the territory between 1961 and 1974 and the precise effect of Portuguese recognition of Indian claims. The suggestion is that it is the recognition itself which makes good India's title to Goa and not the initial use of force. What is prohibited under international law is the unlawful use of force, and force used to obtain self-determination may be regarded as lawful. The whole question of the use of force will be discussed in Chapter 13.

7.3.4 Cession

The possibility of cession of territory under the provision of a peace treaty has already been mentioned in 7.3.2 (above). Cession involves a complete transfer of sovereignty by the owner state to some other state, and may involve a part or all of the owner state's territory. Traditionally there was no bar on the extent to which one state could cede territory to another, although today, a treaty which purported to provide for the cession of territory in conflict with principles of self-determination would violate *jus cogens* and therefore be invalid. It should be noted that the principle *nemo dat quod non habet* applies in international law just as in municipal law: it is not possible for a state to cede what it does not possess.

Cession need not only arise in cases of transfer of territory from losing to victorious state following a war. In the past, land has been ceded in an exchange agreement, for example Britain and Germany exchanged Heligoland and Zanzibar by a treaty made in 1890, and in 1867 Russia ceded Alaska to the United States in exchange for payment.

7.3.5 Accretion

It is possible for states to gain or lose territory as a result of physical change. Such changes are referred to as 'accretion' and 'avulsion'. Accretion involves the gradual increase in territory through the operation of nature, for example, the creation of islands in a river delta. Avulsion refers to sudden or violent changes, such as those caused by the eruption of a volcano. The distinction between avulsion and accretion can be significant in boundary disputes which will be discussed at 7.4 (below).

7.3.6 Other possible modes of acquisition

As has already been stated, issues of title to territory are complex and will usually involve the application of a number of principles. In practice, cases rarely fall neatly into one of the five categories mentioned, and claims to territory will be based on a combination of factors. In addition to the five modes of acquisition that have been discussed, a number of others have been suggested from time to time. Among those that can be clearly identified are 'adjudication', 'disposition by joint decision' and 'continuity and contiguity'.

7.3.6.1 Adjudication

In certain situations, territory may accrue to one state by virtue of a decision of an international tribunal. This is most likely to occur in the context of boundary disputes. Thus in the *Frontier Dispute* case (1985), Burkina Faso and Mali agreed to submit their boundary dispute to a chamber of the ICJ and agreed to accept that tribunal's finding.

7.3.6.2 Disposition by joint decision

Following both World Wars, the victorious states assumed powers of disposition with regard to the territory of the defeated states. More often that not, such dispositions were subsequently confirmed by the provisions of a peace treaty and thus may be thought to come within the concept of cession. However, it is believed that such dispositions remain valid irrespective of any subsequent treaty, and are today justified on the basis of the entitlement of the international community to impose collective sanctions on aggressor states.

7.3.6.3 Continuity and contiguity

The two principles of continuity and contiguity relate to occupation. Under the principle of continuity, an act of occupation in a particular area extends sovereignty so far as it is necessary for the security and natural development of the area of claim. Thus, for a long period, France claimed that its eastern border should follow the west bank of the River Rhine. A more modern example, although not expressed as such, would be Israel's wish to claim the strategically significant Golan Heights from Syria. Connected to the principle of continuity is the hinterland doctrine, under which coastal settlements were deemed to extend over the area of immediate hinterland.

The principle of contiguity involves the extension of sovereignty to all areas that are geographically pertinent to the area of claim. The possibility of such a principle was rejected by Max Huber in the *Island of Palmas* case. It is in respect of the polar regions that the principle has been most used. Both the Soviet Union and Canada have made claims in respect of the Arctic based on the sector principle, which is itself an adaptation of the contiguity principle. Other Arctic states have not followed this example, and a major argument against any territorial claims to the Arctic is that since the area consists almost entirely of frozen sea it constitutes a part of the high seas and is therefore not capable of national appropriation. As regards Antarctica, both Chile and Argentina have made claims based on the contiguity principle, although such claims have not gone unopposed. Under the Antarctic Treaty 1959, all claims to national sovereignty were suspended, and it is argued that Antarctica now constitutes part of the common heritage of mankind, incapable of national appropriation. There will be further discussion of the regime pertaining in Antarctica in Chapter 17.

7.4 Boundaries

Disputes over territory may often arise in the context of boundary disputes, and a number of principles exist which may be of assistance in the determination of borders between states. Sometimes a boundary will be evidenced by some physical barrier, but more often than not the border is an invisible line, and where relations between neighbouring states are friendly, agreement will be reached to enable free movement of officials across the border and joint exploitation of resources which straddle the borderland. For example, as a result of modern surveying techniques, the border between France and the UK in the Channel Tunnel has been pinpointed with immense accuracy, yet agreement between the two states has been reached to provide for customs officials from

one state to operate in the other, and for the police of one state to carry out arrests in the Tunnel *environs* of the other state.

Two particular aspects of boundaries will be considered here. The first relates to boundary disputes which arise following decolonisation. The principle which is commonly applied is known as *uti possidetis juris*. The principle was first applied during the break up of the Spanish Empire in South America, when the newly independent states agreed that their boundaries would conform to those set down by the former colonial power. The principle was adopted by the Organisation of African Unity in 1964 when it declared that colonial boundaries existing at independence constituted a tangible reality which all member states pledged themselves to respect. The principle was recognised by the ICJ in the *Frontier Dispute* case (1986) and is reflected in the Vienna Convention on the Succession of States in Respect of Treaties 1978, which provides that treaties establishing boundaries are an exception to the general rule that successor states start with a clean slate in respect of treaties entered into by their predecessors. Further confirmation of the universal nature of the principle came when the EC Arbitration Commission on Yugoslavia (1993) declared that it applied to newly independent states formerly part of a federation. The extent to which the principle has worked in practice with regard to Bosnia is, of course, the subject of much debate.

The other aspect of boundaries to be considered relates to those boundaries formed by rivers. There are a number of well recognised principles which operate in regard to river boundaries in the absence of any express agreement. As far as non-navigable rivers are concerned, the boundary will follow the median line between the two banks. If the river is navigable, the boundary follows the median line of the principal navigation channel, known as 'the Thalweg'. Of course, rivers can be subject to physical changes, and the effect of such changes depends on whether they are a result of accretion or avulsion. Where physical change is gradual (accretion) the boundary will reflect the changes. However, where avulsion occurs the boundary will follow its original course.

7.5 Rights of foreign states over territory

It is a general rule of international law that states have exclusive sovereignty over their territory. However, there are a number of exceptions to this general rule where a foreign state(s) may be granted certain rights over the territory of another independent sovereign state. Such situations include leases – for example the 99-year lease granted by China to the UK in respect of the New Territories and Kowloon – and servitudes.

Servitudes occur where territory belonging to one state is made to serve the interests of territory belonging to another state. The state enjoying the benefit may be entitled to do something on the territory concerned, for example, exercise a right of way, or take water for irrigation. Alternatively, the state on whom the burden falls may be obliged to refrain from doing something, for example, an obligation not to fortify.

Servitudes are normally created by treaty, although very occasionally they have been created as a result of long usage. For example, in the *Rights of Passage*

case (1960), the ICJ recognised that Portugal had a right of passage across Indian territory between its Daman and Goa, and that such a right for peaceful purposes existed on the basis of a local customary law between India and Portugal. Such problems as arise will generally involve issues of state succession. The term is adapted from Roman Law, where servitudes ran with the land and bound successors in title. The question then arises as to whether this is also true of international law. There have been a number of instances where international tribunals have held the successor states bound. In the *Free Zones of Upper Savoy and District of Gex* case (1932) the PCIJ held that France was obliged to perform a promise made by Sardinia to maintain a customs-free zone in territory which France had subsequently acquired from Sardinia.

It remains unclear exactly what type of obligation survives changes of sovereignty. For example, under the Lease-Lend Agreement 1940, the UK granted USA military bases on certain British islands in the West Indies. The USA considered that its rights would lapse when the islands became independent. Also of relevance is the North Atlantic Fisheries Arbitration (1910), in which a panel of arbitrators had to consider the effect of a 1818 treaty between UK and USA which stated that 'the inhabitants of the US shall have, for ever, in common with the inhabitants of the UK, the liberty to take fish of every kind from the seas off the Newfoundland coast'. The arbitrators held that this provision did not create a servitude which prevented UK making regulations limiting the fishing rights of all persons, including US nationals, in the area concerned. Arguments have followed as to the precise nature of the decision and it is pointed out that the arbitrators drew a distinction between express grant of sovereign rights and purely economic rights. By this the tribunal implicitly accepted a class of limited servitudes. Clearly with regard to some benefits, such as the right to take water from neighbouring states, it seems more appropriate that they should run with the land rather than be personal to the present title holder.

Servitudes can exist for the benefits of more than just one state. For example, the *Aaland Islands* case (1920) concerned an agreement made in 1856 between Russia, France and Britain under which Russia agreed not to fortify islands lying near Stockholm in the Baltic. Sweden was not part of the treaty. In 1918 the islands became part of Finland, which began fortifying the islands. Sweden complained to the League of Nations and a Committee of Jurists decided that Sweden could claim the benefit of the 1856 treaty. Finland had succeeded to Russia's obligations, and the treaty was designed to preserve the balance of power: therefore all states directly interested could invoke it.

It has been suggested that a similar interpretation should be placed on treaties governing the Panama and Suez Canals. Servitudes are particularly important with regard to rivers and canals. There is a customary rule that foreign ships can be excluded from internal waters, and this is especially hard on land-locked states. Since 1815 most major rivers have been open to navigation – either to all states, riparian states, or ships of all states party to a particular treaty. In 1888 the Convention of Constantinople opened the Suez Canal to all nations. In 1901 and 1903 similar agreements dealt with the Panama Canal. Egypt succeeded to Turkey's obligations, and although the Suez Canal Company was nationalised in 1956, in 1957 Egypt publicly declared that it

would keep the canal open to all nations. It was widely understood that Egypt breached its international obligations when it attempted to close the canal to Israeli shipping. It is believed that the 1888 treaty internationalises and institutionalises the use of the canal: the canal is effectively an easement across Egyptian territory.

7.6 Loss of state territory

To the five modes of acquiring sovereignty over territory correspond five modes of losing it – namely, cession, dereliction,[27] operations of nature, subjugation, prescription. But there is a sixth mode of losing territory – namely, revolt. No special details are necessary with regard to the loss of territory through subjugation, prescription, and cession, but the operations of nature, revolt, and dereliction require discussion.

Operations of nature as a mode of losing territory correspond to accretion as a mode of acquiring it. Just as through accretion a state may be enlarged, so it may be diminished through the disappearance of land and other operations of nature. And the loss of territory through operations or nature takes place *ipso facto* by such operations. Thus, if an island near the shore disappears through volcanic action, the extent of the maritime belt of the littoral state concerned is thereafter to be measured from the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and now covers part of the land on the bank from which such piece became detached, the territory of one of the riparian states may be decreased through the boundary line being *ipso facto* transferred to the new middle or mid-channel of the river.

Revolt followed by secession has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition.[28] The question at what time a loss of territory through revolt is consummated cannot be answered once and for all, since no hard and fast rule can be laid down regarding the time when a state which has broken off from another can be said to have established itself safely and permanently. It is perhaps now questionable whether the term revolt is entirely a happy one in this legal context. It would seem to indicate a particular kind of political situation rather than a legal mode of the loss of territorial sovereignty ...

Dereliction (or abandonment or relinquishment) as a mode of losing territory corresponds to occupation as a mode of acquiring it. Dereliction frees a territory from the sovereignty of the present state-owner. It is effected through the owner-state completely abandoning territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it. Just as occupation requires first, the actual taking of possession (*corpus*) of territory, and, secondly, the intention (*animus*) of acquiring sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention of giving up sovereignty

27 The forfeiture of an inchoate title is not the same as the dereliction of territory which has been definitely acquired, whether by occupation or otherwise.

28 Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the USA from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810, Greece from Turkey in 1830, Cuba from Spain in 1898, and Panama from Colombia in 1903. There were a number of other instances in Europe during, and at the end of, the First World War.

over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory. Thus, for instance, if an uprising forces a state to withdraw from a territory, such territory is not derelict as long as the former possessor is able, and makes efforts, to retake possession. It is only when a territory is really derelict that any state may acquire it through occupation. History knows of several such cases. But very often, when such occupation of derelict territory occurs, the former owner protests, and tries to prevent the new occupist from acquiring it. The cases of the Island of Santa Lucia and of Delagoa Bay may be quoted as illustrations:

(a) In 1639 Santa Lucia, one of the Antilles Islands, was occupied by England, but in the following year the English settlers were massacred by the natives. No attempt was made by England to retake the island, and France, considering it no man's land, took possession of it in 1650. In 1664 an English force under Lord Willoughby attacked the French, drove them into the mountains, and held the island until 1667, when the English withdrew, and the French returned from the mountains. No further step was made by England to retake the island, but it nevertheless asserted for many years to come that it had not abandoned the island *sine spe redeundi*; and, that, therefore, France in 1650 had no right to consider it no man's land. Finally, however, England resigned its claims in the Peace Treaty of Paris 1763.

(b) In 1823 England occupied, in consequence of a so-called cession from native chiefs, a piece of territory at Delagoa Bay which Portugal claimed as part of the territory owned by her at the Bay, maintaining that the chiefs concerned were rebels. The dispute was not settled until 1875, when the case was submitted to the arbitration of the President of France. the award was given in favour of Portugal, since the interruption of the Portuguese occupation in 1823 was not to be considered an abandonment of a territory over which Portugal had exercised sovereignty for nearly 300 years.[29, 30]

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29 See Hall, para 34. The text of the award is reprinted in Moore, *International Arbitrations*, V, 1898, Washington: United States Department of State at p 4984.

Dereliction is again a traditional term which no longer entirely happily fits the kind of situation where a state, for example, renounces a claim, thus in effect recognising another claim to title. There are several modern examples which it is appropriate to describe here but which cannot altogether be described as a 'loss' of territorial sovereignty. Thus: (a) In 1972 Columbia and the USA signed a treaty whereby the USA renounced all claims to sovereignty over three groups of small reefs in the Caribbean, Quita Sueno Bank and the Cays on Roucador and Serranca Banks. In return Colombia guaranteed the continuation of certain fishing. (Quita Sueno is submerged at high tide and in the view of the USA was not subject to any claim of sovereignty by any government.) See *Bulletins of the State Department* (2 October 1972), p 387; (b) Under an agreement entering into force on 1 September 1972 the USA recognised the sovereignty of Honduras over the Swan Islands, which has been in the possession of the USA since 1893. See *Bulletin of the State Department* (18 September 1972) at p 326; (c) In a Exchange of Notes of 29 June 1976 (TS No 8 (1977); Cmnd 6713) between the Government of the Seychelles and the Government of the UK, certain conditions were expressed concerning the return to the Seychelles of the islands of Aldabra, Descroches and Farquar'; (d) Kiribati (the former Gilbert Islands) became independent on 12 July 1979. Under the Kiribati Act 1979, a constitution for the new state was contained in an Order in Council made under the Act. In Schedule 2 to the constitution the territories of Kiribati include the islands Canton and Endorbury, whose status has formerly been a matter of dispute between the UK and the USA. There was an agreement drawn up and signed at the time of the independence negotiations by which the USA renounced sovereignty over those islands.

30 *Oppenheim's International Law*, 9th edn, Vol 1, 1996, London: Longman at pp 716–18.

CHAPTER 8

JURISDICTION

8.1 Introduction

State jurisdiction concerns essentially the extent of each state's right to regulate conduct or the consequences of events. In practice jurisdiction is not a single concept. A state's jurisdiction may take various forms. Thus a state may regulate conduct by legislation; or it may, through its courts, regulate those differences which come before them, whether arising out of the civil or criminal law; or it may regulate conduct by taking executive or administrative action which impinges more directly on the course of events, as by enforcing its laws or the decisions of its courts. The extent of a state's jurisdiction may differ in each of these contexts.[1]

Jurisdiction concerns both international law and the internal law of each state. The former determines the permissible limits of a state's jurisdiction[2] in the various forms it may take, while the latter prescribes the extent to which, and the manner in which, the state in fact asserts its jurisdiction.[3] Much of the law relating to jurisdiction has developed through the decisions of national courts applying the laws of their own states. Since in many states the courts have to apply their national laws irrespective of their compatibility with international law, and since courts naturally tend to see the problems which arise primarily from the point of view of the interests of their own state, the influence of national judicial decisions has contributed to the uncertainty which surrounds many matters of jurisdiction and has made more difficult the development of a coherent body of jurisdictional principles.

International problems of jurisdiction arise almost exclusively where a state, either directly or through proceedings in its courts, seeks to assert its authority over persons, property or circumstances which (at least arguably) are or occur abroad. In such cases the questions which usually arise concern the actual or constructive location of the persons, property of circumstances in question; if

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1 See also Basdevant and others, *Dictionnaire de la terminologie du droit international* (1960) pp 354–57 for a useful description of several senses of 'jurisdiction', including some of the 'competence' aspects.

The meaning of 'jurisdiction' has had to be considered in several cases before the European Commission and Court of Human Rights since Article 1 of the European Convention on Human Rights obliges each state party to secure the rights in question to 'everyone within its jurisdiction'. That provision has been held to apply in various circumstances where a state has exercised authority or control in a manner relevant to the exercise of the right in question.

To the extent that jurisdiction is a matter of the limits to the exercise of authority, it may be noted that questions of jurisdiction may arise not only in relation to states but also in relation to other entities which exercise authority internationally, such as international organisations, and, perhaps less clearly, multinational corporations.

2 In the *Lotus* case the PCIJ, while stating that international law generally left states 'a wide measure of discretion' in the application of their laws and the jurisdiction of their courts added that that discretion was 'limited in certain cases by prohibitive rules' and that it was 'required of a State … that it should not over-step the limits which international law places upon its jurisdiction': PCIJ, Ser A, No 10, at p 19.

3 As to so-called 'organic' jurisdiction of states and international organisations (ie jurisdiction over their organs as such) see Seyersted (1965) *ICLQ* 14 at pp 31–82, 493–527.

their location is abroad, the extent to which the laws of the forum state are to be construed so as to apply extra-territorially;[4] and, if they are so construed, whether the exercise of the jurisdiction involves any infringement of the rights of other states, or of generally accepted limits to national jurisdiction.

Jurisdiction is not coextensive with state sovereignty, although the relationship between them is close; a state's 'title to exercise jurisdiction rests in its sovereignty'.[5] That jurisdiction is based on sovereignty does not mean that each state has in international law a sovereign right to exercise jurisdiction in whatever circumstances it chooses. The exercise of jurisdiction may impinge upon the interests of other states. What one state may see as the exercise of its sovereign rights of jurisdiction another state may see as an infringement of its own sovereign rights of territorial or personal authority. In practice, however, it is only in relatively few cases that overlapping claims to jurisdiction cause serious problems, usually where the states concerned attach importance to the assertion of their competing claims, and more often in criminal cases (where the element of public authority is more evident)[6] than in civil cases. Usually the coexistence of overlapping jurisdiction is acceptable and convenient; and forbearance by states in the exercise of their jurisdictional powers avoids conflict in all but a small (although important) minority of cases.

Although it is usual to consider the exercise of jurisdiction under one or other of more or less widely accepted categories, this is more a matter of convenience than of substance. There is, however, some tendency now to regard these various categories as parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states.[7, 8]

International jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention – the difference is merely terminological): laws extend so far as, but no further than, the sovereignty of the state that puts them into force, nor does any legislator normally intend to enact laws which apply to or cover persons, facts, events or conduct outside the limits of his state's sovereignty. This is a principle or, perhaps one should say, an observation of universal application. Since every state enjoys the same degree of sovereignty, jurisdiction implies respect for the corresponding rights of other states. To put it differently, jurisdiction involves both the right to exercise it within the limits of a state's sovereignty and the duty to recognise the same right of other states.

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4 This is essentially a matter of domestic law and the interpretation of the relevant provisions of statute or common law.

5 PCIJ, Ser A, No 10, at p 19. See also Lord Macmillan in *The Christina* [1938] AC 485, 496–97: 'It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits.'

6 An added complication may arise where one state wishes to punish as criminal conduct which another does not regard as involving an offence.

7 See Mann, *Hague Recueil*, 111 (1964), i, pp 43–51, 82ff; Brownlie, *Principles of International Law*, 4th edn, 1990, Oxford: Oxford University Press at pp 298, 306–07. The adoption by the ICJ in the *Nottbohm* case [1955] *ICJ Rep* at p 4 of the principle of a 'genuine link' has been of some influence in the present context.

8 *Oppenheim's International Law*, Vol 1, 9th edn, 1996, London: Longman at pp 456–58.

> Or to put the same idea in positive and negative form, the state has the right to exercise jurisdiction within the limits of its sovereignty, but is not entitled to encroach upon the sovereignty of other states ...
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> Since in the present world sovereignty is undoubtedly territorial in character, in assessing the extent of jurisdiction the starting point must necessarily be its territoriality such as it was developed over the centuries and defined by the Huber-Storyan maxims: as a rule jurisdiction extends (and is limited) to everybody and everything within the sovereign's territory and to his nationals wherever they may be.
>
> It is difficult to believe that these elementary propositions of public international law will be contested. On the contrary, the principle as defined is universal in the sense that *prima facie* it applies to all legislation and all state intervention derived or sanctioned by the competent authority, ie the legislator himself as well as those judicial and executive authorities controlled and empowered by him. Accordingly, there is no room for distinguishing between criminal, public and private laws. The suggestion that the doctrine applies to criminal and public law as well as the prerogative rights of the state such as taxation, but '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'[9] is untenable: a legislator who was to invalidate all marriages not celebrated in church and declare the children of such marriages illegitimate would act *ultra vires* and could not expect his statute or the judgments of his courts giving effect to it to be internationally recognised. It may well be that 'the cases in which a state violates international law, eg by applying its own substantive law to a given situation must be extremely rare'.[10] The point is that if such a rare case were to occur it would constitute an international wrong; the very absence of examples in the legislative, though not judicial, practice of states is likely to contribute to the proof of this rule. This remains as first stated by Lord Russell of Killowen in 1896[11] and since then frequently reaffirmed in the Anglo-American world; normally no state was allowed to apply its legislation:
>
> > … to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.
>
> When this statement of the rule refers to legislation, it contemplates, of course, not only statutes or common law, but also all judicial and executive acts giving effect to the sovereign's will. International law, therefore, employs the term 'legislation' in a very wide sense indicating regulations rather than merely enactment.[12]

A number of different categories and types of jurisdiction should be identified from the outset. First, it is necessary to distinguish between 'prescriptive jurisdiction', which indicates the power to prescribe rules, and 'enforcement jurisdiction', which refers to the power to enforce rules. It is also useful to

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9 Akehurst (1972–73) *BYIL* 145 at p 187.

10 Kahn-Freund, 143 *Hague Recueil* (1974–III) at p 176.

11 *The Queen v Jameson* [1896] 2 QB 425, 430.

12 Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', in *Further Studies in International Law*, 1990, Oxford: Clarendon Press (reprinted from a course given to the Hague Academy (1984 ii *Hague Recueil*, 186, 9–98) at pp 4–5.

distinguish between 'legislative', 'executive' and 'judicial jurisdiction'. 'Legislative jurisdiction' refers to the power of the state to make binding laws within its territory. Clearly, there are limits on the 'legislative supremacy' of a state. A state which adopts laws that are contrary to international law will render itself liable for the breach of international law on the international plane, although the internal constitutional position may be such that the municipal courts have to give effect to the municipal law. 'Executive jurisdiction' refers to the capacity of the state to act within the borders of another state. Since states possess territorial sovereignty, it follows that generally state officials may not exercise their functions on foreign soil without the express consent of the host state. 'Judicial jurisdiction' refers to the power of the municipal courts to try cases in which a foreign factor is present. It is the exercise of judicial jurisdiction which has received most discussion.

International law concerns itself with the propriety of the exercise of jurisdiction; exercise itself is a matter for the discretion of the state concerned. Jurisdiction has primarily and historically been exercised on a territorial basis, but there are occasions when states exercise jurisdiction outside their own territory. The PCIJ in the *Lotus* case (1927) confirmed that:

> A state may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

However, the Court went on to suggest that this rule really only applied to enforcement jurisdiction; a state could exercise prescriptive jurisdiction in its own territory in respect of acts which occurred abroad provided that there was no positive rule of international law prohibiting such an exercise of power.

It should be recognised that much of the discussion of jurisdiction involves the identification of principles rather than the assertion of rigid rules of law. In this context, the words of Sir Gerald Fitzmaurice in the *Barcelona Traction* case (1970) are of relevance:

> It is true that under present conditions international law does not impose hard and fast rules on states delimiting spheres of national jurisdiction in such matters ... but leaves to states a wide discretion in the matter. It does, however, (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by the courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another state.

In addition to jurisdiction exercised on a territorial basis, there are a number of other relevant principles which can be identified and which have received varying degrees of international acceptance.

> An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by states at the present time. These five general principles are: first, the territorial principle, determining

> jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality of national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most states, regarded with misgivings by a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely, though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognised principle of jurisdiction. The fifth, asserted in some form by a considerable number of states and contested by others, is admittedly auxiliary in character and is probably not essential for any state if the ends served are adequately provided for by another principle.[13]

The commentary to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935 identified five general principles, namely:

(a) the territorial principle;

(b) the passive personality principle;

(c) the nationality principle;

(d) the protective principle; and

(e) the universality principle.

Discussion of the application of these principles will form the main part of this chapter. Before looking at them in detail, it is necessary to consider some issues raised by the assertion of civil jurisdiction. One final introductory point needs to be made: this chapter is concerned with the exercise of jurisdiction by states on the municipal plane. Questions of jurisdiction also arise on the international plane and the subject of international criminal jurisdiction will be discussed in Chapter 9.

8.2 Civil jurisdiction

The rules relating to the exercise of civil jurisdiction have tended to be more flexible than those relating to criminal jurisdiction. Some writers have argued that there in fact exist no clear rules of customary international law governing the exercise of civil jurisdiction, although there are an increasing number of treaties dealing with the matter. The traditional rule in the common law countries was that courts would have jurisdiction over civil disputes if the defendant was present in the territory, no matter for how short a period. Civil law countries have tended to operate on the basis that the defendant is habitually resident within the territory where jurisdiction is to be assumed. The position within the European Union is governed by the Brussels Convention on

13 Dickinson, 'Introductory Comment to the Harvard Draft Convention on Jurisdiction with Respect to Crime 1935' (1935) 29 *AJIL*, Supp 443.