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,

diplomatic missions, etc. The general view is that every state has a right to grant territorial asylum subject to the provisions of any extradition treaty in force. The granting of territorial asylum is regarded as an aspect of state territorial sovereignty. A more important question is whether there ever exists any duty to grant asylum. The right to grant extra-territorial asylum is more controversial and needs to be established in each case, since it involves a derogation from territorial sovereignty.

Article 14, Universal Declaration of Human Rights 1948 provides that:

1 Everyone has the right to seek and enjoy in other countries asylum from persecution.

2 This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

A resolution of the UN General Assembly, the Declaration on Territorial Asylum, which was adopted on 14 December 1967 recommended a number of practices and standards:

1 a person seeking asylum from persecution should not be rejected at the frontier – the individual case should be considered properly. This is generally known as the principle of *non-refoulement*;

2 if a state finds difficulty in granting asylum, international measures should be taken to try and alleviate the burden;

3 asylum should be respected by all other states.

The preamble to the declaration made clear that the grant of asylum to persons fleeing persecution is a peaceful and humanitarian act that cannot be regarded as unfriendly by any other state. It now seems to be accepted that the principle of *non-refoulement* is part of customary international law and is a fundamental rule of refugee law. Refugees are defined as those having a well-founded fear of persecution. What has yet to be settled is how the phrase 'well-founded fear of persecution' is to be construed. In particular it is not clear whether the test is an objective or a subjective fear; whether it depends solely on the refugee's own perceptions or whether the views of the receiving or the alleged persecuting state are significant. There are a number of treaties dealing with the rights of refugees, in particular the Refugee Convention 1951 as amended by the Protocol 1967.

As far as extra-territorial asylum is concerned, there exists no general right to grant diplomatic asylum. This point was confirmed by the ICJ in the *Asylum* case (1950).[102] Exceptionally extra-territorial asylum may be granted:

(a) as a temporary measure to individuals in physical danger;

(b) where there is a binding local customary rule that diplomatic asylum is permissible;

(c) under special treaty.

102 [1951] *ICJ Rep* at p 1.

8.11 Illegal seizure of offenders

Article 16 of the Harvard Draft Convention provided that no state should have jurisdiction over an offender who had been brought within its territory as a result of measures which themselves breached international law. However, the article appears to be more in the nature of *lege ferenda* than of *lex lata*. state practice seems to establish that the illegal seizure of offenders in the territory of another state is not of itself a bar to the exercise of jurisdiction. In the *Eichmann* case (1961)[103] the defendant was unlawfully seized by Israeli agents in Argentina and transported to face trial in Israel. In *United States v Yunis* (1991),[104] the US courts found that they had jurisdiction although Yunis, a Lebanese national, had been lured onto a yacht in the Mediterranean by FBI agents and then arrested once the yacht entered the high seas. In both cases there was in existence no formal extradition arrangements between the countries involved and thus some writers have argued that seizure of offenders would negate any claim to jurisdiction if extradition would have been possible. However, in the *United States v Alvarez-Marchain* (1992)[105] the Supreme Court held that the US courts had jurisdiction in spite of the fact that Dr Alvarez-Machain had been seized by US drug enforcement agents in Mexico although an extradition treaty was in force between the US and Mexico. In *R v Plymouth Justices, ex p Driver* (1986)[106] the British police wished to interview Driver, who was in Turkey. No extradition arrangements existed between the UK and Turkey and the police therefore asked the Turkish authorities for assistance. As a result Driver was detained and transported to Britain where he was charged with murder. He argued that the English courts had no jurisdiction, but the Divisional Court held that once a person was lawfully in custody within the jurisdiction the courts had no power to inquire into the circumstances by which that person came into the jurisdiction.

Of course, while the manner in which a defendant is brought before the court may not be a ground for denying jurisdiction, it is possible that the manner in which a defendant is seized may involve other breaches of international obligations. In general, the seizure of defendants by government agents acting outside the territory will amount to a breach of the principle of non-intervention in the domestic affairs of another state and will give rise to international liability. In the *Eichmann* case,[107] the Argentinean authorities made strong protests to Israel about the capture of Adolph Eichmann although the dispute between the two states was resolved before the case came to trial.

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103 [1961] 36 ILR 5.

104 [1991] 30 ILM 403.

105 [1992] 95 ILR 363.

106 [1986] 1 QB 95.

107 [1961] 36 ILR 5.

8.12 The wrongful exercise of jurisdiction

As was stated at the beginning of this chapter, international law is concerned with the propriety of the exercise of jurisdiction. The exercise of jurisdiction over aliens and with respect to events occurring outside the territory may well constitute interference in the domestic affairs of another state. In general, international law prohibits such intervention and it therefore follows that a wrongful exercise of jurisdiction may give rise to liability to another state even in the absence of any intention to harm that other state.

CHAPTER 9

IMMUNITIES FROM NATIONAL JURISDICTION

9.1 Introduction

As was seen in Chapter 7, the principal basis for jurisdiction is territorial. States are recognised as having authority over people, things and events within their own territory and therefore may exercise jurisdiction over them. However, international law does recognise that certain people, things and events are entitled to immunity from the enforcement of local law. It should be noted that immunity is from enforcement rather than from the law itself. It is these exceptions to territorial enforcement which are the subject of this chapter. Traditionally there have been two beneficiaries of the exception: foreign states and foreign diplomats. More recently international organisations have also been accorded certain immunities.

Today, immunity from jurisdiction may be enjoyed by:

(a) foreign states and heads of foreign states (including public ships of foreign states);

(b) armed forces of foreign states;

(c) diplomatic representatives and consuls of foreign states;

(d) international organisations.

An initial point that should be noted is the distinction to be drawn between the related concepts of 'immunity' and 'non-justiciability'. Where an issue is non-justiciable the municipal court has no competence to assert jurisdiction at all. A non-justiciable matter is one that cannot be the subject of judicial proceedings before a municipal court. Immunity arises where the municipal court would ordinarily have jurisdiction but because of the identity of one of the parties involved the court will refrain from exercising that jurisdiction. One of the consequences of the distinction is that it is possible for immunities to be waived but the courts will never be able to consider matters which are non-justiciable. This chapter is principally concerned with immunities.

9.2 State immunity

9.2.1 The basis of state immunity

The traditional view of immunity was set out by Chief Justice Marshall of the United States Supreme Court in *Exchange v McFaddon* (1812).[1] The case concerned a ship, the Exchange, whose ownership was claimed by the French government and by a number of US nationals. The US Attorney General argued that the court should refuse jurisdiction on the ground of sovereign immunity. Chief Justice Marshall stated:

> The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not

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1 (1812) 7 Cranch 116.

> seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

State immunity developed from the personal immunity of sovereign heads of state. At an international level all sovereigns were considered equal and independent. It would be inconsistent with this principle if one sovereign could exercise authority over another sovereign. The immunity of sovereigns is expressed in the maxim *par in parem non habet imperium*. In medieval times ruler and state were regarded as synonymous, and sovereignty was regarded as a personalised concept. By the time of *Exchange v McFaddon* it was clear that sovereign had a representative character and that actions taken on behalf of the sovereign, or in the name of the sovereign, were capable of attracting the same immunities.

State immunity can also be linked to the prohibition in international law on one state interfering in the internal affairs of another. In *Buck v AG* (1965),[2] the Court of Appeal was called upon to discuss the validity of certain provisions of the Constitution of Sierra Leone and refused on the basis that it lacked jurisdiction. In the course of his judgment, Diplock LJ stated:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state ... As a member of the family of nations, the Government of the United Kingdom observes the rules of comity, *videlicet* the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or its property, except in accordance with the rules of public international law. One of the commonest applications of this rule ... is the well known doctrine of sovereign immunity ... the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue.

The question arises as to whether immunity arises *ratione personae* or *ratione materiae*. This quotation would seem to support the view that immunity applies only *ratione materiae,* but other writers are not so sure:

> ... does [immunity] apply *ratione personae* or *ratione materiae*? The answer is probably both. Immunity applies *ratione personae* to identify the categories of persons, whether individuals, corporate bodies or unincorporated entities, by whom it may *prima facie* be claimable; and *ratione materiae* to identify whether substantively it may properly be claimed ... [3]

2 [1965] Ch 745.

3 Sinclair, 'The Law of Sovereign Immunity; Recent Developments' (1980) 167 *Hague Recueil* 113.

It seems better to suggest a twofold test: first, is the entity concerned entitled to immunity (*ratione personae*) and then, if the answer is yes, is the act itself one which carries immunity (*ratione materiae*).

9.2.2 *Absolute and restrictive immunity*

The traditional doctrine of state immunity was absolute in that immunity attached to all actions of foreign states. With the rise of industrialisation during the 19th century, States became more involved in commercial activities, particularly in the area of railways, shipping and postal services. The emergence of the Communist states in the first half of the 20th century and the increasing use of nationalisation as a tool of economic development resulted in a massive growth in the commercial activity of states. It became increasingly common for private individuals and corporations to enter into contracts with foreign state trading organisations. Should a dispute subsequently arise the foreign state trading organisation would be able to rely on the doctrine of sovereign immunity and deny the other party the protection of municipal law. This situation led to calls for the modification of the absolute immunity of states and it was suggested that a distinction could be drawn between the public acts of states (acts *jure imperii*) and private acts (trading and commercial acts – acts *jure gestionis*). Under a restrictive view of immunity it would only be acts *jure imperii* that would attract immunity. In *Dralle v Republic of Czechoslovakia* (1950)[4] the Supreme Court of Austria carried out a comprehensive survey of state practice and concluded that in the light of the increased commercial activity of states the classic doctrine of absolute immunity had lost its meaning and was no longer a rule of international law. In 1952 the US State Department issued the Tate Letter which stated that immunity would only be given to public acts and no longer to private acts. This restrictive approach was supported by four justices of the Supreme Court in *Alfred Dunhill of London Inc v Republic of Cuba* (1976)[5] and the doctrine of restrictive immunity was confirmed in the US Foreign Sovereign Immunities Act 1976.

It should be noted that the doctrine of absolute immunity still applies to Heads of State and is usually extended to such members of their family that form part of their household.

9.2.3 *The British position*

British practice with regard to state immunity has undergone a series of changes. In the mid-19th century the authorities seemed to conflict and there was certainly some evidence of a restrictive view being taken. For example, in *De Haber v Queen of Portugal* (1851),[6] the Lord Chief Justice seemed to favour a restrictive view of immunity when he said:

> ... an action cannot be maintained in an English court against a foreign potentate for anything done or omitted to be done by him *in his public capacity* as representative of the nation of which he is head ... no English Court has

4 [1950] 17 ILR 165.

5 425 US 682 (1976).

6 (1851) 17 QB 171.

> jurisdiction to entertain any complaints against him in that capacity (at p 207 – emphasis added).

The case seen for a long time as the main authority on state immunity was *The Parlement Belge* (1880).[7] In that case, which concerned a mail ship owned and controlled by the King of Belgium and crewed by the Royal Belgian Navy, the Court of Appeal held that it lacked jurisdiction 'over the person of any sovereign ... of any other state, or over the public property of any state which is destined to its public use'. Forty years later, the Court of Appeal in *The Porto Alexandre* (1920)[8] relied on *The Parlement Belge* to find that immunity attached to a ship which had been requisitioned by the government of Portugal and used to carry cargo belonging to a private company. It was argued that the ship was engaged on an ordinary commercial undertaking, but the court held that that was not capable of displacing the rule of absolute immunity laid down in *The Parlement Belge*. The doctrine of absolute immunity was seen at its most extreme in *Krajina v The Tass Agency* (1949).[9] In that case, Krajina claimed damages for a libel contained in the Soviet Monitor which was published by the London office of the Tass news agency. The Soviet Ambassador to the United Kingdom certified that Tass was a department of state of the Soviet Union and the Court of Appeal accordingly decided that it was entitled to immunity. The decision provoked widespread criticism and led to the setting up of a government committee to consider the whole question of state immunity. The committee found that the UK did accord a greater immunity than that granted by many other states but was unable to agree on the question of the degree of immunity required by international law. The courts continued to apply the absolute doctrine, although in *Rahimtoola v Nizam of Hyderabad* (1958)[10] Lord Denning, in a dissenting judgment, put the case strongly for adopting a restrictive approach.

By the 1970s a significant number of states had adopted the restrictive approach, and following lengthy discussions the Council of Europe promulgated the European Convention on state Immunity 1972 which the United Kingdom signed. Its provisions were incorporated into English law by the State Immunity Act 1978 which entered into force on 22 November 1978. Before the Act came into force the British courts had already shown a change in approach in two notable cases: *The Philippine Admiral* (1977)[11] and *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* (1977).[12] The latter case was notable for the judgment of Lord Denning, to which reference has already been made in Chapter 2. In that case the Court of Appeal held that restrictive immunity was now firmly established as a rule of customary international law and it could therefore be incorporated into the common law without need for Act of Parliament. This point was confirmed by the House of Lords in *I Congreso del Partido* (1981),[13] a case which concerned matters occurring before the State

7 (1880) 5 PD 197.

8 (1920) p 30.

9 [1949] 2 All ER 274.

10 [1958] AC 379.

11 [1977] AC 373.

12 [1977] 2 WLR 356.

Immunity Act came into force.

The State Immunity Act 1978 provides in s 1 that states are immune from the jurisdiction of the courts of the United Kingdom except as provided in the Act. The Act contains 10 provisions which create exceptions to the main rule. Probably the most important exception is provided in s 3:

(1) A state is not immune as respects proceedings relating to

(a) a commercial transaction entered into by the state; or

(b) an obligation of the state which by virtue of a contract (whether a commercial transaction of not) falls to be performed wholly or partly in the United Kingdom.

Subsection 3(3) lists those transactions which will be considered commercial:

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a state and an individual.

The principle established by the Act is the classical one: it is the foreign[13] state that is immune from the jurisdiction of the courts.[14] The Act does not speak of a sovereign state. On the existence of a state (and of many other international facts) the Secretary of State's certificate is conclusive evidence;[15] the question whether an unrecognised state is entitled to immunity will, therefore, not come up for judicial decision and it is quite possible that in a given case the Secretary of State's certificate may, in effect, be able to answer that question in the affirmative and thus, contrary to traditional learning, withdraw a point of law from judicial decision – an unfortunate and, possibly, objectionable[16] result. The beneficiaries of immunity, however, comprise a number of defendants other than a state. Their definition invites a few comments.

1 The reference to a state includes, of course, its sovereign, 'in his public capacity'[17] (who and whose family shall enjoy the benefit of the Diplomatic Privileges Act 1964[18] as well as the government and its departments.[19] No serious difficulties are likely to arise in respect of these defendants.

2 Immunity is also enjoyed by an *entity*, ie, a body capable of suing and being

13 [1981] 2 All ER 1064.

14 This includes a Commonwealth state.

15 Section 1 of the State Immunity Act 1978.

16 Section 21.

17 If and so far as the Foreign and Commonwealth Office purports to decide a question of law there may be a violation of Art 6 of the European Convention on Human Rights.

18 Section 14(1)(a).

19 Section 20.

sued, which is not distinct from, that is to say, is a part of, the executive organs of the government.[20] This is to be distinguished from a *separate entity*, ie, a body capable of suing and being sued and distinct from the executive organs of the government; such entity is immune only in certain circumstances to be considered later.

The Act, therefore, does not attach significance to the question whether under its own law the entity is a body corporate, a legal person, or not. It is possible that the entity meets the test of the prescribed procedural status, although it is not a body corporate in the English sense. The Act accepts the decision of a majority in the Court of Appeal[21] according to which a legal entity is entitled to immunity if in substance it is a department of state. The frequently difficult question of whether or not a body is a corporate one has become irrelevant.

Whether the entity which is capable of suing and being sued is 'distinct from the executive organs of the government' is a question of fact and depends on foreign law, *viz* the status which the foreign law confers upon the entity rather than the factual situation. If the entity is intended by the legislator to be distinct, then the fact that it acts in accordance with the directions of the government does not matter. Conversely, if the entity is not intended by the law to be distinct, its actual independence of government organs cannot deprive it of immunity.

It is distinctness from executive organs that matters. Accountability to Parliament or parliamentary organs such as a Public Accounts Committee is immaterial. And the distinctness, it is believed, must be of an organisational character in the sense that the test is provided by the existence of the right of executive organs to give directions about the conduct of the entity's daily business. Political independence is a different and irrelevant point: the entity may have to observe the general lines of the government's policy, yet be distinct from its executive organs. In practice it will probably be helpful to ask whether in substance the entity is a department of government or carries on its business independently, albeit in line with general government policy.

3 Constituent Territories of a federal state have been dealt with somewhat oddly. As a rule they are treated as if they were a separate entity except that s 12 relating to services of process and judgments in default of appearance applies to them in any case. An Order in Council, however, may provide for other provisions to apply as they apply to a state.[22] This creates uncertainty and exposes a legal question to political influence and pressure, but in view of an unsatisfactory provision of the European Convention[23] the British legislator probably had to adopt some such solution.

A corporation which is 'part and parcel' of a department or an arm of the government of a constituent territory, such as the New Brunswick Development Corporation was found to be in relation to the Province of New Brunswick,[24] is not specifically mentioned in the Act and would appear to be disentitled to immunity. *Ex hypothesi* it is not and cannot be an entity which is part of the

20 Section 14(1),

21 *Baccus SA v Nacional del Trigo* [1957] 1 QB 438 (Jenkins and Parker LJJ, Singleton LJ dissenting). Noted (1957) *Modern Law Review* 20 at p 273.

22 Section 14(5).

23 Article 28; see SI 1979/457 relating to Austria's constituent territories.

24 *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604; *cf Swiss-Israel Trade Bank v Government of Malta* [1972] 1 Lloyd's Rep 497. On both cases see comment (1973) *Modern Law Review* 38 at p 18.

central government and therefore covered by s 14(1). And s 14(5) and (6) as summarised above only refers to the immunity of the constituent territory itself (for instance, 'as if it were a separate entity'), but does not touch a separate entity or a corporation created by the constituent territory. Nor can such an entity be treated as if it were a department of the constituent territory's government. The wording is so clear that a body corporate which is separate and distinct cannot be put on the same level as its creator. Different reasoning was possible and was in fact adopted under the common law, but it is not supported by the accepted canons of statutory interpretation. Nor is there any cause for regretting that such a body as the New Brunswick Development Corporation no longer enjoys immunity in this country. International law did not at any time confer such a privilege upon it.

Exceptions to immunity

The Act includes 10 provisions which create exceptions to the rule of immunity established by the first section. Many of them and certainly those which in practice are the most important ones are founded upon the existence of a 'commercial transaction' or of 'commercial purposes'. They adopt the distinction between acts *jure imperii* and acts *jure gestionis*, which in 1951 the Inter-Departmental Committee had rejected as unacceptable. What is more, to a large extent they refrain from a definition, but leave it to the courts to work out the distinction. In fact 'commercial purposes' is defined in s 17(1) in somewhat circular terms, namely by reference to the definition of 'commercial transaction', in s 3. It is a field which has yielded a large harvest in foreign jurisdictions. Both the Brussels and the European Conventions as well as the recent legislation adopted by the United States of America have accepted exceptions based on the commercial character of the activity. There can be no question of foreign legal developments being a source of law governing the interpretation of an English statute. Yet where the English statute intends to codify the law in a manner consistent with international law, comparative material will have persuasive material of varying strength in construing terms that are now accepted to be common to most countries and expressive of the present state of public international law.

Another general point which requires emphasis is that it would be unjustifiable to subject ss 2 to 11 of the Act to a narrow construction on the ground that they contain exceptions to the principle laid down in s 1. The European Convention precluded any such argument by enumerating in Articles 1 to 14 the circumstances in which a state is not entitled to immunity and by providing in Article 15 for immunity 'if the proceedings do not fall within' the former group. In England it has frequently been a technique of statutory interpretation to say that an exception does not derogate from the principle to a greater extent than the words strictly require, that, in other words, in case of doubt the principle rather than the exception should be held to apply.[25] But this is not invariably so and should certainly not be so in the present case. What the legislator described as exceptions represents a very broad sector of state activity. Its limits should be so drawn as to fit the legislative purpose behind each provision rather than the drafting technique that the legislator followed. The so-called exceptions are a far-reaching group of provisions which are not subordinate, but equal to, on the

25 Such suggestions have frequently been made. See, eg Cockburn LJ in *Sowerby v Smith* [1884] LR 9 CP 524 at 532 where he said that a certain provision 'being in derogation of the freehold given by the Act … must, I think, be construed most strictly'.