that of other states. We cannot forget either the test of reasonableness of the jurisdiction to prescribe, which (as with all of these issues) will be litigated in the courts of the prosecuting state. Because of the nature of cyberspace, the great potential for conflicts of law, a fairly strong connection between the e-mailer and the target state will be necessary to assert the jurisdiction to prescribe for the target state based on the principle of objective territoriality.

VI Jurisdiction in cyberspace: a preview

In this final section of the paper, I believe it would be useful to discuss how the theory of international spaces affects two up-and-coming topics in cyberspace law. This is necessarily brief and general, but should describe the outlines of future litigation.

A Copyright law

Copyright is currently a 'hot topic' in cyberspace law. As the world wide web is full of written information, it will be the source of considerable copyright litigation. Unlike courts hearing criminal cases, courts of general jurisdiction may hear civil cases in which a foreign state has the jurisdiction to prescribe law, and will apply that foreign law. Two American cases, *Religious Technology Center v Netcom*, No C95-20091 RMW (ND Cal, 3 March 1995) and *Playboy Enterprises Inc v Frena*, 839 F Supp 1552 (Md Fla 1993), avoided international jurisdictional problems. Both were cases brought by American nationals against American nationals, all of whom were clearly subject to American territorial jurisdiction. As the adage goes, there can be no conflict of laws unless there is an actual conflict. Either case would be much more interesting if one of the parties had not been subject to US territorial and national jurisdiction. Fair Use doctrine is not a question of international law.

We can, of course, propose a hypothetical situation. What if Scientology's religious books were copyrighted in the United States, but not in Latvia.[82] Now there is a web site uploaded by a Latvian on which is posted a link to a file containing the religious work. All the downloader need do is click on the link, and the copyrighted work will appear on his computer.

At its greatest extent, American copyright law could reach a webpage created by an American, and uploaded in Latvia. It could also reach a webpage created for an American, by a Latvian citizen, and uploaded in Latvia. As a matter of international law, however, the United States would not have jurisdiction to prescribe copyright law for a webpage uploaded by a Latvian in Latvia whose only connection with the United States was a wish that Americans should download this material. In this situation, there is no American nationality on which to predicate such jurisdiction, nor is there territorial jurisdiction. Objective territoriality, or 'effects' jurisdiction is *per se* unreasonable without considerably more.[83] An American court should throw out this suit for want of jurisdiction or

82 We are lucky to have law in Latvia, incidentally. There are plenty of places of uncertain national jurisdiction, including: The Transdniester Republic (Transdnistrovia), Chechnya, Nagorno-Karabakh, Western Sahara, the Spratly Islands, the Palestinian 'occupied territories,' Svalbard, Abkhazia, North Cyprus, the Kashmir, the Republika Srbska (in Bosnia-Herzegovina), parts of the Rub'al Khali (Empty Quarter), and territory within the city of Rome belonging to Knights of Malta and enjoying certain extraterritorial rights.

83 How much more? Probably quite a bit, given how hostile Latvian courts would be to such a proposition. Comity would play a huge role here. Because the harm is a private harm, one could argue that there is never a substantial enough copyright violation to cause the state to invoke this extraordinary jurisdiction. Certainly, the harm would have to far exceed a 'normal' copyright violation.

apply Latvian law based on the Latvian nationality of the uploader and controller, and dismiss.

B Libel

A recent case in the Supreme Court of Western Australia[84] allowed a US national to sue an Australian defendant over a bulletin board (BBS) posting which the US national claimed was defamatory. This would make sense with traditional conflict-of-laws rules, if the publication were in a newspaper in Australia. The analysis is fairly straightforward: if the place of the tort (*lex loci delicti*) was Australia, then Australia has the jurisdiction to prescribe a rule for that action under the principle of subjective territoriality. Under the theory of international spaces, the tort would have to be defined as the uploading of tortious material from Australian territory, in order for Australian law to apply under the principle of subjective territoriality. Australian law probably does not do so, yet.

However, in this case the *lex loci delicti* of the tort of libel is actually in cyberspace. The libel appeared in cyberspace. It was 'published' in cyberspace. In order for a libel to take place, the uploader and the downloader need to be brought together, as they only can in cyberspace. Under the nationality principle, Australia has the jurisdiction to prescribe a law for libels committed by Australian nationals in cyberspace. Australia could permit a US national to sue an Australian in that instance.

If it was the American who had libelled the Australian, the situation is reversed. The Australian could sue the American in Australian courts, but those courts would have to apply US law to the American's action in cyberspace. If US law does not so provide, an Australian may not have the right to sue an American national for libel committed in cyberspace.

VII Conclusion

This survey of international law and the treatment of the jurisdiction to prescribe in 'vast sovereignless regions' supports the theory of international spaces. Antarctica, outer space, the high seas, and cyberspace, are four international spaces, whose unique character for jurisdictional purposes is the lack of any territorial jurisdiction. In these four places, nationality is, and should be, the primary principle for the establishment of jurisdiction. Such a rule will provide predictability and international uniformity. It strikes a balance between anarchy and universal liability, and it works. Recognition of cyberspace as an international space is more than overdue. It is becoming an imperative.

I will conclude with a hypothetical situation, which may serve as a warning to national courts not yet aware of the international character of cyberspace.

A Danish citizen posts lurid photographs on his personal web page. The government in Copenhagen has not seen fit to forbid the uploading of such material. Indeed, Danish courts may already have deemed such a law unconstitutional. The Dane is visiting a cousin in the United States over Thanksgiving weekend. Learning of his arrival, the FBI telephones a magistrate, giving her the URL[85] and requesting a warrant for his arrest. The magistrate

84 *Rindos v Hardwick* No 940164 (31 March 1994) The opinion is unpublished. The details I have on the case come from Jeremy Stone Weber: Note: Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech 46 Case W Res 235 (1995).

85 Uniform Resource Locator. This is the set of words (usually preceded by http://) that represents an internet address, which is otherwise just a series of numbers.

soon downloads the offensive material, obscene under *Miller*[86] in any state in the union, and prohibited by the Internet Decency Act, and issues the warrant. The FBI makes the arrest on Thursday.

On Monday morning, the appointed lawyer for the somewhat melancholy Dane files a petition seeking a writ of *habeas corpus*. My client is a Danish national, argues the lawyer, and he uploaded the pornography while in Denmark. The United States has no jurisdiction to prescribe a law for this action under either the nationality principle or the territoriality principle. The Internet Decency Act should be construed to conform to international law, in the absence of an express Congressional intent to violate international law.

Faced with a statute that explicitly proscribes indecent material on the internet, the judge must decide whether to continue to hold the man who has been in jail for three days already. This paper is intended to provide the Dane's lawyer with his argument, and the judge with an answer. [87]

8.4 Protective or security principle

Under this principle, a state can claim jurisdiction over offences committed outside its territory which are considered injurious to its security, integrity or vital economic interests. The principle remains ill-defined and there are uncertainties about how far it can extend. There remains a considerable danger of abuse. Nevertheless, a large number of states have used the principle to a greater or lesser extent. The Commentary to the Harvard Research Draft Convention stated:

> In view of the fact that an overwhelming majority of states have enacted such legislation [relying on the protective principle], it is hardly possible to conclude that such legislation is necessarily in excess of competence as recognised by contemporary international law.

It has been suggested that the principle was applied in the case of *Joyce v DPP* (1946)[88] which involved the trial for treason of the Nazi propagandist William Joyce, also known as Lord Haw-Haw. Joyce was born in the United States, but in 1933 he fraudulently acquired a British passport by declaring that he had been born in Ireland. In 1939 he left Britain and began work for German radio broadcasting propaganda to Britain. The House of Lords had to decide whether the British courts had jurisdiction to try him for treason. They decided that jurisdiction did exist. Lord Jowitt LC answered the question as to whether the English courts could have jurisdiction to try an alien for a crime committed abroad by stating:

> There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or ... without the realm ... No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own

86 *Miller v California* (1971) 413 US 15. It is my opinion that William Byassee is right, and downloading obscene material from cyberspace is protected under the first amendment by *Stanley v Georgia*, 394 US 557 (1969). See William Byassee, *supra* note 1.

87 Darrel Menthe, *Jurisdiction in Cyberspace: The Theory of International Spaces* (1997) http://www.leland.stanford.edu.80/class/law449/papers/menthe.htm

88 [1946] AC 347.

> security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws.

The House of Lords also found that jurisdiction could be based on the fact that Joyce owed allegiance to the British Crown. Although he was not a British national and the act of treason had occurred outside the United Kingdom, Joyce had availed himself of a British passport and could thereby be deemed to owe allegiance to the Crown and be liable for breach of that allegiance.

The protective personality principle is most often used in cases involving currency, immigration and economic offences. For example, s 170 of the UK Customs and Excise Management Act 1979 creates jurisdiction over acts done abroad, whether committed by UK nationals or not, to further the fraudulent evasion of import restrictions and duties.

8.4.1 The effects doctrine

A development which is linked to the protective principle and to the objective territorial principle is the emergence of a particular type of extra-territorial jurisdiction known as the 'effects doctrine'. According to this doctrine, States claim jurisdiction over acts committed abroad which produce harmful effects within the territory. The rationale behind the effects doctrine is the need to protect national economic interests. The effects doctrine has been particular significant in the area of US anti-trust or anti-cartel law. In the *Alcoa* decision (*US v Aluminium Co of America* (1945))[89] the US Second Circuit Court of Appeals stated that:

> Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.

The court suggested that jurisdiction would be founded if two conditions were met: the performance of a foreign agreement must be shown to have had some effect in the US, and secondly, this effect must have been intended. The decision provoked widespread opposition outside the US. In *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* (1953),[90] the English Court of Appeal was willing to issue an injunction preventing compliance with an order of the US courts made as a result of the application of the effects doctrine.

In the face of widespread opinion that the *Alcoa* decision contravened international law, application of the effects doctrine was modified in *Timberlane Lumber Co v Bank of America* (1976)[91] in which it was stated that the courts had to take into account the economic interests of other nations and the nature of the relationship between the defendants and the US. US courts would only exercise extra-territorial jurisdiction if the interests of the US and the effects on US foreign trade were sufficiently strong *vis-à-vis* the interests of other states. In spite of this modification, application of the doctrine continues to be criticised and a number of states have taken action themselves to protect their national

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89 (1945) 148 F 28 147.

90 [1953] 1 Ch 19.

91 [1976–97] ILR 66.

companies. For example, under the UK Protection of Trading Interests Act 1980 the Secretary of State can prohibit the production of documents or information to a foreign state's courts if that foreign state is indulging in extra-territorial action relating to the control and regulation of international trade. Furthermore, a UK national or resident can sue in an English court for recovery of damages paid under the judgment of a foreign court in such a situation.

In practice little use has been made of such counter-legislation and the US seems further to have moderated its position such that jurisdiction will only be asserted if the main purpose of an anti-trust agreement is to interfere with US trade and such interference actually occurs. It is submitted that implemented in this way the effects doctrine would be little different in practice from the objective territorial principle and the traditional passive personality principle.

There has been discussion as to the extent to which the effects doctrine has been applied by the European Court. In the *Dyestuffs* case (*ICI v Commission* (1972))[92] the court exercised jurisdiction over ICI, for the purposes of the case a national of a non-EEC country, to control the activities of a price-fixing cartel which had been established outside the EEC but which was having effects within the EEC. The European Commission and the Advocate General had supported jurisdiction on implementation of the effects doctrine, although this position had been criticised by a number of member states. The Court, however, sought to justify the exercise of jurisdiction on the fact that ICI was operating through subsidiaries within the EEC. In the *Woodpulp* case (*Ahlstrom Osakeyhtio v Commission* (1988))[93] the Court went further in exercising jurisdiction over 41 woodpulp producers and two trade associations, all of which were non-EEC nationals. The court stated:

> An infringement of Article 85, such as the conclusion of an agreement which has the effect of restricting competition within the Common Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

The Court went on to state that it was immaterial to the exercise of jurisdiction whether the producers in the case operated through intermediaries or subsidiaries within the Community and further claimed that the exercise of jurisdiction in the case was covered by the territoriality principle. Critics of the decision, such as Dr Francis Mann, have argued that the decision goes further than the *Alcoa* case and is incompatible with the rules of international law. Others have sought to suggest that the decision is only an extension of the objective territorial principle. It seems accurate to state that the effects doctrine *per se* cannot be supported by any of the sources of international law, although supporters of the effects doctrine point to the dictum of the PCIJ in the *Lotus* case as authority for the view that any assertion of jurisdiction is lawful unless it is specifically prohibited.

92 [1972] ECR 619.

93 [1988] ECR 5193.

8.5 Nationality principle

Most civil law systems claim a wide jurisdiction to punish crimes committed by their nationals, even on the territory of a foreign state. Those states which make little use of the nationality principle do not appear to protest about its use elsewhere. Although a state may not enforce its laws within the territory of another state, it can punish crimes committed by nationals extra-territorially when the offender returns within the jurisdiction. Jurisdiction based on nationality is less usual in common law countries, although there may be exceptions with regard to serious offences. For example, under English law, the courts have jurisdiction over British nationals who have committed murder or manslaughter, bigamy or treason outside the territory of the UK. It should also be noted that s 70 of the Army Act 1955 provides for the jurisdiction of the UK military legal system over UK military personnel wherever they are stationed. The specific jurisdictional issues raised by foreign troops will be considered in more detail in Chapter 8.

As a general rule, international law sets no limits on the right of a state to extend its nationality to whomsoever it pleases. In the *Nationality Decrees in Tunis and Morocco* case (1923)[94] the PCIJ stated that:

> In the present state of international law, questions of nationality are, in the opinion of the Court, in principle within the [jurisdiction of the state].

This position was confirmed in Article 1 of the Hague Convention on the Conflict of Nationality Laws 1930, which provides that:

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

In the *Nottebohm* case (1955)[95] the ICJ stated:

> According to the practice of states, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred ... is in fact more closely connected with the population of the state conferring nationality than with that of any other state.

Thus the general rule is that there should be some genuine link between a state and the person to whom it grants nationality. The two most important bases upon which nationality is founded are descent from parents who are nationals (*jus sanguinis*) and birth within the territory of the state (*jus soli*). It is also possible for individuals to change nationality, for example by marriage or by naturalisation based on residence. The issue of nationality is considered in more detail in the context of nationality of claims in Chapter 9.

94 (1923) PCIJ Ser B, No 4.

95 [1955] *ICJ Rep* at p 4.

8.6 Passive personality

Under this principle, jurisdiction is claimed on the basis of the nationality of the actual or potential victim. In other words, a state may assert jurisdiction over activities which, although committed abroad by foreign nationals, have affected or will affect nationals of the state. The Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935 did not list the passive personality principle as a basis of jurisdiction and the commentary to the Draft Convention indicated that state practice with regard to the principle was inconclusive. The principle was rejected by all six dissenting judges in the *Lotus* case. It is argued that in most cases jurisdiction based on the passive personality principle could also be justified on the protective and the universality principle.

The commonly cited example of the principle is the *Cutting* case (1886). Cutting, a US national, had published defamatory statements amounting to a criminal offence against a Mexican national under Mexican law, even though the publication had taken place in Texas. Cutting was convicted of the offence, *inter alia* on the ground that Mexico was entitled to exercise jurisdiction on the basis of the passive personality theory. This view was strongly contested by the US and eventually Cutting was released, although Mexico claimed that the release was due only to the fact that the victim of the defamation withdrew from the action.[96]

The prevailing view has until recently been that the passive personality principle should not be regarded as a proper basis for exercising jurisdiction. The main ground of objection to the principle is the fact that it seems to base jurisdiction solely on the fortuitous fact of the victim's nationality, which may very often be irrelevant to the commission of the offence itself. However, within the last 10 years the US has begun to alter its practice and it remains to be seen the effect this will have on state practice around the world. The first major indication of the change concerned the Achille Lauro affair, in which the United States sought extradition from Italy of the leader of the group which had hijacked the Achille Lauro in 1985. The sole link between the US and the hijacking was that the hijackers had killed Leon Klinghoffer, a US national. Further confirmation of the US change in attitude was provided by the decision of the Court of Appeal, District of Columbia, in *United States v Yunis* (1991).[97] Yunis, a Lebanese national, was charged with hostage-taking and piracy in connection with the hijacking in 1985 of a Royal Jordanian Airline aircraft on which US citizens were travelling. The Court of Appeals upheld the decision of the lower court which found that the passive personality principle did authorise states to assert jurisdiction over offences committed against their citizens abroad. Chief Judge Mikva stated:

> Under the passive personality principle, a state may punish non-nationals for crimes committed against its nationals outside its territory, at least where the state has a particularly strong interest in the case.

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96 *Moore's Digest*, Vol II (1906) Washington: US Govt at p 228.

97 (1989) 83 *AJIL* 94.

Yunis unsuccessfully argued that the passive personality principle could only apply where the victims were chosen precisely because they were nationals of a particular state, which was not the case here. The court did also base jurisdiction on the universality principle, and it is suggested that in both this case and in the Achille Lauro incident jurisdiction could, and probably should, have been based on the universality principle alone given the nature of the offences involved. The universality principle is discussed at 8.7 (below). The most recent US decision involving the passive personality was made by the Supreme Court in *United States v Alvarez-Machain* (1992).[98] Dr Alvarez-Machain was a Mexican national who was accused of participating in the torture and murder of a US special agent in the Drug Enforcement Agency. The torture and murder had taken place in Mexico. Although there was an extradition treaty between Mexico and the US, Alvarez-Machain was abducted by US agents and flown to the US. At first instance the District Court upheld Mexican complaints that it lacked jurisdiction to hear the case. The decision was upheld in the Court of Appeals, and the US government appealed to the Supreme Court. It held that the US courts had jurisdiction to try the accused as long as the manner in which he was brought to the court did not breach any treaty obligations between the two states. The court examined the extradition treaty and found that the abduction of Alvarez-Marchain did not contravene any express or implied provisions of the treaty. It therefore held that the US courts had jurisdiction. The court ignored the possibility of the abduction being prohibited by customary international law and the decision seems to provide further evidence of the use of the passive personality principle, since the only connection the US had with the case was the fact that the victim of the crime was a US national. It remains possible to argue that jurisdiction in this case could have been based on the universality principle, since the offence involved allegations of torture.

8.7 Universality principle

It has been seen that so far all the bases of jurisdiction have in some way involved a connection with the state asserting jurisdiction. Events have taken place within the territory of the jurisdictional state or they have been committed by or against nationals or in some other way impinge on the interests of the state claiming jurisdiction. International law further recognises that where an offence is contrary to the interests of the international community, all states have jurisdiction irrespective of the nationality of the victim and perpetrator and the location of the offence. The rationale behind the universality principle is that repression of certain types of crime is a matter of international public policy.

The origins of universal jurisdiction can be traced to the fight against piracy. Customary international law provides that any state can exercise jurisdiction over pirates, provided the alleged pirate is apprehended on the high seas or within the territory of the state exercising jurisdiction. Clearly the nature of piracy makes it difficult, if not impossible, for jurisdiction to be based on any of the other principles: the offence is, by definition, committed outside the territory

98 [1992] 95 ILR 355.

of any particular state; the nationality of the pirates would not always be possible to ascertain; and those apprehending the pirates would very often not have been the victims of the act of piracy. The rule of customary international law was affirmed in the Convention on the High Seas 1958, Article 19, and is included in Article 105 of the Law of the Sea Convention 1982.

Piracy under international law (or piracy *jure gentium*) must be distinguished from piracy under municipal law. Offenders that may be characterised as piratical under municipal law may not fall within the definition of international law and thus are not susceptible to universal jurisdiction. Piracy *jure gentium* was defined in Article 15 of the High Seas Convention 1958:

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

The law relating to piracy and the more general issue of jurisdiction on board ships will be considered in more detail in Chapter 10.

A number of other offences have since joined piracy in being regarded as capable of being subject to universal jurisdiction. One of the earliest offences to be so recognised was slave trading. By the second half of the 19th century it was widely accepted that customary international law prohibited the slave trade, and a number of states began to assert jurisdiction over offences connected with slavery on the basis of the universality principle. For example, s 26 of the UK's Slave Trade Act 1873 provides that the English courts have jurisdiction over certain slavery offences irrespective of where or by whom they are committed. The Slavery Convention 1926 further provides for universal jurisdiction over such offences. Since 1945, universal jurisdiction has been provided for in a number of treaties on matters of international concern, for example, torture, drug trafficking, attacks on diplomats, hostage taking and the hijacking and sabotage of aircraft. Jurisdiction over offences relating to aircraft will be discussed in more detail in Chapter 11.

There has been some discussion of the basis of jurisdiction over war crimes and other breaches of the laws of war. Many writers consider that the exercise of jurisdiction over war crimes is a further example of the universality principle and the classic example given is the *Eichmann* case (1961).[99] Adolph Eichmann was head of the Jewish Office of the German Gestapo and, as such, had been responsible for the carrying out of Hitler's 'Final Solution'. In 1960 he was

99 [1961] 36 ILR 5.

abducted by Israeli agents in Argentina and brought to Israel where he was charged with war crimes, crimes against humanity and crimes against the Jewish people. During the course of his trial in Jerusalem, his lawyers made objections to Israeli jurisdiction. It was argued that Eichmann had been a German national at the time of the offences which had been carried out elsewhere than on the territory of Israel against persons who were not Israeli nationals. At the time of the offences, of course, Israel did not exist as a state. The Jerusalem District Court found that it did have jurisdiction, stating that:

> The abhorrent crimes defined in the [Israeli Nazi and Nazi Collaborators (Punishment) Law 1951] are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Criminal Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[100]

Brownlie argues, correctly it is submitted, that a distinction needs to be drawn between such cases where what is being punished is the breach of international law (*delicta juris gentium*) and the true application of the universality principle where international law merely provides that states have a liberty to assert jurisdiction over certain specific acts which are not themselves necessarily breaches of international law. The distinction may be important since the strict application of the universality principle would seem to depend upon the municipal law of the state asserting jurisdiction whereas jurisdiction over international crimes involves interpretation of the provisions of international law. Thus in the *Barbie* case (1983)[101] the French court found that it had jurisdiction over crimes against humanity committed by Klaus Barbie on the basis of the provisions of the relevant international agreements which were not subject to the usual statutory limitations of French law. The subject of war crimes and crimes against humanity will be discussed in more detail in Chapter 14.

8.8 Double jeopardy

It has already been seen that very often it will be the case that more than one state has jurisdiction over a particular act. In such situations the question of double jeopardy arises: if a person is acquitted or convicted in one state, can that person subsequently be prosecuted for the same offence in another state? There is no unequivocal answer: the Harvard Draft Convention does provide that no state should prosecute or punish an *alien* who has been prosecuted in another state for much the same crime. But no reference is made to *nationals* who have been prosecuted in another state. The English courts have generally held that an acquittal or conviction by a court of competent jurisdiction outside England is a bar to indictment for the same offence before any court in England. However, before a plea of *autrefois convict* or *acquit* can be sustained it must be

100 [1961] 36 ILR 5 at para 12.

101 [1983] 78 ILR 78.

shown that the defendant stands in jeopardy of punishment for a second time. Thus in *R v Thomas* (1984) the defendant could be tried in England for an offence for which he had already been tried and convicted in Italy since he had been tried and convicted in his absence and there appeared little likelihood of his actually serving his sentence in Italy.

8.9 Extradition

The term extradition denotes the process whereby, under treaty or upon a basis of reciprocity, one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state, such requesting state having jurisdiction. The rationale behind the law and practice of extradition is as follows:

(a) a desire not to allow serious crimes to go unpunished. Frequently a state in whose territory a criminal has taken refuge cannot prosecute the offence because of a lack of jurisdiction. It will therefore surrender the criminal to a state that can try and punish the offence;

(b) the state on whose territory the offence has been committed is the best able to try the offence because of the availability of evidence etc.

Extradition developed in the 19th century through the use of bilateral treaties, and the principle was accepted that there was no right to extradite, although there is also no rule forbidding the surrender of offenders. In England, extradition is governed by the Extradition Act 1989. Extradition is more principally a matter for municipal law although a number of general principles can be discerned.

Before extradition can be ordered two conditions must be satisfied:

1 there must be an extraditable person;

2 there must be an extradition crime. Such crimes are usually listed in the extradition agreement and very often political crimes, military offences and religious offences are not extraditable. Obviously the definition of such crimes is an area for much argument and there have been a number of cases involving arguments about the extent to which acts of terrorism constitute political crimes.

A usual requirement is that of double criminality: the act should be a crime in both states. Furthermore, it is a general principle that a state should not try an offender for any offence other than the one for which he was extradited.

A particular question that has been raised in the *Lockerbie* case (1992) is whether, in situations where more than one state has jurisdiction over an offence, a state can insist on the extradition of a defendant from a state which is willing to prosecute the offence itself. The matter was not considered by the ICJ when Libya made its request for provisional measures of protection, but it is likely to be raised when the merits of the case are heard.

8.10 Asylum

Linked to the question of extradition is asylum. It involves two elements: shelter and a degree of active protection. It may be either territorial asylum, granted by a state on its territory, or extra-territorial asylum, granted in consular premises,