Industries, Ltd. v. Commission of the European Communities*, where I.C.I. was regarded as having committed acts in the E.E.C. because the acts had been committed by I.C.I.'s E.E.C. subsidiaries which were so closely identified with I.C.I. that their acts could be attributed to I.C.I.⁵ *Qui facit per alium facit per se* is a general principle of criminal law, but it depends on proof that the subsidiary was acting on the instructions of the parent company; such instructions cannot be presumed merely from the possession of a controlling shareholding.⁶ If these rules are disregarded there will be an excess of

¹ This rule of venue is unknown in most European countries: van Hecke, *ibid.* 106 (1962), pp. 322-3.

² Brewster, *Antitrust and American Business Abroad* (1958), pp. 56-61; *International and Comparative Law Quarterly* (1963), Supplement No. 6, pp. 110-14.

³ The United Kingdom thinks otherwise (*British Practice in International Law* (1967), pp. 59-60), but this is surely wrong; see above, n. 1, and below, n. 4, both this page.

⁴ Council of Europe, *Explanatory Report on the European Convention on the International Validity of Criminal Judgments* (1970), pp. 49 et seq.; I.L.R., vol. 38, p. 133; *Gallina v. Fraser* (1960), *ibid.*, vol. 31, p. 356; *R. v. Governor of Brixton Prison, Ex parte Caborn-Waterfield* (1960), *ibid.*, vol. 30, p. 376. The commentary on the Harvard Research Draft Convention thinks otherwise (*American Journal of International Law*, 29 (1935), Supplement, pp. 600-1), but cites little authority. Bormann was tried in his absence by the International Military Tribunal at Nuremberg.

⁵ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 666-7; *Common Market Law Reports* (1972), pp. 557, 629. The Court's judgment is open to criticism on the facts; see Mann, *International and Comparative Law Quarterly*, 22 (1973), pp. 35, 46-50.

⁶ *Contra*, the decision of the Commission of the European Communities in the *Continental Can*

jurisdiction (unless, of course, jurisdiction over the parent can be based on some alternative ground recognized by international law).

The reach of court orders

As the Commission and the Advocate-General pointed out in *Imperial Chemical Industries, Ltd. v. Commission of the European Communities*, there are hardly any examples of States (as opposed to academic writers) protesting against the assumption of jurisdiction by United States courts in antitrust cases; almost all the protests are against the type of orders made by United States courts at the end of the case.¹

United States courts have good reasons for making far-reaching orders in antitrust cases. For instance, if a United States court strikes down a market-division scheme and allows foreign companies to compete in the United States, it seems unfair that foreign companies should be allowed to continue enforcing the scheme by keeping United States companies out of foreign markets. If, as often happens, foreign companies use their patent rights to maintain the market-division scheme, United States courts may be tempted to order them to assign their patents or to grant licences under them to other companies. Such an order was made in *U.S. v. Imperial Chemical Industries, Ltd.*²

But having good reasons for doing something is not necessarily the same as having a legal right to do it.

United States courts claim that they are following precedents established in cases where courts of equity ordered defendants to do or refrain from doing certain acts abroad.³ Such orders usually forbid the defendant to do something, but courts of equity have an equal power to order positive conduct.⁴ The nationality of the defendant is irrelevant;⁵ it is true that in some cases courts have refrained from addressing an injunction to a foreign defendant concerning his conduct abroad, but such abstention has always been based on other considerations, such as the principle of *forum non conveniens*,⁶ or the fact that the injunction would be ineffective,⁷ or the rule

case (1971), *Common Market Law Reports*, 11 (1972), D. 27; but the real point in this case had nothing to do with the parent company's liability for its subsidiary's acts.

¹ (1972), *Recueil de la jurisprudence* (1972), pp. 619, 634-5, 700-1; *Common Market Law Reports* (1972), pp. 557, 605.

² (1952), 105 F. Supp. 215.

³ Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), pp. 457, 497-506; *Massie v. Watts* (1810), 6 Cranch 148; *Ellerman Lines v. Read*, [1928] 2 K.B. 144; Mann, loc. cit. (above, p. 147 n. 1), pp. 147-50.

⁴ Messner, *Minnesota Law Review*, 14 (1930), p. 494; *Columbia Nistri & Carta Carbone v. Columbia Ribbon and Carbon Manufacturing Co.* (1966), *American Journal of International Law*, 61 (1967), p. 614.

⁵ *Carron Iron Co. v. Maclaren* (1855), 5 H.L. Cas. 416, 436-7.

⁶ *Carron Iron Co. v. Maclaren*; *Vanity Fair Mills v. T. Eaton Co. Ltd.* (1956), I.L.R., vol. 23, p. 134.

⁷ *Re Chapman* (1873), L.R. 15 Eq. 75; *Re Vocalion (Foreign) Ltd.*, [1932] 2 Ch. 196.

that injunctions can be used only to enforce rights under the *lex fori*, not rights under foreign law.¹

But all these cases arose out of private law disputes between private parties. The antitrust cases are entirely different; the proceedings were brought by United States authorities in the exercise of their sovereign powers.

In the past, United States courts have tended to look at the question in terms of judicial jurisdiction; jurisdiction to try the case entails jurisdiction to make any orders which are in any way related to the facts of the case. It is submitted that this approach is wrong;² the real question is one of legislative jurisdiction. The power of courts in private law cases to order foreigners to perform acts abroad is a reflection of the rule that international law in principle imposes no limitations on the legislative power of States in private law. But international law does limit the legislative power of States in criminal law and with respect to laws conferring sovereign or prerogative powers on the State. The United States would be the first to admit that it would violate international law if Congress passed a law to expropriate the British patents of British companies, or to compel British companies, under the threat of quasi-criminal sanctions, to grant licences to every applicant to use its British patents. But a law which enables judges to impose such obligations on British companies is just as contrary to international law as an Act of Congress which imposes such obligations.³ International law does not permit a court order to be given a greater extra-territorial reach than a statute,⁴ otherwise a State could evade limitations on its legislative jurisdiction by empowering its courts to make far-reaching orders.

United States courts have disregarded these principles more than once. The most striking example is *U.S. v. The Watchmakers of Switzerland Information Centre, Inc.*, which virtually required the reorganization of the Swiss watch industry in Switzerland, in a way which was contrary to

¹ *'Morocco Bound' Syndicate, Ltd. v. Harris*, [1895] 1 Ch. 534; *Vanity Fair Mills v. T. Eaton Co. Ltd.* (1956), I.L.R., vol. 23, p. 134.

² It is true that jurisdiction to try a case carries with it jurisdiction to order the parties to produce relevant documents situated abroad (see above, p. 178), because otherwise the judge would be unable to try the case properly. But the orders made in cases like *U.S. v. Imperial Chemical Industries, Ltd.*, unlike orders for the discovery of documents, are not necessary in order to enable the judge to try the case; they are made at the end of the trial, not at the beginning. Their real purpose is to put it out of the defendant's power to break antitrust law again in the future, but in this respect they often go further than international law allows; State *A* can punish a national of State *B* whose factory in State *B* blows noxious fumes across the border, but it cannot put it out of his power to cause pollution again in the future by expropriating his factory, because a State has no power to expropriate property owned by foreigners abroad.

³ To be precise, a breach of international law occurs only when the order or law is enforced: Verzijl, *Nederlands Tijdschrift voor Internationaal Recht*, 8 (1961), pp. 12-16, and see above, p. 187.

⁴ Conversely, if a State has a right to punish someone for breaking its law, it also has a right to bind him over or enjoin him not to repeat his offence; the court order merely reaffirms an obligation imposed by the law.

long-established Swiss Government policy.¹ The fact that such United States judgments are not recognized by foreign courts² does not prove that such judgments are contrary to international law; one only has to think of the analogy of criminal law and tax law, where foreign judgments are hardly ever recognized, without any implication that the judgments are contrary to international law. But foreign governments have protested that some of the orders made by United States courts in antitrust cases are contrary to international law.³

The usual response of United States courts to such protests is to insert a clause in the judgment providing that defendants (especially foreign defendants) shall not be obliged to do anything in a foreign country which is prohibited by the law of that country (such a clause appeared in the judgment in the *Swiss Watches* case). This saving clause really misses the point of the protests; it is the very existence of the court order which is contrary to international law, and not merely the fact that it obliges a defendant to break foreign law. However, the saving clause, coupled with foreign legislation forbidding parties to comply with such court orders, does have the *practical* effect of nullifying the excess of jurisdiction produced by many orders of United States courts in antitrust cases.⁴

PART IV. RECOGNITION OF THE EXERCISE OF JURISDICTION BY OTHER STATES

I. THE MEANING OF THE LAW OF NATIONS AND OF COMITY

One frequently comes across judicial dicta, particularly in the older cases, stating that the recognition of foreign laws, judgments and acts of State is required by comity or by the law of nations. The meaning of these terms, however, is often far from obvious.

The law of nations

'The law of nations' is a translation of the Latin *ius gentium*, which did not mean international law in the modern sense, but those rules of municipal law which were common to all peoples. The sixteenth- and seventeenth-century writers on international law used the term in the original Latin

¹ (1963), *Trade cases*, § 77, p. 414. Protests by the Swiss Government that the judgment violated international law led to a partial modification of the judgment, but it is submitted that the modification did not go far enough to eliminate the excess of jurisdiction in the original judgment. See I.L.A. (1964), pp. 410-13 and (1966), pp. 67-74.

² *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] Ch. 19 (the judgments in the English Court of Appeal are ambiguous on the question whether the United States court order violated international law).

³ Brewster, *Antitrust and American Business Abroad* (1958), pp. 46-7.

⁴ See above, p. 208.

sense as well as in the modern sense of public international law. Grotius's book *De jure belli ac pacis* is not only a book on international law; it is a book on the law common to mankind and nations, and therefore contains large portions devoted to such private law subjects as the law of inheritance. This ambiguity remained common up to (and including) the early nineteenth century.¹

As we shall see in the next two sections, private international law was frequently spoken of as part of the law of nations (in its Latin sense).² Admiralty law on such matters as salvage was likewise described as being part of the law of nations;³ so was the law merchant.⁴ For some years after 1815 French courts argued that marriage was part of the *droit des gens*, because it was common to all peoples, but that adoption was not.⁵

Even today this outlook is sometimes found. Courts still occasionally say that salvage is governed by the *ius gentium*.⁶ In *Jenny and Hedwige R. v. Belgian State* the Brussels Court of Appeal said that 'the right of property is a natural right, deriving from the *ius gentium*, and not a mere civil law right'.⁷ In *Madzimbamuto v. Lardner-Burke* the Rhodesian High Court clearly used *ius gentium* in the Roman law sense when analysing the legal relationship between a ruler's subjects and a usurper.⁸

But such expressions are usually avoided nowadays, because they obscure the crucial difference between public international law and other bodies of transnational law such as private international law, Admiralty law and the law merchant. The upsurge of legislative activity throughout the western world during the nineteenth century made it necessary to distinguish, probably for the first time, between those rules of the *ius gentium* which could be altered unilaterally without provoking protests from other States and those which could not. If a State passed a law claiming a territorial sea of more than three miles, it was denounced as a law-breaker by other States. If it altered its rules of private international law, for instance by substituting the *lex patriae* for the *lex domicilii* as the personal law,⁹ no such

¹ Rheinstein, *University of Chicago Law Review*, 22 (1955), pp. 775, 802-17.

² See above, p. 172 and below, pp. 219, 224, 226-7. In *The Halley* (1867), 2 Adm. and Ecc. 3, at pp. 5-6, Sir Robert Phillimore distinguished between the '*ius inter gentes*, or public international law, and . . . the *ius gentium*, or private international law'.

³ *The Two Friends* (1799), 1 C. Rob. 271, 279; *The Bee* (1836), 3 F. Cas. 41, 43; *Cammell v. Sewell* (1860), 5 H. and N. 727, 744.

⁴ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395, 420. See also *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 455, per White, J., dissenting, and Nussbaum, *A Concise History of the Law of Nations* (1953), p. 28.

⁵ Batiffol, *Aspects philosophiques du droit international privé* (1956), pp. 144 et seq.

⁶ *Sobonis v. Steam Tanker National Defender* (1969), 298 F. Supp. 631, 635; *Usatore v. The Victoria* (1949), *Annual Digest*, 1949, p. 150.

⁷ (1933), *ibid.*, 1933-34, p. 323.

⁸ (1966), I.L.R., vol. 39, pp. 61, 115 et seq.

⁹ This happened in many continental countries during the nineteenth century. Before the French Revolution all western European countries applied the *lex domicilii*, which explains why this practice was described as belonging to the *ius gentium*.

reaction occurred. In *The Johan and Siegmund* Sir William Scott admitted that the old rule of Admiralty law concerning the right of possession over ships, laid down by 'the general maritime law of nations', had been 'variously modified by the municipal law of different countries'; but he did not suggest that those countries had done anything improper in departing from the old rule.¹

Other differences between public international law and other bodies of transnational law also became accepted during the nineteenth century.² Public international law, unlike the other rules, applied by and large only to relations between States, not to relations between individuals. (It is true that during the twentieth century this distinction has become a little blurred, but during the nineteenth century it was clear.) It also came to be realized that public international law had different sources; for instance, the practice of States which produced customary international law was different from the practice of merchants which produced the law merchant.

In cases dealing with the recognition of foreign laws, judgments and acts of State, references to the *ius gentium*, the law of nations or even international law should therefore be treated with caution. One cannot assume, without further inquiry, that public international law is meant. Indeed, there is probably a presumption that it is not meant, unless there is something else in the context (e.g. an express reference to *public* international law, or an allusion to the rights or sovereignty of other States being infringed, etc.) which suggests otherwise.

Comity

The term 'comity' was first used by the Netherlands writers on private international law, Paul Voet (1619-77), Ulric Huber (1636-94) and John Voet (1647-1714). The Voets used it to mean 'courtesy'. Huber, on the other hand, seems at times to have regarded comity as being part of the *ius gentium*,³ but, as we have seen, *ius gentium* in the seventeenth century did not necessarily mean public international law.⁴

'Comity' is translated into French as *courtoisie internationale*, into Italian as *cortesia internazionale*, into German as *Völkercourtoisie*—terms which

¹ (1810), Edw. Adm. 242. See also below, p. 227. Parry, *Nationality and Citizenship Laws of the Commonwealth* (1957), pp. 22 et seq., suggests that originally there was a uniform nationality law throughout Europe which predated modern international law; international law did not oblige States to keep to this uniform law, and at a later date States changed it without breaking international law.

² Kaplan and Katzenbach, *The Political Foundations of International Law* (1961), pp. 66-7.

³ Yntema, *Michigan Law Review*, 65 (1966), p. 1; Lipstein, [1972-B] *Cambridge Law Journal*, pp. 69-70. English courts at one time also described rules of private international law as arising *ex comitate et iure gentium*: *Robinson v. Bland* (1760), 1 Wm. Bl. 234, 258-9; *Ruding v. Smith* (1821), 2 Hag. Con. 371, 386. See also *Bank of Augusta v. Earle* (1839), 38 U.S. 519, 589.

⁴ See above, pp. 212-14.

clearly do not denote any legal obligation.¹ In English-speaking countries, however, 'comity' is much more ambiguous. British and American judges often speak of a breach of comity in circumstances where reference to international law would be more appropriate; thus it is said to be contrary to comity to break a treaty² or to prosecute a foreigner for crimes committed abroad,³ and sovereign and diplomatic immunities have been described as resting on comity.⁴ Sir Hersch Lauterpacht ascribed this practice to Austinian doubts as to whether international law was really law; the judges talked about comity instead of international law, in order to avoid recognizing international law as law.⁵ There is, however, another possible explanation. Many rules of international law are based on a desire to act courteously towards other States,⁶ and courtesy does require that the legal rights of other States should be respected;⁷ courtesy and international law lend reciprocal support to one another, and it is therefore likely that a breach of international law will be a breach of courtesy (or comity), without suggesting that international law and comity are synonymous. *Khedivial Line, S.A.E. v. Seafarers' International Union* is exceptional in identifying comity with reciprocity of a type which may sometimes be required by international law.⁸

But in most cases comity has been treated as something different from international law.⁹ Thus it has been said that extradition of criminals, in the absence of a treaty, is a matter of comity, not of right;¹⁰ that exclusion of foreign vessels from a port would be a breach of comity, but not of international law;¹¹ that coastal States have a legal right to try crimes committed on board foreign ships in their ports, but often refrain from exercising it as a matter of comity;¹² and that the exemption of fishing vessels from seizure by enemy warships is a rule of comity and not of international law.¹³

¹ This is confirmed by the State practice of France and Italy: Kiss, op. cit. (above, p. 147 n. 6), vol. 1, pp. 43-4; *La prassi italiana di diritto internazionale*, 1st Series, vol. 1, p. 5.

² *Collico Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. 1.

³ *Joyce v. D.P.P.*, [1946] A.C. 347, 352.

⁴ *The Parlement Belge* (1880), L.R. 5 P.D. 197, 214, 217; *El Neptuno* (1938), 62 Lloyds List Law Reports 7, 9; *R. v. A.B.*, [1941] 1 K.B. 454, 457. But see below, p. 216 at n. 1.

⁵ *International Law* (collected papers ed. by E. Lauterpacht, 1970), vol. 1, pp. 44-6.

⁶ Hackworth, vol. 4, p. 460 ('comity is the basis of much of international law'); *Sison v. Board of Accountancy* (1949), I.L.R., 18 (1951), pp. 14, 15-16.

⁷ This may be what Cohen L.J. meant in *Krajina v. Tass Agency*, [1949] 2 All E.R. 274, 280, when he spoke of 'the principles of comity established by international law'.

⁸ (1960), I.L.R., vol. 31, pp. 137, 140. See also the equivocal opinion of the Attorney-General Knox (1902), reported in D. R. Deener, *The United States Attorneys-General and International Law* (1957), p. 284.

⁹ See also below, pp. 218, 233.

¹⁰ Phillimore, *Commentaries upon International Law* (3rd ed., 1879), vol. 1, p. 522; *State v. Brewster* (1835), 7 Vt. 118.

¹¹ McNair, *International Law Opinions* (1956), vol. 1, p. 343.

¹² C. J. Colombaros, *The International Law of the Sea* (6th ed., 1967), pp. 324-7; P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 145.

¹³ *The Young Jacob and Johanna* (1798), 1 C. Rob. 20; *The Paquete Habana* (1900), 175 U.S. 677, 693-4.

In *The Cristina* Lord Wright said that sovereign immunity 'is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law'.¹ The United States State Department clearly regards comity as something different from international law.² Some judges have identified comity with courtesy,³ or described it as 'a blend of courtesy and expedience'.⁴ A large number of cases hold that comity is something more than courtesy, but nevertheless deny⁵ (or at least refrain from stating)⁶ that it is synonymous with a duty imposed by international law.

Given the ambiguity of the word 'comity', one cannot say that the word is misused when it is used as a synonym for international law. However, it is not often used in this sense, and there must therefore be a strong presumption (unless there is clear evidence that a reference to international law is intended) that judicial statements that recognition of foreign laws, judgments and acts of State is required by comity do not mean that it is required by international law.

2. APPLICATION OF FOREIGN LAW

International law sometimes incorporates rules of municipal law. For instance, a treaty between States may provide that some question related to the subject-matter of the treaty shall be governed by some system of municipal law. In a sense, this happens whenever a treaty refers to national currencies; United States law alone can determine the meaning of the words 'United States dollars'. A party to the treaty cannot evade its obligations under the treaty by refusing to recognize United States laws defining the value of United States dollars.

Similar considerations apply to nationality laws. Under both customary law and treaties a State can often claim rights on behalf of its nationals. Sometimes a treaty lays down its own definition of nationality; for instance, Article 78 (9) (b) of the Italian Peace Treaty, 1947, provides that 'the term

¹ [1938] A.C. 485, 502.

² Hackworth, vol. 2, pp. 314-15; *American Journal of International Law*, 65 (1971), p. 601. Cf. the equivocal opinion of Attorney-General Knox (1902), reported in D. R. Deener, *The United States Attorneys-General and International Law* (1957), p. 284.

³ *El Neptuno* (1938), 62 Lloyd's List Law Reports 7, 9; *Olivier v. Townes*, 2 Mart. (N.S.) 93.

⁴ *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.* (1969), *American Journal of International Law*, 65 (1971), pp. 610-11.

⁵ *Johnston v. Compagnie Générale Transatlantique* (1926), 242 N.Y. 381, 387. Despite certain ambiguities, *Hilton v. Guyot* (1895), 159 U.S. 113, 163-4, 166, probably points the same way. (*Hilton v. Guyot* has been cited with approval in a number of subsequent cases, such as *Anderson v. N.V. Transandine Handelsmaatschappij* (1941), *Annual Digest*, 1941-42, pp. 10, 13, and *Sison v. Board of Accountancy* (1949), I.L.R., 18 (1951), pp. 14-16.) See also Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (1894), p. 102.

⁶ *Mast Foss & Co. v. Stover Manufacturing Co.* (1900), 177 U.S. 485, 488; *R.S.F.S.R. v. Cibrario* (1923), 235 N.Y. 255.

"United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy'. However, in the absence of such special clauses, the general rule is that the question whether an individual has the nationality of State *A* is answered by looking at the law of State *A*. To be sure, there are exceptions to this general rule—double nationality gives rise to problems, the nationality law itself may be contrary to international law, there is no duty to recognize the loss of enemy nationality in wartime, etc.—but these are exceptions to the general rule and not negations of it. As a general rule, a State cannot evade its duties with regard to the nationals of other States by refusing to recognize the foreign laws defining their nationality.

Apart from cases where a rule of municipal law is incorporated into international law, are States under any duty to apply the laws of other States? In European countries the courts of one State have applied the laws of other States for centuries; books on private international law devote hundreds of pages to expounding rules governing the application of foreign laws.¹ But is this practice required by public international law?

Doctrinal opinion

The statist writers did not discuss the question whether public international law imposed a duty on States to apply foreign laws. They sought to deduce rules of private international law, not from public international law, but from Roman law. (It is true that Roman law influenced the development of public international law, but this merely means that private international law and public international law share the same ancestry to some extent, not that public international law lays down rules of private international law.) In any case, the conflicts of laws which were studied by the statist writers were usually inter-provincial conflicts and not international conflicts;² the Emperor and the Church had overriding authority over the city-states of medieval Italy, and the King of France had overriding authority over the diverse customs of French provinces in the sixteenth century.

Paul Voet (1619–77) and Ulrich Huber (1636–94) were the first authors to answer the question: why do courts apply foreign law? They answered the question by producing the famous theory of comity.³

¹ Or, according to some writers on private international law, the enforcement of rights created under foreign law, or the creation and enforcement of a right under the *lex fori* which resembles a right under foreign law. The acquired rights theory and the local law theory are concerned with analysing *what* a court does; the present study is concerned with analysing *why* the court does it. These two questions are entirely separate from one another. References in the present chapter to the application of foreign laws are not intended to indicate any approval or disapproval for the vested rights theory or the local law theory, and supporters of either of these theories are at liberty to rephrase such references accordingly.

² Nussbaum, *Columbia Law Review*, 42 (1942), pp. 189–90.

³ See above, p. 214.

Huber exercised great influence in English-speaking countries, where his theories of vested rights and of comity long enjoyed popularity. The vested rights theory throws no clear light on the question which concerns us; some supporters of the vested rights theory believed that respect for foreign vested rights was required by public international law,¹ but others did not.² But, whatever the meaning which Huber may have attributed to 'comity',³ his English-speaking followers clearly interpreted it as implying that public international law imposed no duties to apply foreign law.⁴

Joseph Story is a good example. In his *Commentaries on the Conflict of Laws*, first published in 1834, he wrote:

The laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. . . . No other nation, or its subjects, are bound to yield the slightest obedience to those laws (s. 7).

A State may prohibit the operation of all foreign laws and the rights growing out of them within its own territories. It may prohibit some foreign laws, and it may admit the operation of others (s. 23).

Whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter, that is to say upon its own jurisprudence and polity, and upon its own express or tacit consent (s. 23).

The application of foreign laws is a matter of comity, which he identified with mutual convenience, not with legal obligation (s. 33).

Story's views, which were echoed by Wheaton,⁵ still remain more or less unchallenged in English-speaking countries.⁶ Thus Dicey says:

Many attempts have been made to link up these two departments of law [public and private international law], . . . but all these attempts have failed.⁷

A similar negative attitude is taken in Canada.⁸ However, since this question lies on the borderland between public and private international law, it is often avoided by writers on either subject; in the United States,

¹ See the authors cited by Nussbaum, loc. cit. (above, p. 217 n. 2), pp. 198-9.

² A. V. Dicey, *Conflict of Laws* (2nd ed., 1908), pp. 3, 11; *Gray v. Gray* (1934), 87 N.H. 82, 86.

³ See above, p. 214.

⁴ The seventeenth- and eighteenth-century French writers who also adopted Huber's comity theory likewise interpreted it in this sense: P. Lerebours-Pigeonnière, *Droit international privé* (8th ed., by Y. Loussouarn, 1962), p. 325.

⁵ H. Wheaton, *Elements of International Law* (1904), pp. 129-31.

⁶ The main exception is E. C. Stowell, *International Law* (1931), pp. 285 et seq. Fachiri, this *Year Book*, 12 (1930), pp. 95, 97-8, comes close to saying that international law imposes a duty to apply foreign law, but does not quite say so.

In 1883 Lorimer argued that international law imposed a duty to apply foreign laws, but as a Scotsman he was probably less influenced by Story than by writers in civil law countries like Germany and Italy. In any case, most Scots writers and judges do not share Lorimer's opinion. See, generally, Anton, *Private International Law* (1967), p. 1. Lorimer argued that recognition of a foreign State implies necessarily recognition of the foreign State's laws. For refutation of this type of argument see Lipstein, *Transactions of the Grotius Society*, 35 (1949), p. 147.

⁷ Dicey and Morris on the *Conflict of Laws* (8th ed., 1967), p. 8.

⁸ Castel, *Conflict of Laws* (1968), p. 36.

particularly, the preoccupation of private international lawyers with conflicts between the laws of the member-states of the federation makes them disinclined to consider questions of public international law.

On the continent of Europe events took a different course, at least for a time.

Savigny, in volume 8 of his *System des heutigen römischen Rechts* (1849), based private international law on a *völkerrechtliche Gemeinschaft* of nations having intercourse with one another (s. 348). The usual meaning of *Völkerrecht* is 'public international law', but this phrase is the only passage in the whole of his book which could be interpreted as implying that rules of private international law are derived from public international law. It is much more likely that he was thinking of the 'law of nations' in a sense similar to its original Latin meaning, because he considered that similarities between the cultures and laws of different States were the logical basis for uniformity of rules of private international law. (The corollary to this, of course, is that major differences between systems of municipal law are likely to be reflected in differences in rules of private international law—a consequence which was pointed out by Wächter and which was to be forcefully emphasized by Bartin.) In any case, Savigny said expressly that 'no State can require the recognition of its law beyond its bounds' (s. 348).

Mancini, in his inaugural lecture at Turin in 1851, advocated the principle of nationality as the basis of international law; but in this lecture he was concerned with public international law and did not refer to private international law. His views on private international law, and on its relation to public international law, were much more cautious. An article which he published in 1874 contains passages which might be interpreted as meaning that public international law required the application of foreign law (particularly of the *lex patriae*);¹ but he admitted that rules of private international law differed from State to State, and his main concern was to advocate treaties unifying such rules for the future; he made little attempt to argue that existing public international law laid down rules about the application of foreign law.

Mancini's followers, however, did argue that public international law imposed a duty on States to apply foreign laws.² In particular, they maintained that public international law required the application of the *lex patriae* as the personal law.³ They seemed oblivious of the fact that at least

¹ *Journal de droit international*, 1 (1874), pp. 221, 285, and especially p. 298.

² Nussbaum, *Columbia Law Review*, 42 (1942), p. 189; Maury, *Recueil des cours*, 57 (1936), p. 329; Ago, *ibid.* 58 (1936), pp. 247, 252 et seq.; Pacchioni, *Diritto civile italiano* (1935), Part 1, vol. 2, pp. 53 et seq.; Lipstein, *Transactions of the Grotius Society*, 27 (1942), pp. 142-3, 146-8.

³ This was not the only choice of law rule which they tried to base on public international law. Thus Zitelmann, *Internationales Privatrecht* (1897), contended that public international law required the application of the *lex patriae* to contracts between the nationals of another

half the countries in the world applied the law of an individual's domicile or religion instead; that the application of the *lex patriae* as the personal law in certain European countries was a recent innovation; and that even international tribunals had often applied the law of domicile as the law governing succession.¹ Virtually no one nowadays believes that application of the *lex patriae* is required by public international law; the disputes between French private international lawyers over the question whether France should adopt the *lex domicilii* or retain the *lex patriae* are conducted without reference to public international law. Indeed, the view that application of *any* foreign law is required by public international law is seldom held nowadays.² Even in its heyday this view exercised little influence on courts; the *Reichsgericht* declared in its judgment of 12 October 1903 that 'the rules of private international law are not propositions of the law of nations, but integral components of the private law in question'.³

Conflicting foreign laws

Supposing, for the sake of argument, that international law did require States to apply foreign laws, how would one deal with a situation where different States had enacted conflicting laws to govern the same transaction? Theoretically, one might apply the law of the State which had the closest connection with the facts of the *particular* case, as in *Babcock v. Jackson*;⁴ but this approach is still a relatively novel and unusual one, and so cannot be regarded as required by public international law. Alternatively, one might apply the law of the State which had the greatest interest in governing the situation, as suggested by Antoine Pillet,⁵ Brainerd Currie⁶

State, the *lex situs* to property and the *lex loci delicti commissi* to torts. See also below, p. 222. On the *lex situs*, cf. below, pp. 224-6, on the *lex loci delicti commissi*, cf. above p. 186.

¹ *Stevenson* claim (1903). R.I.A.A., vol. 9, pp. 494, 510; *Brignone* claim (1903), *ibid.*, vol. 10, p. 542; *Mezger* claim (1903), *ibid.*, p. 417. Compare Lipstein, *Transactions of the Grotius Society*, 27 (1942), pp. 173-4, and *ibid.* 29 (1943), p. 75.

² But a few writers do still hold it; see Evrigenis, *Recueil des cours*, 118 (1966), pp. 319, 419-26. It is true that many writers believe that a State may not apply its own law to cases which have no connection with it (see above, pp. 181 et seq.), but that does not mean that the State is obliged to apply foreign law to such cases; its courts could equally well refrain from trying such cases, since the rules of public international law concerning denial of justice do not go so far as to require a court to try cases which have no connection with the State of the forum.

³ 55 E. 349. But cf. *Kingdom of Belgium v. E.M.J.C.H.*, where the Hague Court of Appeal referred to '... the accepted principle of international law ... under which States ought to assist each other in securing extra-territorial effect to their legislation which concerns their subjects ...' (I.L.R., 20 (1953), pp. 26, 28); if 'subjects' means 'nationals', this dictum becomes extremely dubious, particularly since the action was in quasi-contract, where nationality is not an appropriate connecting factor. For further criticism of this case, see Mann, *loc. cit.* (above, p. 147 n. 1), pp. 144-5.

⁴ (1963), 12 N.Y. 2d 473.

⁵ Pillet set out his views in a long article serialized in the *Journal de droit international* during 1894-6. Unlike Currie and Briggs, he sought to base his theory on the requirements of public international law.

⁶ Morris, *The Conflict of Laws* (1971), pp. 530-5.

and Briggs.¹ But this is clearly not required by public international law, either, because it is precisely in those spheres where a State has the greatest interest in having its law enforced by foreign courts (criminal law, revenue law and 'public' law generally) that its law is least likely to be enforced.² Besides, how could a third State reconcile the equal but opposite interests of two foreign States? (For instance, a State of emigration has an interest in having its law applied to its absentee *nationals*, whereas a State of immigration has an equal interest in having its law applied to its new *domiciliaries*.)

If foreign laws were applied out of a sense of duty owed to foreign States, one would expect to find that courts would begin their inquiry by looking all round the world to see if any State's legislation applied to the facts of the case, and that they would then try to reconcile the rival claims of different States by applying the law of the State which had the greater interest in having its law applied. This is not what happens in practice. A court applies the law indicated by the choice of law rules of the forum. The fact that other foreign States wish to have their laws applied is disregarded. The fact that the State whose law is indicated by the choice of law rules of the forum does not wish to have its law applied is also usually disregarded; *renvoi* is the exception, not the rule.

Probably no simple answer can be given to the question why courts apply foreign laws; the reasons probably vary from country to country, from century to century, and from context to context.³ But one factor which is more constant than any other is a desire to do that which is most just and appropriate for the individuals who appear before the court. That is why the law of an enemy State is applied in wartime. The application of foreign law is designed to benefit individuals, not to benefit the foreign State (that is probably why revenue laws and other 'public' laws are not enforced abroad). Some people might imagine that a State might be entitled to protest if its nationals were denied the benefits of its law in foreign courts; but, quite apart from the fact that such protests are almost never made,⁴ the application of his national law may not necessarily be in the individual's interests. For instance, if a Frenchman breaks a contract with an Englishman, and if French law awards higher damages than English law, it is in

¹ *International and Comparative Law Quarterly*, 4 (1955), p. 329.

² Mann, *Transactions of the Grotius Society*, 40 (1955), p. 25; van Hecke, *Recueil des cours*, 126 (1969), pp. 409, 484-98.

³ In countries where the law has been codified, rules of private international law are often deduced from the provisions of the code defining the scope of application of the *lex fori*. For instance, Article 3 of the French Civil Code provides that the status and capacity of Frenchmen are governed by French law; from this the French courts inferred that the status and capacity of foreign nationals should be governed by the foreign *lex patriae*. This translation of unilateral rules into bilateral rules can also be seen in the context of the recognition of foreign judgments; see below, p. 237.

⁴ See below, pp. 228-30.

the Frenchman's interests to have English law applied. Conversely, English courts apply French law to determine the formal validity of marriages celebrated in France, even though the parties concerned are English; application of French law is not an act of deference to the French State (it is inconceivable that France would have *locus standi* to protest on behalf of an English litigant), but is simply believed to be most just and appropriate for the individuals concerned.

One cannot argue that public international law requires the application of foreign law without also arguing that public international law lays down choice of law rules, because otherwise there is no satisfactory way of resolving conflicts between competing systems of foreign law. But attempts to discover choice of law rules laid down by public international law have not been successful.¹ The attempt to prove that application of the *lex patriae* is required by public international law has already been mentioned.² Lipstein gives two other examples of choice of law rules which are often supposed to be required by public international law—the rule that form is governed by the *lex loci actus*, and the rule that the *lex rei sitae* must be applied to immovables and that rights acquired under a previous *lex rei sitae* must be recognized and respected.³

¹ Article 1 of the Statutes of the Hague Conference on Private International Law (adopted after the Second World War) says that the conference 'aims at the progressive unification of rules of private international law', and unification would not be necessary if uniformity already existed. Even the earlier Hague Conventions state in their preambles that the parties were: *désirant établir des règles communes concernant plusieurs matières de droit international privé*, or . . . *des dispositions communes pour régler les conflits de lois*, which implies that common rules did not already exist.

It is true that many rules of public international law are unsettled, but there is all the difference in the world between, say, the Geneva Conference on the Law of the Sea in 1958, where the 'three-mile' States and the 'twelve-mile' States accused one another of breaking the law, and a conference on private international law, where the *lex patriae* States and the *lex domicilii* States did not denounce one another as law breakers. No one imagines that public international law resolves conflicts of laws in the way that it is supposed to resolve the question of the width of the territorial sea.

² See above, pp. 219–20.

³ *Transactions of the Grotius Society*, 27 (1942), pp. 142, 146. These are respectively the fifth and fourth of what Lipstein describes as the tenets of the internationalist school. The first three tenets are as follows:

1. Every State must have a system of private international law.
2. States may not exclude the application of foreign law altogether.
3. No State may impose its own rules as to status upon persons who are merely temporary residents.

The third tenet is discussed above, pp. 186–7. As for the first and second tenets, which are echoed in s. 9 of the *Restatement*, they are too vague to be proved or disproved. Besides, surely each case where a court refuses to apply foreign law must be considered in isolation. Suppose that States *A* and *B* refuse to apply foreign law in tort cases; is it logical to argue that *A*'s refusal to apply foreign tort law is in accordance with public international law but that *B*'s refusal to apply foreign tort law is not, because *B*, unlike *A*, also excludes the application of foreign law in non-tort cases? How can it be suggested that the plaintiffs in the tort actions in *B* have suffered a greater denial of justice than the plaintiffs in the tort actions in *A*? It is not enough to say that a State may not exclude the application of foreign law altogether; this is meaningless unless a list is given of the circumstances in which non-application of foreign law is prohibited.

In *Recueil des cours*, 135 (1972), pp. 97, 169, Lipstein qualifies the second tenet by adding

It is impossible to hold that *locus regit actum* is a mandatory rule; compliance with the forms laid down by another system of law is often treated as an alternative. For instance, German private international law requires observance either of the *lex loci* or of the *lex causae*;¹ Italian private international law also adds the *lex patriae*, if all the parties have the same nationality.² In the Soviet Union compliance with the *lex fori* is an alternative to compliance with the *lex loci*.³ In the case of contracts, compliance with the law governing the essential validity of the contract is accepted as an alternative to compliance with the *lex loci* in most countries;⁴ some countries add the personal law of the parties or the *lex fori* as a third alternative.⁵ In the case of wills, the personal law and/or the *lex situs* are treated as alternatives to the *lex loci* in many countries; in some countries even the *lex fori* is admitted as an alternative.⁶ In the case of marriages celebrated outside the State of the forum, compliance with the personal law of the parties is often treated as an alternative to compliance with the *lex loci*.⁷ In many countries the form of a cheque need not be in accordance with the law of the place of signature, if it is in accordance with the law of the place of payment.⁸

Sometimes compliance with the forms of the *lex loci* is not enough to give an act formal validity. The formal validity of a transfer of property is often governed by the *lex situs*.⁹ The formal validity of a will is (or was) often governed by the law governing the succession.¹⁰ Many Latin American countries require observance of the forms of the *lex fori* if a contract is to be performed (or enforced, in some cases) in the State of the forum;¹¹ in

that a State may exclude foreign law on grounds of public policy, and rephrases the fourth tenet as follows: 'Immovables are governed by the *lex situs*, and rights in *movables* acquired in virtue of a previous *lex situs* must be respected' (italics added).

¹ E.G.B.G.B., Art. 11 (1). The rule is the same in Japan, Poland and Portugal.

² Introduction to the *Civil Code*, Art. 26. The rule is the same in Greece: T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 138.

³ Ibid., pp. 304-5.

⁴ Wolff, *Private International Law* (2nd ed., 1950), p. 446; Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 254; Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), Chapter 31; *Restatement, Second, Conflict of Laws* (1971), s. 199.

⁵ Rabel, op. cit. (in the preceding note).

⁶ Rabel, *Vanderbilt Law Review*, 6 (1953), p. 533; *International and Comparative Law Quarterly*, 15 (1966), pp. 457, 468; T.M.C. Asser Instituut, *Statutory Private International Law* (1971), pp. 113, 250. See also the Hague Convention on the Formal Validity of Wills, 1961.

⁷ Rabel, *The Conflict of Laws*, vol. 1 (2nd ed., 1958), pp. 228-9; T.M.C. Asser Instituut, op. cit. (in the preceding note), p. 291; *International and Comparative Law Quarterly*, 15 (1966), pp. 457, 464.

⁸ Geneva Convention on Cheques, 1931. The law in the Soviet Union is the same.

⁹ Wolff, *Private International Law* (2nd ed., 1950), p. 524; *Restatement, Second, Conflict of Laws* (1971), vol. 2, pp. 13, 72-3, 166; Rabel, *The Conflict of Laws*, vol. 4 (1st ed., 1958), pp. 46-8. See also the sources cited above, n. 2 on this page.

¹⁰ Treaty of Montevideo, Art. 44; *Selected Readings on the Conflict of Laws* (ed. Culp, 1956), pp. 992-3; *Restatement, Second, Conflict of Laws*, vol. 2, pp. 48-50, 121-2; Cheshire (and North), *Private International Law* (8th ed., 1970), p. 590.

¹¹ Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), Chapter 31.

the Soviet Union the form of foreign trade transactions entered into by Soviet organizations must comply with Soviet law.¹ Common law countries make no distinction between the formal and essential validity of many transactions, such as contracts and transfers of property; formal validity is therefore governed by the *lex causae*.² Many other countries, while paying lip-service to the idea of formal validity's being governed by the *lex loci*, evade it in practice by questionable classifications; for instance, they say that their nationals have no capacity to make a holograph will abroad,³ or to go through a civil form of marriage abroad.⁴ Reference should also be made to the tendency of courts in common law countries to treat the Statute of Frauds (which would be regarded in most countries as regulating the form of contracts) as a matter of procedure, governed by the *lex fori*.⁵

As for the other rule mentioned by Lipstein, it is true that the *lex rei sitae* is applied to immovables in the vast majority of cases. But there is no evidence that this practice reflects any conviction that the application of the *lex rei sitae* is required by public international law;⁶ rather, it would seem to be based on a realization of the futility of following any other course, since a judgment applying any other law would not be applied in the State of the *situs*. Even so, the equitable doctrine of jurisdiction *in personam* can be used to make rights derived from the *lex fori* prevail over rights derived from the *lex rei sitae*;⁷ and in cases of universal succession (death, bankruptcy, etc.) the *lex rei sitae* will not necessarily be applied (in Italy, Greece, Czechoslovakia, Poland, Portugal, Spain and a number of Muslim and African countries succession to immovables is governed by the personal law).

At one time movables were usually governed by the owner's personal law, and Story went so far as to say that this was a rule of the *ius gentium*; but he clearly meant *ius gentium* in the Roman sense, because he added that the State of the *situs* would be entitled to apply its own law, although he regarded this as undesirable.⁸ Nowadays, of course, the *lex situs* is generally applied,⁹ and some authorities even suggest that application of the *lex situs*

¹ *Principles of Civil Legislation of the Soviet Union and Union Republics* (1961), s. 125.

² *Hall v. Cordell* (1891), 142 U.S. 116; Cheshire (and North), *Private International Law* (8th ed., 1970), pp. 219-20, 483-6 and 513.

³ Wolff, *Private International Law* (2nd ed., 1950), p. 589 (Netherlands, Portugal, Uruguay and Greece).

⁴ This rule used to exist in most countries of eastern and southern Europe, and still exists in Greece, Egypt, Malta, Cyprus, Yugoslavia, Iran and (to some extent) Israel and Spain. See Rabel, *The Conflict of Laws*, vol. 1 (2nd ed., 1958), pp. 230-3; Katičić, *Recueil des cours*, 131 (1970), pp. 393, 430.

⁵ *Leroux v. Brown* (1852), 12 C.B. 801.

⁶ Apart from ambiguous dicta in some municipal judgments; see below, p. 226.

⁷ See above, pp. 174, 210-11.

⁸ *Commentaries on the Conflict of Laws*, s. 380 and 390.

⁹ Rabel, *The Conflict of Laws*, vol. 4 (1st ed., 1958), pp. 30 et seq. In Spain the *lex patriae* of the owner is still applied (Art. 10 (1) of the Civil Code).

is required by public international law.¹ It is advisable to be clear what exactly is in issue. Clearly a State is not entitled to invoke the fact that property was acquired abroad as a pretext for expropriating that property without compensation when it is brought into the State's territory; but what is wrong here is not the application of the *lex fori* in place of the *lex situs*, but the confiscatory content of the *lex fori*.² One cannot invoke this rule as an argument for holding that a State is under a duty to apply foreign law in private law disputes between individuals, where there is no question of confiscation by the State of the forum.

The *lex situs* is often not applied to goods in transit, or in cases of universal succession (death, marriage, bankruptcy, etc.). These are justifiable exceptions to the general principle that the *lex situs* should be applied, and do not really undermine the principle. But other cases where the *lex situs* is not applied cannot be explained in this way. In *Simpson v. Fogo*, Wood V.-C. was very indignant about a Louisiana judgment which refused to recognize English mortgagees' rights of ownership over a ship on the sole ground that no such rights existed in Louisiana law³—in other words, the Louisiana court refused to apply the *lex situs* because it was different from Louisiana law. But, on similar facts, courts in some other states of the United States⁴ and in France⁵ have decided cases in the same way as the Louisiana court decided this case, and there is no record of other States' protesting against such judgments.

But even if practice were uniform in applying the *lex situs*, what would that prove? Application of the *lex situs* seems to be based on commercial convenience, not on any *opinio iuris* that application of the *lex situs* is required by public international law. Nor can one blur the issue by saying that application of the *lex situs* is a general principle of law. True, it is a general principle of law in the sense that it is so widespread in municipal law that an international tribunal, if it ever had to decide which law governed title to property, would be justified in borrowing the rule from municipal law and applying it.⁶ But that does not mean that a State which did not apply the rule would be breaking public international law.

¹ Dicta in *Inglis v. Robertson*, [1898] A.C. 616, 625, per Lord Watson, in *État Russe v. La Ropit* (1928), Kiss, op. cit. (above, p. 147 n. 6), vol. 2, p. 173, and in *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 454-5, per Justice White, dissenting, point in this direction.

² See above, pp. 181-90. Similarly a State which acquires territory is not allowed to confiscate property within that territory acquired under the law of the predecessor State; this is presumably the meaning of Lipstein's reference to the previous *lex rei sitae* in the case of immovables, above, p. 222.

³ (1863), 32 L.J. Ch. 249, 254-5.

⁴ Rabel, *The Conflict of Laws*, vol. 4 (1st ed., 1958), p. 89.

⁵ Cass. req., 19 March 1872, Sirey 1872 I. 238.

⁶ This has often been done; but with regard to questions other than the law governing title to property, the choice of law rules applied by international tribunals have been conflicting and inconsistent. See Niboyet, *Recueil des cours*, 40 (1932), pp. 157, 226 et seq.; Lipstein, *Transactions of the Grotius Society*, 27 (1941), p. 142, and *ibid.* 29 (1943), p. 51.

Extinctive prescription is a general principle of law in the sense that it exists in most municipal systems and has been borrowed and applied by international tribunals; but is there any reason to suppose that a State would break public international law if it made no provision for extinctive prescription in its own municipal law?¹

Municipal judgments and international choice of law rules

A number of judgments by English and American courts,² mainly in older cases, say that certain choice of law rules are laid down by the *ius gentium* or by international law. In *Robinson v. Bland* Lord Mansfield said that 'the general rule, established *ex comitate et iure gentium*', was that contracts were normally governed by the law of the place where they were made.³ In *Scrimshire v. Scrimshire* it was said to be a rule of the *ius gentium* that the form of a marriage was governed by the *lex loci*.⁴ The application of the *lex rei sitae* to immovables has also been said to be a rule of the *ius gentium*.⁵

It seems fairly clear, however, that *ius gentium* was used in its Roman sense, not in the sense of public international law.⁶ The few references to 'international law' in the more recent cases must be taken either to represent a mistranslation of the words *ius gentium* which the judges had read in the older cases, or to refer to the *private* international law of the forum. Some of the cases attach the label of international law to rules which are uniquely English (or American) and which do not exist in other countries. For instance, in *Ennis v. Smith* the United States Supreme Court said that it was a rule of the *ius gentium* that movables should be disturbed (sc.

¹ Verzijl, *International Law in Historical Perspective* (1968), vol. 1, pp. 60-1.

² Similar dicta occasionally appear also in judgments from other countries. For instance, in *The Windhuk* (1940), *Annual Digest*, 1938-40, p. 169, a Brazilian court said that international law determined which law should govern the question whether a debt was privileged (i.e. secured) on a ship. But it is likely that private international law was meant; the court said that authors were divided between the claims of *lex situs* (the law of the State of the port) and of the law of the flag State. See also above, p. 225.

In *Anita v. Treves* (1930), *Annual Digest*, 1929-30, p. 106, the Turin Court of Appeal said that 'on account of a generally followed principle of international law, relations of private law, including questions of civil status, which take place on board merchant vessels are governed by the law of their own State', and not by the law of the foreign port where the vessel happened to be. But this rule is not universally accepted: *MacKinnon v. Iberia Shipping Co.*, I.L.R., 21 (1954), p. 126; Rabel, *The Conflict of Laws*, vol. 2 (1st ed., 1947), pp. 342-5.

³ (1760), 1 Wm. Bl. 234, 258-9. See also *James v. Allen* (1786), 1 Dallas 188 (Pennsylvania) and *Arnott v. Redfern* (1825), 172 E.R. 40, 41.

⁴ (1752), 2 Hag. Con. 395. See also *Ruding v. Smith* (1821), 2 Hag. Con. 371, 386, and *Berthiaume v. Dastous*, [1930] A.C. 79, 83. Cf. *Maksymec v. Maksymec* (1956), *Modern Law Review*, 20 (1957), pp. 641-2.

⁵ *Davis v. Headley* (1871), 22 N.J. Eq. 115. See also the judgment of the United States consular court, reported in Hackworth, vol. 2, pp. 545-6.

⁶ Thus in *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395, 417, marriage was said to be an institution of the *ius gentium*; the law merchant was also said to be part of the *ius gentium* (ibid. 420). See above, pp. 212-14.

distributed?) on death according to the *lex domicilii*.¹ There are dicta in *Udny v. Udny* suggesting that the rules laid down in that case about the revival of the domicile of origin (rules which are not accepted in the United States, let alone in civil law countries) constituted the correct interpretation of international law.² In *Re Martin* Lindley M.R. said: 'According to international law as understood and administered in England, the effect of marriage on the movable property of persons depends . . . on the domicile of the husband in the English sense.'³ Anyone with the slightest knowledge of comparative private international law knows that the rules laid down in all of these cases are not accepted in a large number of countries. It would be insulting the intelligence of the judges who decided these cases to suppose that they believed such rules were laid down by public international law (as opposed to the private international law of the forum).

The judges also seem to have recognized that a State was at liberty to depart from the rules laid down in such cases. Thus in *Jones v. Marrable* it was said: ' . . . although it is a rule of international law that the succession to personal property is controlled by the law of the domicile, yet it is in the power of any State to change the law in this respect'.⁴ One State, acting on its own, cannot change public international law; it may, according to its own constitutional law, be able to alter its own municipal law in a manner prohibited by public international law, but courts try to interpret municipal law so that it does not conflict with public international law. The tolerant attitude shown by the court towards the possibility of changing the rule that succession to personalty is governed by the *lex domicilii* shows that the court regarded this rule as a rule of private international law, not of public international law.

Again, the fact that English courts are prepared to accept a *renvoi* in cases involving succession to movables and the formal validity of marriage shows that they do not regard the English choice of law rules as being required by public international law; it is hardly likely that English courts would apply foreign choice of law rules which conflict with the English rules if they thought that the foreign choice of law rules were contrary to public international law.

At all events, courts in common law countries have made it clear that they do not believe that application of foreign law is required by public international law. English courts have been silent on this question.⁵ In the United States, however, application of the laws of another member-state

¹ (1852), 55 U.S. 400.

² (1869), L.R. 1 H.L. (Sc. & D.) 441, 452, 457.

³ [1900] P. 211, 233.

⁴ (1845), 6 Humph. 116, 118 (Tennessee).

⁵ In *Feist v. Société intercommunale belge d'électricité*, [1934] A.C. 161, 173, the House of Lords quoted the judgment of the Permanent Court of International Justice in the *Serbian Loans* case. There is, however, no suggestion that the House of Lords regarded itself as bound to follow the Permanent Court's decision; it cited the Permanent Court's decision in the same way that it would cite a foreign authority, as a persuasive precedent.

of the federation is required by the full faith and credit clause of the federal constitution; courts have held that the full faith and credit clause does not apply to foreign laws,¹ and have sometimes added for good measure (as if to emphasize the difference between application of a sister-state's laws and application of foreign laws) that application of foreign laws is not required by public international law either. In *Loucks v. Standard Oil* Judge Cardozo said: 'the sovereign in its discretion may refuse its aid to the foreign right'.² Similar statements appear in a number of decisions by the Supreme Court; in *Hilton v. Guyot* the Court quoted with approval Wheaton's statement that 'there is no obligation . . . to regard foreign laws',³ and in *Magnolia Petroleum Co. v. Hunt* Stone C.J. said that before the full faith and credit clause was adopted the member States of the union were 'independent foreign sovereignties, each free to ignore rights and obligations created under the laws of the others'.⁴ In *Gray v. Gray* a New Hampshire Court supported the vested rights theory, but rejected the idea that a State was under any legal compulsion to enforce vested rights.⁵ In *Re Solvang* a Canadian court held that Canadian laws were not binding in foreign countries and were enforced merely as a matter of comity; the court said that 'even the Parliament of the United Kingdom could not enact laws which the authorities of foreign States would be bound to recognize'.⁶

Diplomatic protests and negotiations

Stevenson, in an article entitled 'The Relationship of Private International Law to Public International Law', mentions three incidents where States argued in diplomatic negotiations that there was a duty to apply foreign law.⁷ Close analysis shows, however, that no such argument was in fact used.

In the first place, Stevenson points to the treaty of 10 October 1922 between the United Kingdom and Iraq, which provided that 'in matters relating to the personal status of foreigners or in other matters of a civil and commercial nature in which it is customary by international usage to apply the law of another country, such law shall be applied in manner to be prescribed by law'. But there is a well-known distinction between customs which have the force of public international law and usages which do not; the 'usage' referred to in the treaty was probably meant to denote a usage which did not have the force of law.⁸

¹ *Aetna Life Insurance Co. v. Tremblay* (1912), 223 U.S. 185.

² (1918), 224 N.Y. 99, 111.

⁴ (1943), 320 U.S. 430, 439-40.

⁶ (1918), 43 D.L.R. 549, 553.

⁷ *Columbia Law Review*, 52 (1952), pp. 561, 581-2.

⁸ A similar provision in Article 4 of the Judicial Agreement of 4 March 1931 between the United Kingdom and Iraq was described by Nussbaum, *Principles of Private International Law*

³ (1895), 159 U.S. 113, 166.

⁵ (1934), 87 N.H. 82, 86.

Stevenson's second incident occurred in the early nineteenth century, when a marriage between a United States man and a Mexican woman, celebrated in the United States, was declared void by a Mexican church court. Webster, the United States Secretary of State, instructed the United States minister in Mexico to protest to the church, on the grounds that it was 'the almost universal rule' that 'a marriage is valid if it has been contracted according to the laws of the place where the ceremony was performed'. But Webster seems to have treated 'the almost universal rule' as a rule of comparative law, not of public international law, because he added: 'It may be that the local clergymen concerned have proceeded in conformity to the laws of the Republic [of Mexico] and the rules of the Catholic church as established in Mexico, and therefore that any official application to the Mexican executive would be premature, if not improper.'¹

The third incident arose in 1868. A Swiss woman had emigrated to the United States, married a United States citizen and subsequently died. Her son, a United States citizen, later claimed a share in the estate of his maternal grandfather, but his claim was rejected by the Swiss court on the ground that his mother had not complied with the formalities prescribed by the law of the canton of Aargau, with the result that the marriage was void and her son was illegitimate. The United States minister protested successfully, on the ground that legitimacy should be determined by United States law. But his argument was based on a United States-Swiss treaty: 'Under the treaty, the status of the boy John should be decided by the American and not by the Aargovien law.'²

The United States has often said that title to foreign land must be decided by the courts of the *situs* in accordance with the law of the *situs*. But the emphasis here is on the court of the *situs*, not on the law of the *situs*; such statements are simply designed to reaffirm the rule that local remedies must be exhausted. The United States has frequently made claims where local courts have committed a denial of justice in such cases.³

(1943), p. 42, as unworkable; the treaty does not state whether personal status is to be governed by the *lex patriae*, the *lex domicilii* or religious law.

In an exchange of notes on 1 and 2 November 1946 the British Government said they hoped that Syria would regard the personal status of British subjects in Syria as governed by their national law, and Syria promised to do so (*British and Foreign State Papers*, vol. 147, pp. 1091-4). The British Government did not argue that application of the *lex patriae* was required by public international law, but merely pointed out that this was the practice followed in most countries (although not in the United Kingdom!).

¹ Moore, vol. 2, pp. 484-5. In any case, Webster's 'almost universal rule' is no longer accepted nowadays, except perhaps as regards questions of form.

² *Foreign Relations of the U.S.* (1868), vol. 2, p. 195. The minister probably misinterpreted the treaty, but that does not affect the point that his protest was not based on customary international law. For other claims based on treaties, see Moore, vol. 5, p. 120.

³ Moore, vol. 6, p. 704.

The only recorded example of a protest being based on customary public international law occurred in 1863, when Italy argued that States were obliged by international law to recognize that the estate of an intestate dying without heirs should go to his national State and not to the State of the *situs*.¹ But it is clear that public international law lays down no such rule; in most countries immovables would go to the State of the *situs*, and in many countries (including France) movables would go to the State of the domicile.²

With this dubious exception, States have not based protests on customary public international law. They have made protests but they have based them on other grounds. This reliance on arguments other than customary international law indicates, even more clearly than a total absence of any sort of protests would have done, that States do not consider that customary international law requires the application of foreign law.

Conclusions

In some circumstances application of the *lex fori* instead of foreign law can be contrary to public international law, but only if the *content* of the *lex fori* falls below the minimum international standard. What is wrongful is not the refusal to apply foreign law, but the application of rules whose *content* violates international law.³ We have already seen an example of this in connection with title to property.⁴ Similar situations could arise with regard to the status of individuals. In principle, public international law would not forbid a State to apply its *lex fori* to determine the status of all individuals, even if they had no connection with the State; but the *lex fori* would be contrary to public international law if it treated the individuals as having no legal personality at all, for that would be tantamount to treating them as slaves. Such a law would contravene not only the modern rules of international law protecting human rights, but also the long-established rules laying down a minimum international standard for the treatment of aliens.

It seems, however, that different considerations apply to companies; a State is not obliged to recognize the legal personality of a foreign company.⁵ The idea that a company has no existence outside the territory where it was created was popular during the nineteenth century in the United States and continental Europe, although it has lost favour now.⁶ In many

¹ *La prassi italiana di diritto internazionale*, 1st series, vol. 1, p. 9.

² Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 318.

³ See above, pp. 181-90.

⁴ See above, p. 225.

⁵ Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), p. 133; *Barcelona Traction* case (1970), *I.C.J. Reports*, 1970, pp. 3, 235 (sep. opinion by Morelli). But cf. Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 239-41.

⁶ Rabel, *The Conflict of Laws*, vol. 2 (2nd ed., 1960), pp. 125-8. It still exists in Latin America: Perrin, *La reconnaissance des sociétés étrangères* (Geneva thesis, 1969), pp. 21-2.

countries recognition of a foreign company does not occur automatically, but requires a specific act by the executive, which may sometimes be withheld.¹ However, if a State does not recognize a foreign company, it must treat the company's property as if it were the members' property, so it is still bound by the rules of international law forbidding expropriation of foreign-owned property without compensation.²

It might be objected that a deplorable state of affairs would result if States exploited to the full the absence of any rule of public international law requiring the application of foreign law. But fortunately experience has shown that judges and legislatures are usually willing to adopt a generous and co-operative attitude towards foreign laws without any rule of public international law's compelling them to do so.

Far from leading to greater selfishness on the part of States, more widespread recognition of the absence of rules of public international law on the subject might remove those attitudes of insular complacency and dogmatism which have obstructed reform of private international law in the past. The rules of private international law adopted by one country are unlikely to be satisfactory if they are adopted without paying any attention to the rules adopted by other countries;³ but, if judges or legislators believe that their own rules of private international law are ordained by public international law, they may come to think that there is no need to look at other countries' private international law or to re-examine or reform their own rules. The likely result of such complacency is that private international law will develop in different countries along increasingly divergent lines. Such attitudes will also obstruct the unification of private international law by treaty (a unification which many people, including the author, regard as desirable). One of the reasons for the lack of success of the early Hague Conventions on private international law was that they reflected a belief that application of the *lex patriae* as the personal law was required by public international law; as a result, no concessions were made to the *lex domicilii* States, which therefore never became parties to the Conventions. If it is recognized that public international law does not require the application of foreign law and therefore does not lay down any choice of law rules, States will be much more willing to compromise and to change their choice of law rules, thereby facilitating the conclusion of treaties unifying private international law.

¹ Rabel, *op. cit.* (in the preceding note), pp. 135-42. In Germany foreign associations of a non-commercial character require recognition by an administrative act, otherwise they have no legal personality (E.G.B.G.B., Art. 10). For the position in Nova Scotia, see *Re Provinces & Central Properties Ltd. and the City of Halifax* (1968), 70 D.L.R. (2d) 156.

² Per Judge Morelli in the *Barcelona Traction* case (1970), *I.C.J. Reports*, 1970, pp. 3, 235.

³ Cf. Wolff, *Private International Law* (2nd ed., 1950), p. 16: 'Private international law is not itself international; but it should certainly be drawn up in an international frame of mind.'

3. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Judicial practice

In *Cottington's* case Lord Nottingham said: 'It is against the law of nations not to give credit to the judgments . . . of foreign countries.'¹ Similar statements appear in several early English cases.² However, the term 'law of nations' seems to have been used, not in the sense of public international law, but in a sense closer to the original Roman *ius gentium*, to mean a universally accepted body of private international law.³ This is shown by *Wier's* case, where the Court of King's Bench said: 'Ceo est per la Ley de Nations que le Justice dun Nation serra aidant al Justice d'auter Nation, & lun d'executer le judgment de l'auter; . . . & le Judge del Admiraltie est le proper Magistrate pur cest purpose, car il solment ad execution del ley Civil deins ces Relme.'⁴ Here we see the law of nations being treated as part of the civil law (i.e. the law derived from Roman law), and being regarded as similar to Admiralty law.

Perhaps as a result of misinterpretation of these cases, one or two nineteenth-century cases came close to stating that recognition or enforcement of foreign judgments was required by international law. For instance, in *Turnbull v. Walker*, Wright J. said that if a court's jurisdiction was founded on the defendant's allegiance or consent, then 'in conformity with . . . international law or usage the courts of other States will regard its judgments as binding and will, with certain exceptions, enforce the judgment', whereas the judgment had merely local force if jurisdiction was founded on other factors (e.g. Order 11 of the Rules of the Supreme Court).⁵ Wright J. seems to have been uncertain whether this practice was based on international law or on mere usage. Again, if the judgment is binding on the courts and not merely on the parties, why is it not enforced without exceptions? It should also be remembered that a foreigner on a brief visit to England is regarded as owing allegiance for the purpose of conferring jurisdiction on English courts; and yet most foreign courts would not enforce an English judgment if the sole ground of the English court's jurisdiction was service of a writ on a foreigner during a brief visit to England.⁶

Such cases are exceptional. As early as 1744 English courts had begun to react against *Cottington's* case by treating foreign judgments as only prima facie evidence of the facts established by the foreign court.⁷ In

¹ (1688), 2 Swanst. 326.

² See the cases cited in *Hilton v. Guyot* (1895), 159 U.S. 113, 170, 173, and also *Hughes v. Cornelius* (1683), 89 E.R. 907, 908. See also Vattel, *The Law of Nations*, Book 2, ss. 84-5.

³ See above, pp. 212-14.

⁴ (1607), Rolle, *Abridgement* vol. 1, p. 530, pl. 12.

⁵ (1892), 67 L.T. 767, 769.

⁶ See above, pp. 170-1.

⁷ *Gage v. Bulkeley*, 27 E.R. 824. Similar views were expressed in *Walker v. Witter* (1778), 99 E.R. 1, in *Galbraith v. Nevill* (1789), 1 Doug. 6 note, and in Joseph Story's *Commentaries on the Conflict of Laws* (1834), s. 608.

Bryant v. Ela the Supreme Court of New Hampshire said that the law of nations required respect for Admiralty judgments only.¹ In *Godard v. Gray* Blackburn J. said: 'It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgments of a foreign tribunal. Several of the continental countries . . . do not enforce the judgments of other countries. . . .'² In *Re Solvang* the Supreme Court of Alberta said that judgments are usually recognized abroad as a matter of comity, but that foreign courts are not bound to recognize them.³ The dissenting judges in *Hilton v. Guyot* based enforcement of foreign judgments on the principle *interest reipublicae ut sit finis litium*, and added: 'it is not necessary that we should hold it to be required by some rule of international law'.⁴ In *Magnolia Petroleum Co. v. Hunt* Stone C.J. said that the member states of the federation, before the adoption of the federal Constitution containing the full faith and credit clause, were 'independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others'.⁵ In *Johnston v. Compagnie Générale Transatlantique* it was held that the enforcement of foreign judgments was a 'question . . . of private rather than public international law, of private rather than public relations'.⁶

Until the late eighteenth century English courts seldom enforced foreign laws; they compensated for this restrictive approach by being very liberal in their willingness to enforce foreign judgments.⁷ Courts in civil law countries, which had applied foreign laws for centuries, were much less liberal in their attitudes to foreign judgments. To some extent this difference of approach survives to this day.

A French ordinance of 1629 forbade the enforcement in France of foreign judgments against a French subject.⁸ In cases involving foreign defendants French courts have been somewhat more liberal. The Rouen *Tribunal de commerce* went as far as to say in 1885 that it was contrary to the principles of sovereignty for the courts of one country to order a party to pay back damages which he had been awarded by the courts of another country.⁹ Georges Scelle believed that a total refusal to recognize or

¹ (1815), Smith (N.H.) 396, 404.

² (1870), L.R. 6 Q.B. 139, 148.

³ (1918), 43 D.L.R. 549, 553.

⁴ (1895), 159 U.S. 113, 229. For the majority opinion, see below, p. 236.

⁵ (1943), 320 U.S. 430, 439-40.

⁶ (1926), 242 N.Y. 381.

⁷ Cheshire (and P. M. North), *Private International Law* (8th ed., 1970), pp. 35-7. Cases like *Gage v. Bulkeley* (see above, p. 232 n. 7) constituted only a temporary exception to this practice and do not reflect the modern law.

⁸ See below, p. 238.

⁹ *Depeaux v. Stevenson*, *Journal de droit international* (1885), p. 427. But ordering the plaintiff to pay back damages goes far beyond merely refusing to enforce the judgment; it is a question of undoing the judgment and not simply of disregarding it. In any case, the Tribunal de commerce was probably wrong in thinking that such an order was contrary to public international law; in *Ellerman Lines v. Read*, [1928] 2 K.B. 144 an English court issued an injunction to restrain the defendant from enforcing anywhere in the world a Turkish judgment which he had obtained by fraud.

enforce foreign judgments was contrary to public international law;¹ but the mutual independence of courts in different countries (the principle on which he based his views) could equally well be interpreted to point in the opposite direction.

The actual practice of courts in France and other civil law countries is so restrictive that it is difficult to reconcile with any belief that recognition or enforcement of foreign judgments is required by public international law. Until 1964 a French court, when asked to enforce a foreign judgment, could review it on the merits. *Révision au fond*, as it is called, was disapproved by the French Court of Cassation in *Munzer v. Jacoby-Munzer* in 1964, but it still exists in Belgium, Quebec (but not normally for judgments from other Canadian provinces) and Portugal, and to some extent in Greece and Italy;² the law in Luxembourg is unsettled.³ The *Munzer* case reaffirmed another condition laid down by French law—the foreign court must have applied the law designated as applicable by French choice of law rules, or must at least have applied a law having the same content. France is not alone in laying down such conditions; Poland does the same, where Polish choice of law rules require the application of Polish law.⁴ Japanese courts recognize foreign divorces only if they apply the system of law regarded as applicable by Japanese choice of law rules.⁵ German courts refuse to recognize foreign judgments against German nationals in various fields of family law whenever German choice of law rules require the application of German law and the foreign court has applied another system of law.⁶

Other countries go even further in denying effect to foreign judgments. The Netherlands law recognizes foreign judgments for various purposes, but will not enforce an award of damages by a foreign court unless there is a treaty or special law requiring enforcement.⁷ The same rule applies in Norway.⁸ Foreign judgments were not enforced in pre-war Poland⁹ or Russia;¹⁰ the same rule applies in Sweden today.¹¹

Even countries which enforce most foreign judgments often exclude certain categories of foreign judgments. For instance, foreign bankruptcy

¹ *Précis du droit des gens* (1934), vol. 2, p. 94. This view is supported by Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 398–9.

² Nadelmann, *American Journal of International Law*, 13 (1964), p. 724; Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 445; T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 171.

³ *Journal de droit international* (1971), p. 153.

⁴ Jodlowski, *ibid.* (1966), pp. 539, 562.

⁵ *Japanese Annual of International Law*, 9 (1965), p. 223.

⁶ Z.P.O., Art. 328–I, no. 3.

⁷ Batiffol, *op. cit.* (n. 2 on this page), p. 443.

⁸ *Nederlands Tijdschrift voor Internationaal Recht* (1967), p. 259.

⁹ *Nochimzon v. Zellstoffabrik Waldhof Tilsit* (1933), *Annual Digest*, 1933–34, p. 21.

¹⁰ De Lapradelle and Niboyet, *Répertoire de droit international* (1930), vol. 7, p. 121.

¹¹ Eek, *International and Comparative Law Quarterly*, 20 (1971), pp. 605, 608. Similarly in Denmark: Philip, *Nederlands Tijdschrift voor Internationaal Recht*, 19 (1972), pp. 227–8.

adjudications are not recognized in Germany, Switzerland, the Netherlands or (usually) the United States.¹ Courts in English-speaking countries, which claim the power to issue injunctions concerning conduct abroad, usually pay little attention to foreign injunctions.² Despite Vattel's statement that States are obliged to recognize the appointment of guardians by foreign courts,³ courts generally do not hesitate to disregard orders by foreign courts when deciding the custody of children;⁴ in the *Desramault* case a French court refused to follow an English magistrates' court order concerning custody, which led to a debate in the British Parliament, but no one claimed that public international law obliged the French court to recognize the English decision.⁵ In Chile, Brazil and Argentina divorce is regarded as contrary to public policy and foreign divorces are not recognized.⁶ In the absence of treaties,⁷ criminal judgments are never enforced abroad, and neither are judgments on questions of tax law or other laws of a 'prerogative' or 'public' character;⁸ if there were a duty to enforce foreign judgments, it would be hard to explain why it did not extend to criminal, tax or other 'public' law judgments, since the adjudicating State has a greater interest in securing enforcement of such judgments than in securing enforcement of judgments in 'private' law cases.

Some guidance may also be obtained from the attitudes of courts to letters of request (or, as they are called in the United States, letters rogatory), i.e. requests sent by the courts of one State to the courts of another State asking the latter to take evidence on behalf of the former. In 1921 the Soviet Union refused to enforce letters of request in the absence of a treaty.⁹ Normally courts are more co-operative, but authority is divided on the question whether international law imposes any duty on courts to act in accordance with letters of request.¹⁰ At one time writers tended to believe that such a duty existed,¹¹ but recently this view has lost favour.¹² Courts

¹ Wolff, *Private International Law* (2nd ed., 1950), p. 560; Nadelmann, *American Journal of Comparative Law*, 11 (1962), p. 628.

² Nussbaum, *Columbia Law Review*, 41 (1941), pp. 221, 224.

³ *The Law of Nations*, Book 2, s. 85.

⁴ *McKee v. McKee*, [1951] A.C. 352; *Republic of Iraq v. First National City Bank of Chicago* (1962), I.L.R., vol. 42, pp. 26, 29 (c.d. 382 U.S. 982); Batiffol, *Droit international privé*, vol. 2 (5th ed., 1971), pp. 121 et seq.

⁵ *Hansard*, H.C. Deb. (1971), vol. 812, written answers, col. 516; vol. 814, cols. 1319-28.

⁶ Valladão, *Recueil des cours*, 133 (1971), pp. 413, 519.

⁷ Shearer, *Extradition in International Law* (1971), pp. 71-2.

⁸ Although criminal judgments are not enforced, their effects may sometimes be recognized (e.g. revocation of a driving licence); but there is no evidence that such recognition is required by public international law. Extradition usually takes the place of enforcement, but it is generally agreed nowadays that there is no duty to extradite in the absence of a treaty.

⁹ *Gurdus v. Philadelphia National Bank*, *Annual Digest*, 1919-42, pp. 62-3.

¹⁰ *American Journal of International Law*, 33 (1939), Supplement, pp. 43-4.

¹¹ *Ibid.*

¹² De Lapradelle and Niboyet, *Répertoire de droit international* (1929), vol. 4, pp. 71, 103; Riezler, *Internationales Zivilprozessrecht* (1949), p. 674.

have generally denied that there is such a duty,¹ and the same view was taken in a circular sent by the French Ministry of Justice to Procurators-General.²

Comity and reciprocity

It is not necessary to invoke public international law in order to find reasons for enforcing foreign judgments. The desire to do justice for individuals, which explains the application of foreign laws,³ also explains the recognition and enforcement of foreign judgments; there is also the consideration that litigation should not be protracted indefinitely, summed up in the maxim *interest reipublicae ut sit finis litium*.⁴ Recognition and enforcement of foreign judgments also lead to stability in family and business relations, which is socially convenient and desirable.

In *Hilton v. Guyot* the United States Supreme Court held that foreign judgments were enforced as a matter of comity, which it regarded as something more than 'mere courtesy and good will', but falling short of a duty imposed by public international law.⁵ The practical effect of comity, as far as foreign judgments were concerned, was that they would be enforced in United States courts only if United States judgments were enforced in the foreign State in question.⁶ The rule of reciprocity, laid down in *Hilton v. Guyot*, has been severely criticized in the United States,⁷ and is now virtually a dead letter because the Supreme Court subsequently decided that federal courts must apply the conflict rules of the state where they sit,⁸ and reciprocity is required in only one or two states of the union.⁹ However, a reciprocity requirement exists in many foreign States, including Austria,¹⁰ several Swiss cantons,¹¹ Spain,¹² Israel,¹³ Yugoslavia,¹⁴ Japan,¹⁵ Colombia,¹⁶ Poland,¹⁷ Czechoslovakia (if the defendant is a Czech national),¹⁸ Lebanon,¹⁹

¹ *American Journal of International Law*, 33 (1939), Supplement, pp. 43-4; *Journal de droit international* (1909), p. 459, (1911), p. 185, (1912), pp. 176, 1143; *Kuehling v. Liebman* (1873), 9 Phila. 160, 163; *Ex parte Taylor* (1920), 220 S.W. 74.

² *American Journal of International Law*, 33 (1939), Supplement, pp. 43-4; but see the opinion of the United States Attorney-General Knox, reported in D. R. Deener, *The United States Attorneys-General and International Law* (1957), p. 284.

³ See above, p. 221.

⁴ *Hilton v. Guyot* (1895), 159 U.S. 113, 229.

⁵ (1895), 159 U.S. 113, especially 163-4, 166.

⁶ *Ibid.* 227-8. The case was decided by 5 votes to 4; the dissenting judges considered that foreign judgments should be enforced without proof of reciprocity. See also above, p. 233.

⁷ Briggs, *The Law of Nations* (2nd ed., 1952), pp. 407-8.

⁸ *Klaxon Company v. Stentor Electric Manufacturing Co., Inc.* (1941), 313 U.S. 487.

⁹ Von Mehren and Trautman, *Harvard Law Review*, 81 (1968), pp. 1601, 1662.

¹⁰ T.M.C. Asser Instituut, *Statutory Private International Law* (1971), p. 105.

¹¹ *Ibid.*, p. 108.

¹² *Ibid.*, p. 154.

¹³ *Ibid.*, p. 243.

¹⁴ *Ibid.*, p. 289.

¹⁵ *Code of Civil Procedure*, Art. 200 (4).

¹⁶ *Dagher v. Dagher* (1958), I.L.R., vol. 26, p. 57.

¹⁷ Jodkowski, *Journal de droit international* (1966), pp. 539, 562.

¹⁸ Kucera, *ibid.*, pp. 783, 803.

¹⁹ Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 443.

Germany,¹ Hungary,² Liechtenstein,³ Roumania,⁴ Turkey⁵ and many non-European countries.⁶ Indeed, one of the considerations which strongly influenced the Supreme Court in *Hilton v. Guyot* was the fact that a reciprocity requirement existed in many countries.⁷

The widespread existence of reciprocity requirements suggests that enforcement of foreign judgments is not required by public international law. Of course, even if it were required by public international law, it would still be lawful for States to take reprisals against States which did not enforce judgments. But refusing enforcement of foreign judgments as an act of reprisal presupposes that it is for the defendant to prove (or for some governmental authority to determine) that the State whose courts have given the judgment does not enforce foreign judgments, whereas the whole essence of reciprocity is that the onus is on the plaintiff to prove that the State whose courts have given the judgment does enforce foreign judgments—and in Germany, at least, this can often be very difficult to prove.⁸

Bilateral rules of jurisdiction and exclusive jurisdiction

An almost universal requirement for the recognition of foreign judgments is that the foreign court should have jurisdiction according to the rules of private international law in force in the State where recognition is sought. The fact that the rules governing the jurisdiction of courts in the foreign State are different is usually disregarded. As a result, there is a tendency for the rules governing the jurisdiction of courts in State *A* to be used as a guide by the courts in State *A* in order to determine when they will recognize or enforce foreign judgments; unilateral rules become bilateral rules. If a wife can sue for divorce in England after being ordinarily resident there for three years, English courts recognize that foreign courts have jurisdiction to try divorce petitions brought by wives who have been ordinarily resident for three years in the foreign State concerned.⁹

There are, however, two points which need to be noted. First, the process of converting unilateral rules into bilateral rules is not always complete. English courts have for many years exercised jurisdiction in certain cases where a writ (or, rather, notice of a writ) has been served on

¹ Nadelmann, *American Journal of Comparative Law*, 13 (1964), pp. 72, 78.

² Wolff, *Private International Law* (2nd ed., 1950), p. 254.

³ Riezler, *Internationales Zivilprozessrecht* (1949), p. 552.

⁴ Ibid.

⁵ Ibid.

⁶ Wolff, op. cit. (n. 2 on this page), p. 254.

⁷ (1895), 159 U.S. 113, 218–27.

⁸ Nadelmann, *American Journal of Comparative Law*, 13 (1964), pp. 72, 78. The distinction between retaliation and reciprocity was emphasized in *Hilton v. Guyot* (1895), 159 U.S. 113, 228.

⁹ *Travers v. Holley*, [1953] P. 246; *Robinson-Scott v. Robinson-Scott*, [1958] P. 71. See, generally, Nussbaum, *Columbia Law Review*, 41 (1941), p. 221. Holleaux, *Compétence du juge étranger et reconnaissance des jugements* (1970), argues that recognition of foreign judgments should not be limited by this requirement; his argument, which is couched almost entirely only in terms of French law, was followed by the Paris Court of Appeal in 1971 (*Journal de droit international*, 100 (1973), p. 239), but most French judgments are incompatible with it.

the defendant abroad, but they refuse to enforce judgments of a foreign court given in similar circumstances.¹ The position is the same in many Commonwealth countries.² As Wolff says, 'every State is inclined to concede to its own courts a wider jurisdiction than it is prepared to recognize in foreign courts, and no rule of international law prevents States from establishing such discordance'.³

Secondly, States sometimes claim exclusive jurisdiction over certain kinds of case, and the result of this is that they refuse to recognize the jurisdiction or judgments of foreign courts in such cases.⁴ Most States claim that their own courts have exclusive jurisdiction over land situated in their own territory, and continental courts often claim exclusive jurisdiction in specialized types of case (e.g. insurance, labour law and patents),⁵ but often claims to exclusive jurisdiction are more far-reaching. The French ordinance of 1629 which forbade the execution in France of foreign judgments against French nationals was based on the idea that French courts had exclusive jurisdiction over French nationals;⁶ a similar rule exists in France to this day.⁷ Swiss courts have exclusive jurisdiction over personal actions against persons domiciled in the canton in question.⁸ Hungarian courts claim exclusive jurisdiction in divorce cases if either party is a Hungarian national.⁹ A somewhat similar rule exists in Yugoslavia,¹⁰ which also claims exclusive jurisdiction in succession cases over immovables in Yugoslavia and over movables left abroad by Yugoslav nationals.¹¹ In France a *clause compromissoire* conferring jurisdiction on French courts is regarded as ousting the jurisdiction of foreign courts.¹²

The practice outlined in the preceding pages suggests that the recognition and enforcement of foreign judgments are marked by so many inconsistencies that it is virtually impossible to argue that recognition and enforcement are required by public international law.

¹ *Schibby v. Westenholz* (1870), L.R. 6 Q.B. 155.

² Read, *Recognition and Enforcement of Foreign Judgments* (1938), pp. 138-9; *Sharpes Commercials Ltd. v. Gas Turbines Ltd.*, [1956] N.Z.L.R. 819.

³ Wolff, *Private International Law* (2nd ed., 1950), p. 53.

⁴ German courts do not recognize foreign judgments if, under German private international law, a German court or a court of a third State had exclusive jurisdiction: von Mehren and Trautman, *Harvard Law Review*, 81 (1968), pp. 1601, 1611-12. A similar rule exists in Poland (*Journal de droit international* (1966), p. 557), and (where Czechoslovak courts claim exclusive jurisdiction) in Czechoslovakia (*ibid.*, p. 802).

⁵ Weser, *American Journal of Comparative Law*, 10 (1961), pp. 323, 337-8.

⁶ Holleaux, *op. cit.* (above, p. 237 n. 9), p. 204.

⁷ Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 425.

⁸ Fragistas, *Recueil des cours*, 104 (1961), pp. 165, 228-9. A similar rule exists in France: Batiffol, *op. cit.* (in the preceding note), p. 426.

⁹ Szászy, *Private International Law in the European Peoples' Democracies* (1964), pp. 353, 355.

¹⁰ Katičić, *Recueil des cours*, 131 (1970), pp. 393, 475-7; also in Poland: *Journal de droit international* (1966), p. 557.

¹¹ Katičić, *loc. cit.* (in the preceding note), p. 483. Poland claims exclusive jurisdiction over the succession of a Polish national who dies in Poland: *loc. cit.* (in the preceding note), p. 557.

¹² Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 425.

Diplomatic protests

Treaties are often made for the mutual recognition and enforcement of judgments, and the only diplomatic dispute concerning the enforcement of judgments which has ever come before an international tribunal concerned the interpretation of a treaty for the reciprocal enforcement of judgments.¹ On one occasion the United Kingdom protested against the non-recognition of an English judgment, on the grounds that non-recognition was contrary to 'comity' and 'general usage'; the protest was not based explicitly on international law.² In 1888 the United States protested against a French refusal to recognize a United States naturalization judgment, on the grounds that judgments entered by a competent court 'are ubiquitous in their effect';³ here again, the protest was based on general usage rather than on international law, and in any case laws and judgments concerning nationality are really in a class of their own.⁴ In 1910 the United States described the 'general rule that judgments secured in one country are, as a matter of comity, enforced in the other country' as 'a rule well recognized in international law'.⁵ This statement appeared in a *tu quoque* reply to a German complaint that United States courts discriminated against Germans; the German complaint was not based on international law, and the United States did not press the accusation that German non-enforcement of United States judgments was contrary to international law. In any case, the reference to comity⁶ may suggest that 'international law' here meant private international law.

Prize courts

As we have seen, there is little evidence to suggest that recognition and enforcement of foreign judgments are required by public international law, and a good deal of evidence to suggest that they are not. But prize courts may constitute an exception. Some of the dicta concerning prize judgments are inconclusive. For instance, in *The Odessa* the Privy Council said: 'As the right to seize is universally recognized, so also is the title which the

¹ *Italy v. Peru* (1903), R.I.A.A., 9 (1959), p. 79.

² Stevenson, *Columbia Law Review*, 52 (1952), pp. 561, 585-6. In this case the United Kingdom was arguing that the court of the decedent's last domicile had exclusive jurisdiction to determine the validity of a will of movables. But this view, although supported by Vattel (*The Law of Nations*, Book 2, s. 85), does not reflect the practice of English courts: *Dicey and Morris on the Conflict of Laws* (8th ed., 1967), rules 87, 95, 97. See also above, p. 238 at n. 11.

³ *Foreign Relations of the U.S.* (1888), vol. 1, p. 511.

⁴ See above, pp. 216-17.

⁵ *Foreign Relations of the U.S.* (1910), p. 522.

⁶ The statement was made fifteen years after the Supreme Court's decision in *Hilton v. Guyot*, where the Court said that foreign judgments were enforced as a matter of comity, and interpreted comity to mean something less than an obligation imposed by public international law. See above, p. 236.

judgment of the Court creates. The judgment is of international force. . . .¹ Is this a statement of fact (judgments are recognized) or of law (judgments must be recognized)? The Italian Prize Tribunal was more forthright in *The Polinnia*, when it said that judgment gives the capturing State a title 'which other States must recognize in the sphere of their municipal law in obedience to a duty imposed by international law'.² Similar views were expressed by Phillimore in a Law Officer's opinion,³ and a Netherlands court held that international law forbade the Netherlands courts to question a decision of a German prize court, even if it was contrary to international law.⁴ On the other hand, Heffter believed that States were under no duty to recognize titles created by foreign prize court decisions.⁵

If international law does require States to recognize foreign prize court decisions, this can best be explained as an exception to the general rule which does not require recognition or enforcement of foreign judgments,⁶ and it can be justified by the special functions which the laws of war confer on prize courts.

4. THE ACT OF STATE DOCTRINE

Where the defendant is a servant or agent of a foreign State

An individual cannot be sued or prosecuted in one State for acts of war committed on behalf of another State; the place where the act was committed is irrelevant.⁷ This rule of international law protects not only members of the armed forces, but also civilians in certain circumstances, e.g. if a civilian burns crops on military orders in order to prevent the crops' falling into the hands of advancing enemy forces.⁸ The same rule probably applies to hostilities falling short of war,⁹ although some authorities deny this.¹⁰

¹ [1916] 1 A.C. 145, 154. See also *Dobree v. Napier* (1836), 132 E.R. 301, 306, and *The Cysne* (1930), R.I.A.A., 2 (1949), p. 1050.

² (1941), *Annual Digest*, 1943-45, pp. 490, 492-3.

³ McNair, *International Law Opinions* (1956), vol. 3, p. 74.

⁴ *De Hoop* (1921), *Annual Digest*, 1919-22, p. 489. This judgment may be influenced by the exaggerated ideas which Netherlands courts have of the act of State doctrine; see below, p. 248.

⁵ *Le droit international public de l'Europe* (4th French ed.), s. 172.

⁶ This is the view taken by Luigi Sico, *Toute prise doit être jugée* (1971), pp. 233-61.

⁷ Wright, *American Journal of International Law*, 39 (1945), pp. 257, 271-2; Holdsworth, *Columbia Law Review*, 41 (1941), pp. 1313, 1318. Cases which make exceptions to this principle (see below, p. 241 at nn. 3-6) expressly or impliedly acknowledge that the principle applies when the exceptions are not relevant.

⁸ *Ford v. Surget* (1878), 97 U.S. 594, 606. Note that in this case the enemy forces had not yet occupied the area in question. If they had already occupied it, the individual would have been a saboteur and would not have been protected by the rule: see below, p. 241 n. 2.

⁹ *MacLeod's case*, Moore, vol. 2, p. 25; *Commonwealth v. Blodgett* (1846), 12 Metcalf 56 (*obiter dicta* by Supreme Judicial Court of Massachusetts).

¹⁰ *Schooner Exchange v. McFaddon* (1812), 7 Cranch 116, 140 (*obiter*); *Re B.P.Z.S.* (1955), I.L.R., 22 (1955), p. 208 (but the defence of act of State was not pleaded).

There are, however, a number of exceptions. The act of State doctrine, as it is called, does not prevent charges of treason or similar crimes being brought against persons who by reason of their nationality or residence owe allegiance to the adjudicating State.¹ Nor does it protect unprivileged belligerents, such as spies and saboteurs.² Above all, it does not protect those who are charged with war crimes,³ crimes against peace,⁴ crimes against humanity⁵ or genocide.⁶ On the other hand, a defendant who is not himself guilty of a crime against peace does not lose his immunity solely by reason of the fact that the war in which he is fighting is an aggressive war.⁷

The act of State doctrine is not limited to acts of war. In the *MacLeod* case the United Kingdom argued that international law prevented foreign courts from sitting in judgment on 'a public act of persons in Her Majesty's service, obeying the order of their superior authorities'.⁸ The Committee of Experts for the Progressive Codification of International Law stated in 1927 that 'the inability of courts to exercise jurisdiction in regard to a sovereign act of a foreign government . . . should apply where the defendant is sued personally for acts done by him in his capacity as a public official—though he no longer retains that capacity at the time of the proceedings—or under powers conferred upon him by a foreign State'.⁹ The rule that a diplomat is immune from proceedings in respect of his official acts after the expiry of his term of office is explained by several writers (and by members of the International Law Commission when discussing what later became the Vienna Convention) by saying that such acts are acts of State—in other words, the rule about diplomats is part of a wider rule about State servants in general.¹⁰

¹ *R. v. Neumann* (1946), *Annual Digest*, 1946, p. 239; *Mittermaier* (1946), *ibid.*, p. 69; *Public Prosecutor v. Drechsler* (1946), *ibid.*, p. 73; *Bittner* (1946), *ibid.*, p. 95; *Colman* (1947), *ibid.*, 1947, p. 139; *Public Prosecutor v. Koi*, [1948] A.C. 829; *Lamar v. Browne* (1876), 92 U.S. 187; Hackworth, vol. 2, p. 406. But see Elman, *International and Comparative Law Quarterly*, 18 (1969), p. 178.

² Baxter, this *Year Book*, 28 (1951), p. 323.

³ See the authorities cited above, p. 240 n. 7; *Goering* (1946), *Annual Digest*, 1946, pp. 203, 221–2.

⁴ *Goering*, *ibid.*; *Weizsaecker* (1949), *ibid.*, 1949, pp. 344, 348–9.

⁵ *Goering*, *loc. cit.* (n. 3 on this page), *Eichmann* (1961–2), I.L.R., vol. 36, pp. 44–8, 308–12; *State v. Schumann* (1966), *ibid.*, vol. 39, pp. 433, 438.

⁶ *Eichmann*, *loc. cit.* (above, in the preceding note).

⁷ *List* (1948), *Annual Digest*, 1948, pp. 632, 636–7 (see also pp. 412–22); Wright, *American Journal of International Law*, 39 (1945), pp. 257, 267; Kelsen, *International and Comparative Law Quarterly*, 1 (1947), pp. 153, 156 et seq.; H. Lauterpacht, this *Year Book*, 30 (1953), pp. 206, 218; Dunbar, *Juridical Review* (1963), pp. 246, 264–73; Oppenheim, *International Law* (7th ed., by H. Lauterpacht, 1952), vol. 2, pp. 218–20.

⁸ It is uncertain whether the United States thought that this principle should be limited to members of the armed forces (Moore, vol. 2, pp. 25, 29), but other incidents in United States practice make clear that the principle applies to civilian officials as well as to members of the armed forces (*ibid.* 23–4, 29). See also *Restatement, Second, Foreign Relations Law of the U.S.* (1965), s. 66 (f).

⁹ Cited by Kelsen, *California Law Review*, 31 (1943), pp. 530, 540.

¹⁰ Dinstein, *International and Comparative Law Quarterly*, 15 (1966), pp. 76, 82–7.

This view is confirmed by many decisions of municipal courts. In *Hatch v. Baez* a New York court said: 'The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of the sovereignty thereof, . . . has the sanction of the most approved writers on international law.'¹ A United States court held in *Lyders v. Lund* that such a suit is an action against the State itself, and must therefore be dismissed.² English courts have also dismissed such suits, but without clearly basing their decisions on international law.³ Australian,⁴ Belgian⁵ and French⁶ courts regard the rule as based on a form of sovereign immunity, and thus required by international law. The rule was not followed by the Supreme Court of Eire,⁷ nor in a decision of a Netherlands court of first instance in 1923;⁸ but the latter decision no longer represents the Netherlands law, since the Amsterdam Court of Appeal decided in *Republic of the South Moluccas v. Royal Packet Shipping Company* that international law prohibited the Netherlands courts from hearing actions against the servants or agents of a foreign State.⁹ It is not necessary that the defendant should be an official of the foreign State; the rule applies equally to commercial companies acting on behalf of the State.¹⁰

The application of the act of State doctrine to acts other than acts of war is, however, subject to a number of exceptions.

First, since it is an off-shoot of sovereign immunity, and since sovereign immunity probably no longer extends to acts *iure gestionis*, the servant or agent of a State cannot claim immunity in respect of acts *iure gestionis*.¹¹

Secondly, the French Court of Cassation held in *Brocard v. Brégante* that the doctrine does not apply when both parties are nationals of the State of the forum.¹² However, this exception is very doubtful. *Brocard v. Brégante* is the only case in which the question has even been mentioned, but there

¹ (1876), 7 Hun. 596, 600 (this was an action against a former President of the Dominican Republic in respect of his official acts). See also *Underhill v. Hernandez*, below, pp. 244-5.

² (1929), *Annual Digest*, 1929-30, p. 321.

³ *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781; *Carr v. Francis Times*, [1902] A.C. 176; *Twycross v. Dreyfus* (1877), 5 Ch. D. 605 (although the real point in this case was that the foreign government had an interest in property held by the defendant, as in *Frazier v. Hanover Bank* (1953), I.L.R. 20 (1953), p. 173).

⁴ *Grunfeld v. U.S.A.* (1968), 3 N.S.W. Reports 36; *Journal de droit international* (1970), p. 146.

⁵ *Urrutia and Amollobieta v. Martiarena* (1937), *Annual Digest*, 1935-37, p. 237.

⁶ Paris Court of Appeal, 23 August 1870; *Lakhowsky v. Swiss Federal Government* (1921), *Journal de droit international* (1921), p. 179; *Esnault-Pelterie v. The A. V. Roe Co., Ltd.* (1925), *ibid.* (1925), p. 702; Aix Court of Appeal, 30 December 1929, *Sirey* 1930. 2. 153; Dunbar, *Recueil des cours*, 132 (1971), pp. 197, 230-1; *Martin v. Bank of Spain* (1952), *Journal de droit international* (1953), p. 654.

⁷ *Saorstat and Continental Shipping Co. v. Rafael de la Morenas*, *Annual Digest*, 1943-45, p. 97.

⁸ *Advokaat v. Schuddink*, *ibid.*, 1923-24, p. 133.

⁹ (1951), I.L.R. 17 (1950), p. 143.

¹⁰ *Twycross v. Dreyfus*; *Esnault-Pelterie v. The A. V. Roe Co. Ltd.*; *Republic of the South Moluccas v. Royal Packet Shipping Company*; Dunbar, *Recueil des cours*, 132 (1971), pp. 197, 230-1.

¹¹ *Nashashibi v. Consul-General of France in Jerusalem* (1958), I.L.R., vol. 26, p. 190.

¹² (1875), Kiss, *op. cit.* (above, p. 147 n. 6), vol. 3, p. 261.

are several other cases where both parties had the nationality of the State of the forum, and yet the act of State doctrine was held to apply.¹

Thirdly, it is possible that the act of State doctrine does not apply to acts which are contrary to international law. The cases concerning war crimes and crimes against peace might be cited in this connection,² but most of them emphasize that the acts were *crimes* against international law, so it is doubtful whether they apply to breaches of international law which are not crimes against international law. It is true that there are cases of other breaches of international law where the act of State doctrine was not applied, but the point we are discussing was not expressly mentioned in these cases, and the cases can be explained on a different ground.³ In the *Macleod* case the New York court and Senator Calhoun thought that Macleod was not entitled to immunity because the United Kingdom's act was contrary to international law,⁴ but Webster, the United States Secretary of State, considered that Macleod was entitled to immunity even though the United Kingdom had broken international law.⁵ In *Republic of the South Moluccas v. Royal Packet Shipping Company* the Amsterdam Court of Appeal held that international law required the application of the act of State doctrine even in the case of acts which were contrary to international law.⁶ It is much better that the injured State should pursue a claim for compensation against the wrong-doing State, instead of punishing an individual who probably knows nothing about international law and who probably genuinely believed that he was doing his duty for the wrong-doing State.

Fourthly, it would seem that the act of State doctrine does not apply to acts done on the territory of the adjudicating State,⁷ unless the action is for

¹ *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781; *Carr v. Francis Times*, [1902] A.C. 176; Aix Court of Appeal, 30 December 1929, Sirey 1930. 2. 153.

² See above, p. 241.

³ *Kämpfer v. Public Prosecutor of Zürich* (1939), *Annual Digest*, 1941-42, p. 6; *Iseli v. Public Prosecutor of Zürich* (1954), I.L.R., vol. 21 (1954), p. 80 (*obiter*). See below, n. 7 on this page.

⁴ This view is approved by Wharton, *Digest of International Law* (1887), vol. 1, p. 67.

⁵ Pitt Cobbett, *Cases and Opinions on International Law* (3rd ed., 1909), vol. 1, p. 83. The United Kingdom did not use this argument because it was not prepared to concede that it had broken international law. See, generally, Moore, vol. 2, pp. 24-30.

⁶ (1951), I.L.R. 17 (1950), p. 143. See below, pp. 248-9.

⁷ There are a large number of cases which can only be explained on this ground, although the point was not explicitly discussed in most of them: *R. v. Leslie* (1860), 8 Cox C.C. 269; *Vavasour v. Krupp* (1878), 9 Ch. D. 351, 355, 358; *Szalatnay-Stacho v. Fink*, [1947] K.B. 1; *U.S.A. and Republic of France v. Dollfus Mieg et Cie. S.A.*, [1952] A.C. 582; *U.S. v. Deutsches Kalisyndikat Gesellschaft* (1929), 31 F. 2d 199; *U.S. v. Sisal Sales Corporation* (1927), 274 U.S. 268, as interpreted in *Continental Ore Co. v. Union Carbide and Carbon Corp.* (1962), 370 U.S. 690, 705; *Wright v. Cantrell* (1944), *Annual Digest*, 1943-45, p. 133 (Australia); *Kämpfer v. Public Prosecutor of Zürich* (1939), *ibid.*, 1941-42, p. 6 (Switzerland); *Iseli v. Public Prosecutor of Zürich* (1954), I.L.R., vol. 21 (1954), p. 80 (Switzerland); *Mesdag v. Heyermans* (1898), *Journal de droit international* (1899), p. 618 (Belgium). *Contra*, *Esnault-Pelterie v. The A. V. Roe Co. Ltd.* (1925), *ibid.* (1925), p. 702 (France). The *Macleod* case can be distinguished on the grounds that it involved an act of war. See also *Hatch v. Baez*, above, p. 242.

breach of a contract made with the foreign State.¹ There do not appear to be any cases about acts done in the territory of a third State.

However, by allowing officials of another State to act on his territory, the sovereign is sometimes regarded as having by implication granted them certain immunities (which may include immunity from proceedings in respect of official acts); the immunities are based on an obligation not to derogate from his grant of a right of entry.² The rules concerning diplomatic and consular immunities are well established, but even here it should be noticed that immunities are based, not on the appointment by the sending State, but on the recognition of the appointment by the receiving State;³ consequently, a consul enjoys immunity only in respect of his consular functions, not in respect of other functions which he performs on behalf of the sending State.⁴ The position with respect to other types of officials is less clear. When an agent of one government is received in the territory of another for specific purposes and given specific immunities by inter-governmental agreement, this implies that he is entitled to no other immunities.⁵ Some cases imply that there is no immunity unless it is expressly conferred by treaty,⁶ although in one case a French court swung to the opposite extreme by holding that members of a government in exile had the same immunities as an Ambassador.⁷ The rules of customary international law governing visiting forces are particularly controversial.⁸

Where the defendant is not a servant or agent of a foreign State

The judgments in some of the cases brought against servants or agents of a foreign State contain sweeping *obiter dicta*. For instance, in *Hatch v Baex* it was said: 'By the . . . established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another State done within its own territory.'⁹ In *Underhill v.*

¹ *Grunfeld v. U.S.A.* (1968), *ibid.* (1970), p. 146 (Australia); *Lakhowsky v. Swiss Federal Government* (1921), *ibid.* (1921), p. 179 (France); Hackworth, vol. 2, p. 472; *Twycross v. Dreyfus* (1877), 5 Ch. D. 605; Nancy Court of Appeal, 31 August 1871, Sirey 1871. 2. 129; Aix Court of Appeal, 30 December 1929, Sirey 1930. 2. 153; Tribunal civil de la Seine, 31 January 1949, *Journal de droit international* (1946-49), p. 4.

² *The Schooner Exchange v. M'Faddon* (1812), 7 Cranch 116.

³ Dinstein, *International and Comparative Law Quarterly*, 15 (1966), pp. 76, 87-9; *Heirs of Shababo v. Heilen* (1953), I.L.R. 20 (1953), p. 391.

⁴ Beckett, *this Year Book*, 21 (1944), pp. 34, 49.

⁵ *Fenton Textile Association v. Krassin* (1921), 38 T.L.R. 259.

⁶ *Polish Officials in Danzig* (1932), *Annual Digest*, 1931-32, p. 130; *Mesdag v. Heyermans*, *Journal de droit international* (1899), p. 618.

⁷ President of the Civil Tribunal, Le Havre, 13 April 1915, Dalloz, 1915. 5. 3. *Contra*, *Szalatnay-Stacho v. Fink*, [1947] K.B. 1. See also *Re Amand*, [1941] 2 K.B. 239; [1942] 1 K.B. 445.

⁸ Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 354-8.

⁹ (1876), 7 Hun. 596, 599. This rule only applies to acts done by a State within its own territory; it does not apply to acts done by a State as a belligerent occupant (*State of the Netherlands v. Federal Reserve Bank* (1951), I.L.R. 18 (1951), pp. 558, 564; *contra*, *Papadopoulos case*, *Annual Digest*, 1925-26, p. 27, and *ibid.*, 1927-28, p. 34), or in the State of the forum (*Victory*

Hernandez the United States Supreme Court said: 'Every State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.'¹

These dicta have been followed and applied in many cases where the defendant was not a servant or agent of a foreign State. But there is an essential difference between the two groups of cases. Where the defendant is a servant or agent of the foreign State, the act of State doctrine protects him because that doctrine is a corollary of sovereign immunity; the immunity of the State extends to its servants and agents. But there can be no reason for extending the immunity of the State to private individuals or companies who buy expropriated property from the expropriating State² or to other persons who are not servants or agents of the State. There are also other differences. In actions brought against servants or agents of the State, the court merely holds that their immunity prevents the case's being tried; in actions brought against purchasers of expropriated property, the court usually holds, not that they have immunity, but that they have a good title to the property. Appearance by a State as plaintiff is usually regarded as a waiver of immunity, but in the *Sabbatino* case the United States Supreme Court held that the act of State doctrine prevents the court's questioning the legality of expropriation even when the expropriating State is the plaintiff.³ In all these respects the act of State doctrine has been divorced from the principle of sovereign immunity which was its original logical basis.

Almost all of the cases concern expropriation of property. In most countries courts are reluctant to question expropriations in foreign States; but there is little evidence that this reluctance is motivated by a belief that international law requires States to recognize the validity of acts of other States, and in some countries courts have made far-reaching exceptions to the general practice of recognition.

United States courts have been particularly firm in holding that they cannot question acts of foreign States. Such acts cannot be questioned on

Transport case (1963), *International Legal Materials*, 3 (1964), pp. 1030, 1044-45). Nor, according to the *Victory Transport* case, does it apply to the trading activities of the State.

¹ (1897), 168 U.S. 250, 252.

² Almost all of the cases where the act of State doctrine has been applied (apart from cases involving servants or agents of the State) fall into this category. The main exceptions are *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398 (where the State appeared as plaintiff to enforce an expropriatory decree), *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347 (where the plaintiff alleged that the defendant had induced a foreign State to interfere with and seize the plaintiff's property) and *Occidental Petroleum Corp. v. Buttes Gas and Oil Co.* (1971), *American Journal of International Law*, 65 (1971), p. 815 (similar); see also the cases referred to below, p. 248, n. 7, and p. 249 nn. 1, 2, 4, 5.

³ (1964), 376 U.S. 398. Cf. Verzijl, *International Law in Historical Perspective* (1968), vol. 1, p. 169.

the grounds that they are contrary to the law of the State concerned¹ or (probably) that they are contrary to international law,² although the effect of the judicial decisions on this latter point has been partially reversed by Act of Congress.³ New York courts have refused to recognize foreign confiscatory decrees on the grounds that they are contrary to New York public policy,⁴ although state courts are supposed to follow Federal rules on this subject.⁵ One or two cases state that the act of State doctrine is a rule of international law (for instance, in *National Institute of Agrarian Reform v. Terry Kane* a Florida court said that to declare invalid a Cuban expropriation 'would be a denial of the sovereignty of a foreign State'),⁶ but this view was rejected by the Supreme Court in the *Sabbatino* case.⁷ Instead, the Supreme Court regarded the doctrine as based on 'constitutional underpinnings'; the executive had primary responsibility for foreign relations, and pronouncements by the judiciary might impede the efforts of the executive to reach a satisfactory settlement with the foreign State.⁸ Logically, therefore, the doctrine should not apply when the State Department requests the Court not to apply it; this exception was laid down by the Court of Appeals for the Second Circuit in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*⁹ and approved *obiter* by the Court of Claims in *Wyman v. U.S.*,¹⁰ but disapproved by a majority of the Supreme Court in *First National City Bank v. Banco Nacional de Cuba*.¹¹

Courts outside the United States also usually recognize foreign expropriations, sometimes by relying on the act of State doctrine, sometimes by relying on ordinary rules of private international law. There is seldom any suggestion that recognition of foreign expropriations is required by public international law.

English courts usually recognize foreign expropriations.¹² The dictum in *Underhill v. Hernandez*¹³ has been quoted with approval in at least two

¹ *Columbia Law Review*, 62 (1962), pp. 1278, 1291.

² *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, and the earlier cases mentioned *ibid.* 430-1; *Bernstein v. van Heyghen Frères* (1947), *Annual Digest*, 1947, pp. 11, 14.

³ *American Journal of International Law*, 59 (1965), p. 899.

⁴ *Vladikavkazsky Railway v. New York Trust Co.* (1934), *Annual Digest*, 1933-34, p. 65; *Plesch v. Banque Nationale de la République d'Haiti* (1948), *ibid.*, 1948, p. 13; *Sulyok v. Penzintezeti Kozpont Budapest* (1952), I.L.R. 19 (1952), p. 11.

⁵ *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 424-5.

⁶ (1963), 153 So. 2d 40. See also the dicta in *Hatch v. Baez* and *Underhill v. Hernandez*, above, pp. 244-5.

⁷ (1964), 376 U.S. 398, 421. Justice White, who dissented, agreed with the other judges on this point: *ibid.* 444. The same view was taken by the courts below, by most commentators and by the general opinion of the legal profession: see, for instance, *Restatement, . . . Foreign Relations Law of the U.S.* (1965), p. 123.

⁸ 376 U.S. 398, 423, 431-3.

⁹ (1954), 210 F. 2d 375.

¹⁰ (1958), I.L.R., vol. 26, pp. 29, 30.

¹¹ (1972), *International Legal Materials*, 11 (1972), p. 811. The Court divided 5-4; three of the majority supported the *Bernstein* exception; the four dissenting judges and one (possibly both) of the concurring judges condemned it.

¹² *Halsbury's Laws of England* (3rd ed., 1954), vol. 7, pp. 282-5.

¹³ See above, pp. 244-5.

English cases,¹ and Scrutton L.J. in *Luther v. Sagor* reasoned by analogy from the principle of sovereign immunity,² which might suggest that the act of State doctrine was required by public international law; but the approach of Bankes L.J. in *Luther v. Sagor*, which treated the question as one of private international law and not of public international law, probably represents the mainstream of English authority.³ The expropriation can be challenged on the grounds that it is contrary to English public policy⁴ if it is penal or discriminatory,⁵ but probably not if the only ground for complaint is that compensation has not been paid.⁶

Two French cases state that the act of State doctrine is a rule of public international law,⁷ but most French decisions recognizing foreign expropriations make no mention of public international law.⁸ The expropriation will be regarded as contrary to French public policy and will be denied recognition if fair compensation is not paid (or at least fixed) in advance.⁹ This, for all practical purposes, makes nonsense of the idea that recognition is required by international law, since it excludes recognition in virtually the only class of case where the former owner is likely to challenge the expropriation; the exception destroys the rule.

Confiscatory expropriations are also regarded as contrary to public policy in Switzerland.¹⁰ Most German decisions on this point take the opposite view,¹¹ but confiscations which discriminate against people because of their nationality are contrary to public policy.¹²

¹ *Luther v. Sagor*, [1921] 3 K.B. 532, 548-9, per Warrington L.J.; *Princess Olga Paley v. Weisz*, [1929] 1 K.B. 725, 728, per Scrutton and Sankey L.JJ.

² [1921] 3 K.B. 532, 555-6. This reasoning is fallacious: Lipstein, *Transactions of the Grotius Society*, 35 (1949), pp. 157, 159-60; *Banco Nacional de Cuba v. Sabbatino* (1964), 376 U.S. 398, 438; and see above, p. 245.

³ Lipstein, loc. cit. (n. 2 above), *passim*, esp. pp. 158-9. See also *Bank voor Handel en Scheepvaart N.V. v. Slatford* (1951), I.L.R. 18 (1951), p. 171; *Re Helbert Wagg*, [1956] Ch. 323.

⁴ Lipstein, loc. cit. (n. 2 on this page), p. 160.

⁵ *Re Helbert Wagg*, [1956] Ch. 323.

⁶ *Ibid.*, disapproving *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 W.L.R. 246. Note that the argument in the latter case was that expropriation of foreign-owned property is contrary to international law if compensation is not paid. In *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489, and *Republic of Peru v. Dreyfus Brothers Co.* (1888), 38 Ch. D. 348, English courts refused to give effect to the law of a new foreign government invalidating contracts made by the old government, because such laws were contrary to the rules of international law on governmental succession.

⁷ *Lafuente v. Ilaguno y Duranona* (1938), *Annual Digest*, 1938-40, p. 152 (Bordeaux Court of Appeal); *Larrasquitu and the Spanish State v. Société Cementos Rezola* (1937), *ibid.*, 1935-37, p. 196 (according to the judgment at first instance; this dictum does not appear in the judgment of the Poitiers Court of Appeal).

⁸ *Restatement, Second, Foreign Relations Law of the U.S.* (1965), pp. 134-5.

⁹ Batiffol, *Droit international privé* (5th ed., 1971), vol. 2, p. 151.

¹⁰ *American Journal of Comparative Law*, 3 (1954), pp. 88-9.

¹¹ I.L.R. 18 (1951), pp. 197-201; *Journal de droit international* (1929), p. 184; and see the *Bremen Tobacco* case, below, p. 247. A different view was taken by the Superior Court of Hamburg in *Sociedad Minera el Teniente S.A. v. A.G. Norddeutsche Affinerie*, *International Legal Materials*, 12 (1973), p. 251.

¹² *Annual Digest*, 1949, p. 25; *ibid.*; 1948, p. 24; *American Journal of Comparative Law*, 3 (1954), p. 93.

Italian courts approach foreign expropriations in terms of private international law, not in terms of the act of State doctrine. The expropriation will be recognized if it is lawful under the *lex situs*, unless it is contrary to Italian public policy,¹ and it will be regarded as contrary to Italian public policy if it makes no provision for compensation.²

Austrian courts apply the act of State doctrine³ unless the act is contrary to Austrian public policy (e.g. confiscation of a discriminatory nature).⁴ There is no suggestion that recognition of the act is required by public international law.

In the *Anglo-Iranian Oil Co.* case Japanese courts said that they could not refuse recognition to nationalizations which were contrary to international law; it is uncertain whether they meant that recognition was required by international law, although they added *obiter* that they could refuse effect to laws which were contrary to Japanese public policy.⁵

Belgian courts apply the act of State doctrine,⁶ without holding that it is required by international law.⁷ But a foreign expropriation which is discriminatory and does not provide for compensation is contrary to Belgian public policy and will not be recognized.⁸

The Netherlands courts are particularly strict in upholding the act of State doctrine. A number of judgments say that it is a rule of public international law.⁹ At one time it was held that international law obliged the Netherlands courts to recognize foreign acts of State even if they were

¹ *Vaghi v. Reichsbank* (1939), *Annual Digest*, 1938-40, p. 153.

² *Journal de droit international* (1924), p. 254 (reversed on a different ground: *Adriaanse, Confiscation in Private International Law* (1956), p. 62); *Hardtmuth case* (1960), I.L.R., vol. 40, pp. 17, 20 (Court of Cassation). In *Anglo-Iranian Oil Co. Ltd. v. SUPOR* (1953), *ibid.*, vol. 22, pp. 19, 23, Italian courts were satisfied with vague promises of compensation.

³ (1922), *Annual Digest*, 1919-22, p. 56.

⁴ *Hardtmuth case* (1958), I.L.R., vol. 26, pp. 40-1.

⁵ (1953), *ibid.* 20 (1953), pp. 305, 309, 313. Japanese public policy seems to be much the same as Italian public policy; see above, n. 2 on this page.

⁶ *Propetrol case* (1939), *Annual Digest*, 1938-40, p. 25.

⁷ In the *Bauffremont* case the court of first instance held that public international law required Belgian courts to recognize foreign naturalizations (*Journal de droit international* (1880), p. 215); the Brussels Court of Appeal rejected this view and reversed the decision (*ibid.*, p. 508). (In any case, questions of nationality are in a class of their own; see above, p. 217). In *Société du gaz de Nice v. De Loch-Labye (La Belgique judiciaire)* (1896), p. 955, a court of first instance held that the principle of sovereignty prevented a Belgian court from investigating whether a patent issued by France was invalid under French law. But, as a general rule, foreign patents are not recognized at all (*Dicey and Morris on the Conflict of Laws* (8th ed., 1967), pp. 929-30), and there is little difference between not recognizing a patent and holding it to be invalid. In any case how could the application of French law by a Belgian court be construed as a violation of French sovereignty?

⁸ *Kovacs case*, *Revue belge de droit international* (1970), p. 699; Brussels Court of Appeal, 14 October 1967, *Revue de droit international et de droit comparé*, 45 (1968), p. 247. See also *Revue belge de droit international*, 9 (1973), p. 658 (*Rousseau case*).

⁹ *Pétroservice S.A. and Crédit minier franco-roumain S.A. v. El Aguila* (1939), *Annual Digest*, 1919-42, p. 17; see also the cases mentioned in the next note and *Nederlands Tijdschrift voor Internationaal Recht* (1966), p. 58. *Contra*, the *Papadopoulos case* (1928), *Annual Digest*, 1927-28, p. 34.

contrary to international law,¹ although these cases have now been overruled by the *Hoge Raad*.² The Netherlands courts cannot investigate whether the act was contrary to the law of the foreign State,³ but they can refuse recognition if the act is contrary to the Netherlands public policy. In recent years the *Hoge Raad* has held that an act of expropriation is contrary to the Netherlands public policy and will be refused recognition if it discriminates against the Netherlands nationals,⁴ or if it is not accompanied by compensation.⁵ Since the original owner of the property is unlikely to challenge the expropriation if he has received compensation, the result of these exceptions is to make the act of State doctrine a dead letter, as far as the Netherlands courts are concerned.

In short, municipal judgments do not provide a clear answer to the question whether international law requires the application of the act of State doctrine in cases where the defendant is not a servant or agent of the State. The United States Supreme Court answered the question in the negative in the *Sabbatino* case; some other judgments answer the question in the affirmative, but most judgments do not deal with the question at all. Although courts do normally recognize foreign expropriations, there are exceptions. In particular, if recognition is refused (as it is in some countries) whenever fair compensation is not paid, the exception swallows up the rule, because this is virtually the only type of case where the original owner is likely to challenge the expropriation.

Doctrinal opinion does not support the view that application of the act of State doctrine is required in cases where the defendant is not a servant or agent of the State.⁶ International judicial and arbitral decisions are silent. States hardly ever⁷ protest against the non-recognition of their acts by the courts of another State. (This is worth emphasizing, because municipal judges have often based the act of State doctrine on the need not to offend foreign States;⁸ Scrutton L.J. in *Luther v. Sagor* went so far as to say that non-recognition of a foreign act of State might be a *casus belli*!⁹

¹ *Poortensdijk Ltd. v. Soviet Republic of Latvia* (1942), 11 *ibid.*, 1919-42, pp. 142, 143 (*obiter*); *Lesser v. Rotterdamsche Bank* (1953), I.L.R. 20 (1953), pp. 57, 60 (affirmed *sub nom. Kling v. Lesser* (1955), *ibid.* 22 (1955), p. 101); *Republic of the South Moluccas v. Royal Packet Shipping Company* (1951), *ibid.* 17 (1950), pp. 143, 152 (*obiter*). It is hard to believe that such a dysfunctional rule could be a rule of international law.

² *U.S.A. v Bank voor Handel en Scheepvaart* (1969), *International Legal Materials*, 9 (1970), p. 758, following *Bank Indonesia v. Senembah Maatschappij and Twentsche Bank* (1959), I.L.R., vol. 30, p. 28 (Amsterdam Court of Appeal).

³ The *Poortensdijk* case presumably still represents Netherlands law on this point.

⁴ *Indonesian Corporation P. T. Escomptobank v. N. V. Assurantie Maatschappij de Nederlanden van 1845* (1964), *Nederlands Tijdschrift voor International Recht*, 13 (1966), pp. 58, 68.

⁵ *Zeiss case* (1957), *American Journal of Comparative Law*, 7 (1958), p. 287.

⁶ I.L.A. (1962), p. xiv; Lipstein, *Transactions of the Grotius Society*, 35 (1949), p. 157; Mann, *Law Quarterly Review*, 59 (1943), p. 42.

⁸ e.g. *Oetjen v. Central Leather Co.* (1918), 246 U.S. 297, 303-4.

⁹ [1921] 3 K.B. 532, 559.

⁷ Below, p. 250 n. 1.

The truth is that States are not so sensitive on this point as judges believe.) Indeed, there is virtually¹ nothing in the practice of governments to support the view that international law requires the application of the act of State doctrine in cases where the defendant is not a servant or agent of the State.

Moreover, such a view would be unsound as a matter of principle. International law probably does not require the application of foreign laws or the recognition of foreign judgments.² Why should an act of State be treated differently? Because it 'involves the interests of a State as a State'?³ But this is an argument which cuts both ways. At one time it was believed in France that political laws, simply because they were political laws, should not be applied by foreign courts. This view has lost favour now, but only because of the difficulty of defining political laws.⁴ The fact remains that criminal and revenue laws, which involve the interests of the State to a far greater extent than rules of 'private' law do, are much less likely to be applied by foreign courts than the latter.

Since States are independent of one another, it would be a breach of international law for a court of one State to address an order to another State or to annul an act of another State.⁵ Thus, in *Buck v. Attorney-General*⁶ the English Court of Appeal dismissed an action claiming a declaration that the Constitution of Sierra Leone was void; and the French Court of Cassation has held that it would be a violation of the sovereignty of a foreign State if a French court were to annul the attachment of property situated within that foreign State when the attachment had been ordered by a court of that State.⁷ But a court which refuses to recognize a foreign expropriation does not really seek to annul the expropriation (despite unfortunate language in some cases about treating the expropriation as invalid); it merely holds, in effect, that the expropriation has no effect in the State of the forum,⁸ so that the original owner of the property can recover it when it is brought into the State of the forum.⁹

¹ The only exception appears to be a debate in the U.N.C.T.A.D. Trade and Development Board in 1972, when certain Latin American countries argued that application of the act of State doctrine was required by public international law in expropriation cases; the Board passed a resolution which might be interpreted as supporting this view. See *Journal of World Trade Law*, 7 (1973), p. 376.

² See above, Part IV, sections 2 and 3, pp. 216-40.

³ This is the definition of an act of State given by the *Restatement, Second, Foreign Relations Law of the U.S.* (1965), p. 127.

⁴ Munch, *Recueil des cours*, 98 (1959), pp. 415, 443, 450.

⁵ But a State is under a duty to rescind its acts if they are contrary to international law (*Chorzów Factory* case (1928), *P.C.I.J.*, Series A, No. 13, p. 47) and there is nothing wrong in the court of one State calling upon another State to fulfil an already existing obligation.

⁶ [1965] Ch. 745.

⁷ *Sirey* 1932. I. 137. See also *Journal de droit international* (1886), pp. 343, 348 and (1899), pp. 346, 348; but cf. *ibid.* (1890), p. 348. When an English court issues injunctions to persons concerning their conduct abroad, it often emphasizes that it is not addressing the injunction to the authorities of a foreign State (e.g. *Ellerman Lines v. Read*, [1928] 2 K.B. 144).

⁸ Similarly when a court refuses to enforce a foreign judgment: Nussbaum, *Principles of Private International Law* (1943), pp. 246-7.

⁹ This distinction, elaborated by Fedozzi, *Recueil des cours*, 27 (1929), pp. 145, 200 et seq.,

Expropriation of property owned by nationals abroad

It is lawful for a State to pass a law expropriating property owned by its nationals abroad,¹ but a State is not entitled to take possession by force of property situated in other States.² Expropriating States have therefore often tried to enforce such laws in the courts of the State of the *situs*. Such attempts have invariably failed,³ except when the government of the State of the *situs* had by implication agreed to give effect to the expropriatory legislation,⁴ or when a State had vested property in a custodian of enemy property in order to prevent assets situated in an allied State from falling under enemy control.⁵ If a State is under no duty to recognize expropriation of property situated in the expropriating State, it must *a fortiori* be under no duty to recognize expropriation of property situated on its own territory.

This question arose at the end of the Second World War, when the allied powers occupying Germany tried to persuade neutral States to surrender German-owned assets situated in neutral States. The United Kingdom told the United States that no government could claim that foreign States were obliged by international law to hand over assets of that government's nationals.⁶ Switzerland took the same approach in its negotiations with the allies.⁷ Eventually Switzerland agreed to surrender German assets to the allies, but the preamble to the agreement between Switzerland and the allies recites that 'the Swiss Government stated that it was unable to recognize the legal basis of these [allied] claims but that it desired to contribute its share to the pacification and reconstruction of Europe'.⁸ In their negotiations with Sweden the allies argued that 'under principles of comity' the State of the *situs* should allow extraterritorial effect to expropriatory legislation 'in the absence of compelling reasons of public policy to the contrary and the presence of sound reasons in the reparation concept to the affirmative'; in addition to the ambiguity of comity,⁹ this sounds more like a policy argument than a legal argument. Sweden denied that she was under any legal obligation, and the agreement finally reached between

and restated by the Court of Venice in *Anglo-Iranian Oil Co. Ltd. v. SUPOR* (1953), I.L.R. 22 (1955), p. 19, has been overlooked in most of the municipal judgments applying the act of State doctrine. See, for instance, the dicta in *Underhill v. Hernandez*, quoted above, pp. 244-5, and in *National Institute of Agrarian Reform v. Terry Kane*, quoted above, p. 246.

¹ See above, p. 180.

² See above, p. 148.

³ There are at least fifty-nine such cases reported in the *International Law Reports*.

⁴ *U.S. v. Pink* (1942), 315 U.S. 203; *Brownell v. Sun Life Assurance Co. of Canada* (1954), I.L.R. 21 (1954), p. 39.

⁵ *Lorentzen v. Lydden* (1941), *Annual Digest*, 1941-42, p. 131; *Brown, Gow, Wilson et al. v. Beleggings-Societeit N.V.* (1961), I.L.R., vol. 42, p. 409. *Contra*, *Bank voor Handel en Scheepvaart N.V. v. Slatford* (1951), *ibid.* 18 (1951), p. 171.

⁶ *Foreign Relations of the U.S.* (1945), vol. 2, pp. 905-6.

⁷ *Ibid.*, p. 911.

⁸ Cmd. 6884 (1946).

⁹ See above, pp. 214-16.

Sweden and the allies contains neither a denial nor an admission of liability.¹ The agreement with Spain recites that Spain recognizes that the allies, as occupying powers in Germany, have 'no less authority than any previous German Government with respect to German subjects and their property in Spain'²—which leaves the question open. The Austrian Supreme Court held that inter-allied agreements about German assets in Austria had no effect in Austrian law.³

Several Soviet and Czech writers argue that international law obliges (capitalist) countries to give effect to laws enacted by other (communist) countries nationalizing the property of their nationals situated in the former (capitalist) countries.⁴ But communist governments have not apparently put forward such arguments in international negotiations. Indeed, the early Soviet nationalization decrees were interpreted by many Western courts as not being intended to apply to property situated abroad.⁵ Some, at least, of the agreements concluded between communist countries concerning nationalization are based on a strictly territorial principle.⁶ If the views of the Soviet and Czech writers were correct, a United States law nationalizing all assets owned by United States nationals in Cuba would have prevented Cuba from subsequently nationalizing those assets, since Cuba would be obliged to respect the United States law; the United States could have passed such a law for the sole purpose of preventing expropriation by Cuba. Such a state of affairs would obviously be unacceptable to any communist, and would run counter to the principle of local sovereignty over natural resources,⁷ but it is the inescapable logical conclusion of the views advocated by Soviet and Czech writers; what is sauce for the goose is sauce for the gander.

Is there a duty to withhold recognition from illegal acts?

Mann argues that international law imposes a duty on States to withhold recognition from the acts of other States which infringe the rights of third States.⁸ It is true that States often do withhold recognition from the illegal

¹ Cmd. 7241 (1947). See also Mann, this *Year Book*, 24 (1947), pp. 239, 249–50; *Department of State Bulletin* (1947), vol. 17, No. 421, p. 155.

² Cmd. 7535 (1948).

³ (1952), I.L.R. 19 (1952), p. 623.

⁴ Seidl-Hohenveldern, *American Journal of Comparative Law*, 7 (1958), p. 541.

⁵ This *Year Book*, 27 (1950), p. 362; *Journal de droit international* (1952), pp. 1140–2. The Soviet declaration cited in *U.S. v. Pink* (1942), 315 U.S. 203, 219–20, indicates that Soviet law was intended to apply to assets outside the Soviet Union, but it was concerned with the dissolution of Soviet corporations rather than with the nationalization of assets held abroad by individuals of Soviet nationality; in any case, it contained no suggestion that international law obliged other States to give effect to the Soviet law.

⁶ Drucker, *International and Comparative Law Quarterly*, 10 (1961), pp. 238, 247–8, and in *Law Times*, 229 (1960), pp. 279–80, 293–4.

⁷ See above, pp. 188–9.

⁸ *Law Quarterly Review*, 70 (1954), p. 181.

acts of other States,¹ but there is very little evidence that they regard themselves as under a duty to withhold recognition.

This question is of particular relevance to expropriation. The number of cases in which a court of one State has had to deal with the illegal expropriation by another State of property belonging to a national of a third State is very small (usually the dispossessed owner is a national of the expropriating State or of the State of the forum), but in at least four cases courts have recognized such expropriations.² In the *Bremen Tobacco* case the court carefully considered a plea that it was obliged by international law to withhold recognition, and rejected it.³

In some States illegal expropriations are recognized even when the victim is a national of the State of the forum.⁴ It is hardly likely that the courts of such States would give greater protection to the nationals of third States than they give to their own nationals; in other words, it seems reasonable to predict that they would follow the *Bremen Tobacco* case.

Practice in the case of illegal seizure by a belligerent occupant is rather different. Municipal courts are much more inclined to hold that a purchaser from the belligerent occupant does not have a good title,⁵ and this applies equally in cases where the national State of the original owner or the State where the seizure occurred is not the State of the forum.⁶ There is a good deal of doctrinal support for the view that international law requires non-recognition of the occupant's title,⁷ but this view is supported by only one dictum in a municipal judgment,⁸ with other municipal decisions going the

¹ Ibid., pp. 186 et seq.

² *Propétrol and others v. Compania Mexicana de Petroleo* (1939), *Annual Digest*, 1938-40, p. 25; *Anglo-Iranian Oil Co. Ltd. v. Idemitsu Kosan Kabushiki Kaisha* (1953), I.L.R. 20 (1953), pp. 305, 309, 313; *N.V. Verenigde Deli-Maatschappij v. Deutsche Indonesische Tabak-Handels-gesellschaft* (1959), *ibid.*, vol. 28, pp. 16, 25-30 (the *Bremen Tobacco* case); *Sociedad Minera el Teniente S.A. v. A.G. Norddeutsche Affinerie*, *International Legal Materials*, 12 (1973), p. 251. One might imagine that courts would evade the issue by holding that international law merely gives a right to compensation and does not regard the actual act of expropriation as unlawful and invalid if compensation is not paid. However, municipal courts do not seem to have used this argument.

³ (1959), I.L.R., vol. 28, pp. 16, 25-30; see also the commentaries by Domke, *American Journal of International Law*, 55 (1961), pp. 585, 610-15, and Seidl-Hohenveldern, *ibid.* 56 (1962), p. 507. The *Bremen Tobacco* case was followed by the Superior Court of Hamburg in *Sociedad Minera el Teniente S.A. v. A.G. Norddeutsche Affinerie*, *International Legal Materials*, 12 (1973), p. 251.

⁴ See above, pp. 245-9.

⁵ Morgenstern, this *Year Book*, 38 (1951), pp. 291, 302 et seq.; O'Connell, *International Law* (2nd ed., 1970), vol. x, pp. 797-8.

⁶ Morgenstern, *loc. cit.* (in the preceding note), pp. 315-20; *Rosenberg v. Fischer* (1948), *Annual Digest*, 1948, p. 467; *State of the Netherlands v. Federal Reserve Bank* (1951), I.L.R. 18 (1951), p. 558; *N.V. de Bataafsche Petroleum Maatschappij v. War Damage Commission* (1956), *ibid.*, vol. 23, p. 810.

⁷ G. von Glahn, *The Occupation of Enemy Territory* (1957), pp. 193-6; Morgenstern, *loc. cit.* (n. 5 on this page); Oppenheim, *International Law* (7th ed., by H. Lauterpacht, 1952), vol. 1, p. 411; Vásárhelyi, *Restitution in International Law* (1964), pp. 114-26.

⁸ *Société de Sosnowice v. Banque de dépôts et de crédit* (1917), *Revue de droit international privé*, 14 (1918), p. 190.

other way.¹ The Inter-Allied Declaration of 5 January 1943 on acts of dispossession committed in territories under enemy occupation contains a mutual pledge by the allies to co-operate with one another in undoing acts of dispossession, but does not contain anything to indicate that it is declaratory of a duty imposed by customary international law.² The allies later claimed the return of gold which Germany had looted from occupied territories and deposited in neutral countries during the Second World War, although apparently they did not argue that the neutrals were under a legal duty to return the gold; at all events, the agreement between the allies and Switzerland recites that 'the Swiss Government . . . was unable to recognize the legal basis of these claims' but co-operated because 'it desired to contribute its share to the pacification and reconstruction of Europe'.³ Some of the decisions of the Mixed Arbitral Tribunals after the First World War held that Germany had acquired title to property which she had illegally requisitioned in occupied territories during the war; even those decisions which held otherwise tended to rely on special provisions of the Treaty of Versailles and do not support the idea that there is a general duty of non-recognition.⁴

There are also various arguments of principle, analogy and policy which deserve consideration.

As a matter of principle, Mann argues that a State which breaks international law acts *ultra vires*—the implication being that its acts must be treated as nullities by other States.⁵ This raises vast questions which cannot be dealt with fully here; suffice it to say that not all breaches of international law are *ultra vires* acts (or *vice versa*) and not all illegal acts or acts *ultra vires* are absolute nullities.⁶ It may be difficult to say whether a particular illegal act is an absolute nullity or whether it possesses some lesser degree of ineffectiveness. The international community has no centralized organs to answer this question, and in practice each State answers the question for itself by means of recognition. It may be inconvenient for States to treat as absolute nullities acts which are illegal but which they are powerless or disinclined to alter. In practice, when such inconvenience becomes intolerable, a State will recognize the act and thus cure its illegality, bringing the law into line with the facts (instead of bringing the facts into line with the law, as would happen in an ideal world). The real problem therefore is whether States are under any duty to refrain from recognizing illegal acts.

¹ *Papadopoulos case* (1925), *Annual Digest*, 1925-26, p. 27 (affirmed on another ground (1928), *ibid.*, 1927-28, p. 34); *Thirez v. Descamps* (1948), *ibid.*, 1948, p. 608; *Perrin-Jannès ès-qualités v. Masi* (1948), *American Journal of International Law*, 43 (1949), p. 820.

² Cmd. 6418.

³ Schwarzenberger, *The Law of Armed Conflict* (1968), pp. 279-82.

⁴ *Law Quarterly Review*, 70 (1954), pp. 181, 194.

⁵ Jennings in *Cambridge Essays in International Law* (essays in honour of Lord McNair, 1965), p. 64; cf. E. Lauterpacht, *ibid.*, p. 88.

⁶ Cmd. 6884, 1946.

Such a duty exists in the case of illegal situations brought about by the use of threat or force, but there is no evidence that such a duty exists in the case of other types of illegal acts.

Mann also argues that 'a judge who, in a case involving an international delinquency committed by State *A* against State *B*, applies the law of the former, may assist in the consummation of that delinquency and thus engage his own sovereign's international responsibility'.¹ The trouble with this argument is that it does not distinguish between enforcement and recognition. What Mann says might be true if State *A* sought to expropriate the property of some of its nationals as a form of racial persecution,² and if State *B* enforced *A*'s expropriatory laws against the property of *A*'s nationals situated in *B*. But when a State expropriates property situated in territory under its sovereignty or belligerent occupation, the delinquency is consummated by the seizure, not by the recognition of that seizure in the courts of other States (the same is true, *mutatis mutandis*, of most breaches of international law).

Municipal law analogies are not very apposite. In municipal law, if *A* commits an illegal act against *B*, *C* has three choices—he can help *A*, in which case he may sometimes be regarded as acting illegally; he can help *B*; or he can do nothing. But this third choice of doing nothing is not open to a judge who is asked to recognize an act by another State which is contrary to international law; he must either recognize the act or refuse recognition. Under customary law (as opposed to treaties of alliance or guarantee) there is no obligation for one State to come to the help of another which has been injured by a breach of international law. The sad fact is that States do not normally come to the help of other States in such circumstances; they do not usually resort to reprisals or even retorsion against the wrong-doer.³

Other arguments based on analogy, which might at first sight lend support to Mann's position, crumble on closer examination. This is true, for instance, of the rule that a State must pay for property stolen by private individuals if the State later takes the property from the thieves and keeps it.⁴ But a State which recognizes an illegal expropriation by another State is not in the same position as a State which fails to put right the acts of private individuals. A State is under a duty to undo the consequences of certain acts by its inhabitants which injure foreigners, because a State is under a duty to protect foreigners against such acts on the part of its inhabitants; a State is under no duty to protect foreigners against other

¹ *Law Quarterly Review*, 70 (1954), pp. 181, 193-4.

² This assumes that racial persecution is contrary to State *A*'s legal obligations in the sphere of human rights.

³ Akehurst, *this Year Book*, 44 (1970), p. 1.

⁴ *Mazzei case*, R.I.A.A., 10 (1960), p. 525.

States, and therefore under no duty to undo the consequences of acts by other States.

The rule that a pirate cannot pass a good title to property¹ is another irrelevant analogy. In the first place, even if municipal courts were consistent in holding that title remains in the original owner,² there is no evidence that this practice is accompanied by an *opinio iuris* and therefore no authority for the view that a State would break international law by departing from this practice. Secondly, an expropriating State is not in the same position as a pirate; unlike a pirate, it has a legal system which confers at least *prima facie* validity on any title which it acquires by expropriation.

On policy grounds it might be argued that sanctions in international law are weak and that States should therefore be under a duty to uphold international law in their courts, because enforcement of international law in municipal courts is often the only alternative to a breach of international law remaining unredressed. But it would be optimistic to assume that non-recognition by municipal courts will often be an effective sanction against expropriation without compensation;³ the property may remain in the expropriating State or be sold to countries which do not share the western belief that expropriation without compensation is contrary to international law.

Besides, policy considerations cut both ways. The expropriating State and the injured State are almost certain to disagree about whether the expropriation is illegal. The expropriating State may not share the western view that expropriation without compensation is illegal; even if it shares this view, it may disagree with the injured State about the valuation of the property.⁴ In these circumstances, if a court in a third State is forced to

¹ Wortley, this *Year Book*, 24 (1947), p. 258.

² Practice is not uniform; in Spanish law goods held by a pirate for 24 hours or more passed to the captor of the pirate as booty: Calvo, *Le droit international* (3rd ed., 1880), vol. 2, p. 313. See also Verzijl, *International Law in Historical Perspective* (1971), vol. 4, pp. 200-1, 259.

³ The Anglo-Iranian Oil Company's policy of suing purchasers of oil from Iran in the early 1950s had the effect of reducing Iran's oil exports from 31,217,000 metric tons in 1950 to 14,000 metric tons in 1952; even though a number of municipal courts decided against the company, the threat and expense of litigation deterred most purchasers. But at that time there was a world surplus of oil, so that importers (most of whom were in countries which followed the 'western' view of international law about expropriation) were able to meet their needs without buying oil from Iran.

⁴ Making the validity of title to property in municipal law depend on the legality of expropriation in international law causes all sorts of problems which municipal courts are ill suited to solve. Suppose that *A*'s property is expropriated and sold to *B*, and that a court in another State allows *A* to recover his property from *B* on the grounds that the expropriation was contrary to international law. Suppose, further, that, after the date of the judgment, *A*'s State waives its claim or obtains compensation, or property which was originally expropriated for an improper purpose is used for a proper purpose, or the expropriating State, which had originally discriminated against *A*, now removes the element of discrimination by extending the expropriation to all other property-owners. In all of these cases the breach of international law disappears; but what happens to the municipal judgment? If *A* is allowed to keep the benefits of the judgment, he keeps a gain

pronounce on the question whether the expropriation is contrary to international law, it cannot avoid giving offence to one of the disputing States; this not only damages the State of the forum, but may also increase tension between the disputing States, making it harder for them to negotiate a settlement of their dispute.¹ It is much better that the courts of third States should be free to recognize or not to recognize the expropriation in accordance with their own rules of the conflict of laws and public policy, instead of being forced to intervene in a quarrel between other States by pronouncing on issues of public international law. A State which is injured by a breach of international law can drop its claim if it does not wish to be involved in a quarrel with the wrongdoing State (e.g. if it is trying to conciliate the wrongdoing State in the hope of negotiating a trade treaty on favourable terms); why should third States be denied a similar freedom of action?

In conclusion, it is submitted that third States (particularly in cases of expropriation) are under no duty to withhold recognition from acts which violate international law.

for which the original justification has disappeared; if, on the other hand, he is to be forced to give the property back to *B*, no one will want to buy the property from him for fear of finding his title invalidated at a later date.

¹ *Bremen Tobacco* case (1959), I.L.R., vol. 28, pp. 16, 30. In the *Sabbatino* case (1964), 376 U.S. 398, 431-3, the Supreme Court said that the United States Government's efforts to reach a settlement with the expropriating State would probably be impeded if United States courts pronounced upon the legality of expropriation of property owned by United States nationals. Statements by United States courts about the legality of the expropriation of property owned by, say, French nationals would, following the same reasoning, probably have an equally adverse effect on the French Government's efforts to reach a settlement with the expropriating State.

