

The Law Commission

(LAW COM. No. 91)

CRIMINAL LAW

REPORT ON THE TERRITORIAL AND EXTRATERRITORIAL EXTENT OF THE CRIMINAL LAW

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THE LAW COMMISSION

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THE LAW COMMISSION

Item XVIII of the Second Programme

THE TERRITORIAL AND EXTRATERRITORIAL EXTENT OF THE CRIMINAL LAW

*To the Right Honourable the Lord Elwyn-Jones, C.H.,
Lord High Chancellor of Great Britain*

I INTRODUCTION

1. Under subject 3 of Item XVIII of the *Law Commission's Second Programme of Law Reform*, "Extraterritorial Jurisdiction in Criminal Offences"¹ is one of the subjects listed for examination as part of a comprehensive review of the criminal law with a view to its eventual codification. The Law Commission has undertaken the present examination and submits its recommendations on the subject in this report as a further contribution to the plan for the codification of the criminal law.

2. Consultation upon this subject has taken place in several stages and has been unusually prolonged. Issue of our Working Paper² was preceded by limited circulation of a Study Paper in 1968 to certain government departments and some interested bodies and individuals, who had given us many useful suggestions which were incorporated in the paper. Our Working Paper in turn incorporated many of the comments made by the recipients of the Study Paper and it was given a wide distribution amongst government departments, practising and academic lawyers and other interested parties. The response to the paper³ was of value to us in reformulating our recommendations with a view to the issue of a report. While substantial progress was made with that end in view, as we said in our Tenth Annual Report,⁴ work on the report had to give way to more urgent tasks.

3. We are now in a position to submit a final report, but as explained below this deals only with certain aspects of the Territorial and Extraterritorial Extent of the Criminal Law. Draft clauses intended to give effect to our recommendations are in Appendix A.

4. The courts of England and Wales are of course concerned only with conduct which is an offence against the law of England and Wales. With certain exceptions, the general assumption is that to be an offence against English law conduct must in some degree be connected with the territory of England and

¹ The word "jurisdiction" can be confusing: in this report we are concerned primarily with jurisdiction in the sense of the extent of the application of the criminal law. We are not primarily concerned with the narrower question of the jurisdiction of a court to try particular criminal cases, although we deal with some aspects of this question in paragraphs 25-33 and part V, below.

² (1970) Working Paper No. 29.

³ A list of commentators is given in Appendix B.

⁴ (1975) Law Commission's Tenth Annual Report 1974-1975, Law Com. No. 71, para. 32.

Wales. In the majority of cases this means that the conduct must occur in England and Wales,⁵ as for example with offences such as burglary, assault or driving offences. There is some authority⁶ for the view that in what have been termed "result crimes", such as obtaining goods by deception, it is sufficient if only the result occurs in England and Wales. In either event, in order to determine whether there has been an offence against English law, it is necessary to know what is the territory of England and Wales; and one of the principal issues dealt with in this report is the definition of that territory for the purposes of the projected criminal code.

5. Our working paper dealt with two principal aspects of the territorial extent of the criminal law. It examined first the question referred to above, namely what should be the limits of the territory of England and Wales; but it also considered the more difficult question, where a crime has to have some connection with the territory, of how closely connected with that territory proscribed conduct must be before it constitutes an offence against English law. It contained tentative proposals on the latter aspect for legislative provision to the effect that, where any act or omission or any event constituting a prescribed element of an offence occurs in England or Wales, the offence should be deemed to have been committed there, even if other elements of the offence take place outside England and Wales. Since our working paper was published there have been some important decisions which, as we have noted⁷, have lent some support to the view that, if the harm proscribed by certain offences occurs in England and Wales, the offence can be tried here even though other elements of the offence take place outside the territory.

6. We have given close consideration to whether it would be possible to provide general rules of construction which would assist in determining whether an offence has been committed in cases where although some elements of the offence may have been carried out abroad, other elements, including in particular any harm proscribed by the offence, have taken place in England and Wales. We have however come to the conclusion that we cannot recommend any such general rules. Where conduct essential to the commission of an offence has taken place in England or Wales, although other necessary elements of the offence have taken place or relate to territory outside England and Wales, it will frequently be the case that an offence will have been committed under English law.⁸ But we do not think that this can be a universal

⁵ "Apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England": *Cox v. Army Council* [1963] A.C. 48, 67 *per* Viscount Simonds; see also *R. v. Treacy* [1971] A.C. 537, 551 *per* Lord Reid. "England and Wales" for this purpose includes certain adjacent waters: see paras. 14 *et seq.*, below.

⁶ *R. v. Markus* [1976] A.C. 35, 61 *per* Lord Diplock, and see *R. v. Treacy* [1971] A.C. 537, 564 *per* Lord Diplock; but compare Lord Widgery C.J. in *R. v. Markus* [1976] A.C. 35, 48 (C.A.).

⁷ See n. 6, above.

⁸ E.g. in *R. v. Treacy* [1971] A.C. 537: posting letter in England containing demand with menaces to recipient in West Germany *held* an offence under Theft Act 1968, s. 21; *R. v. El-Hakkaoui* [1975] 1 W.L.R. 396: possession of firearm in England with intent by means thereof to endanger the life of persons outside the United Kingdom *held* an offence under Firearms Act 1968, s. 16. Specific statutory provision to the same effect is made by the Theft Act 1968, ss. 22 and 24: a person who handles stolen goods commits that offence even if the stealing took place abroad, provided that the stealing amounted to an offence in the place where it occurred.

rule; much must depend on the policy underlying the particular offence. For example, although it is an offence under section 30 of the Sexual Offences Act 1956 knowingly to live on the earnings of prostitution, it is not self-evident that an offence is committed by anyone who is living off such earnings which have accrued from prostitution in another country.

7. Again, in some cases it is sufficient for an offence to have been committed under English law when, although the conduct required for the offence has taken place abroad, its harmful effects or results are felt in this country. In this connection Lord Diplock has suggested⁹ that “the rules of international comity do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment”. But it is important to note that it is for each state to decide as a matter of its own penal policy what constitutes “harmful consequences”, and those consequences which are considered harmful by one state may be very different from those so considered by another. Thus, before adopting any general rule of jurisdiction based on harmful consequences, it is necessary to consider what would be its implications as regards the jurisdiction which might be claimed by other states in respect of activities which they regard as criminal. We think a provision applicable to all offences, enabling them to be tried in England and Wales on the basis of what may loosely be called the harmful effects of proscribed conduct in this country, would invite similar claims by other countries in respect of offences against their criminal law where at least in some cases the jurisdiction so claimed would run counter to our conceptions of public policy.

8. On the other hand, we believe that progress can be made on this aspect of the territorial extent of the criminal law in the context of individual offences, where the considerations of policy to which we have referred can be examined in their particular application. Thus, although in this report we have confined ourselves to an examination of the first issue mentioned in paragraph 5, above, that is, the precise delimitation of the territory of England and Wales for the purposes of the criminal law, we are considering the second in our reports in preparation on particular offences, both substantive and inchoate¹⁰.

9. While there is an assumption that to be an offence against English law conduct must in some degree be connected with the territory of England and Wales, there are a number of exceptions to this general principle. These exceptions are examined in the report. For example, we review the way in which the law operates in the case of crimes occurring on board British ships and British-controlled aircraft and make recommendations for reform¹¹. There are other instances where penalties are imposed on conduct not (or not solely) according to where it takes place, but also depending on the perpetrator. In some cases the whole or a major part of the criminal law applying within

⁹ *R. v. Treacy* [1971] A.C. 537, 564.

¹⁰ The Criminal Law Revision Committee has also considered aspects of extraterritorial jurisdiction in Offences against the Person: see Working Paper on Offences against the Person (August 1976), paras. 168 *et seq.*

¹¹ See paras. 54 *et seq.*, below.

the territory of England and Wales is made applicable to the conduct of a particular class of persons outside the territory, for example, Crown servants in foreign countries¹². In other cases possession of a particular status, usually but not invariably that of a British subject, makes a person liable for a particular kind of conduct anywhere outside the territory. Murder is a clear statutory example.¹³ Since no comprehensive account of these exceptions to the application of English law on a territorial basis seems to be readily available, we have considered it appropriate to attempt a review of the areas of the criminal law in question.¹⁴ For the most part however we have not made recommendations for changes in these exceptional cases, either because amendment would raise matters of policy which it would be more appropriate to examine in the context of the legislation concerned¹⁵ than in a report devoted in the main to principles of general application or because the offence in question is already under review.¹⁶

10. It must however be noted that one basis for the application of the criminal law ignores considerations of both territory and status. Where conduct constitutes an offence according to international law, as in the case of piracy *jure gentium*, it is an offence wherever and by whomsoever committed. We examine piracy in this report together with the ancient statutes relating to this offence and make recommendations for reform¹⁷.

11. English statute law has in the past not been clear in its terminology as regards the territorial application of a particular offence-creating section and the jurisdiction of the courts to try it¹⁸. For the purposes of this report we consider it important to maintain the distinction between, on the one hand, the territorial extent of application of the criminal law and, on the other, the jurisdiction of the courts, to which we give separate treatment.

12. The recommendations in this report relate only to the law of England and Wales. In the international community of States, however, it is the United Kingdom rather than England and Wales which is the relevant unit. Furthermore, certain proposals in the report deal with amendments to legislation, such as the Merchant Shipping Act 1894, which applies throughout the United Kingdom. Accordingly we recommend that consideration should be given to the implications which our proposals would have for other parts of the United Kingdom. In the meantime the draft clauses have been prepared on the basis that they apply to England and Wales only. Primarily for this reason, the clauses are not at this stage set out in the form of a draft Bill: were it to be decided, for example, that the amendments we recommend to United King-

¹² Criminal Justice Act 1948, s. 31; see further paras. 76, *et seq.*, below.

¹³ See Offences against the Person Act 1861, s. 9, referred to in para. 95, below. Other examples include perjury, bigamy, foreign enlistment, official secrets, unlawful oaths and offences relating to explosive substances: see paras. 85 *et seq.*, below.

¹⁴ See paras. 75 *et seq.*, below. See 271. C.L.Q. p. 268, pub. August 1978.

¹⁵ E.g. the Official Secrets Act 1911; see paras. 89 *et seq.*, below.

¹⁶ E.g. offences against the person are under review by the Criminal Law Revision Committee and offences relating to interference with the course of justice by the Law Commission.

¹⁷ See further paras. 99 *et seq.*, below.

¹⁸ See e.g. Territorial Waters Jurisdiction Act 1878, s. 2, para. 16, below, Offences against the Person Act 1861, s. 9 (murder or manslaughter abroad) and Perjury Act 1911, s. 8 ("venue" in cases of perjury committed outside the United Kingdom).

dom statutes should be of general application, extensive consequential modifications of the clauses would be required. Furthermore, we are conscious of the fact that, although the clauses are all linked to recommendations in this report, they may not naturally form the subject matter of a single and self-contained Bill. It may therefore be that, if our recommendations are accepted, it will be found convenient to implement them in legislation bearing on the particular subject matter of the various clauses.

II THE TERRITORIAL LIMITS FOR THE PURPOSES OF THE CRIMINAL LAW

13. We have mentioned that most offences in English law operate on a territorial basis, and the present report does not question the continued application of the territorial principle in this large majority of cases. But where as in these cases the extent of the criminal law is limited to the territory of England and Wales, the law will be uncertain unless precise boundaries can be set to the outward limits of the territory, and of the adjacent waters, which for this purpose form part of its territory. In our Working Paper¹⁹ we proposed that a general statutory provision should define the area of water adjacent to England and Wales within which, subject to any specific exceptions, the criminal law of England applies and should render any offence committed in such an area triable by any English court within whose jurisdiction the offender might be found. Our consultations confirmed that the achievement of certainty by this means would be widely welcomed, and our present recommendations differ only in detail from those which we originally made.

A. The present position

14. The fundamental question with which we are here concerned is the territorial area within which the criminal law of England and Wales applies. At common law, the territory included the shore down to low water mark and internal, as distinct from territorial, waters. These therefore marked the seaward limits of the jurisdiction of the courts of common law. Internal waters traditionally included areas of bays, gulfs and the estuaries or mouths of great rivers *intra fauces terrae*, (that is, within the jaws of the land) and such waters were treated as being within the body of the adjacent county or counties.²⁰ The looseness of these concepts gave rise to some uncertainty as to their geographical extent.²¹

15. While as regards offences committed within England and Wales the jurisdiction of the criminal courts was limited in the manner described above, their jurisdiction to try offences outside the territory was based on the ancient

¹⁹ Working Paper No. 29, para. 16.

²⁰ *R. v. Keyn* (1876) 2 Ex. D. 63.

²¹ See e.g. *The Fagernes* [1927] P.311.

jurisdiction of the Admiralty²², which was reinforced by statute and extended by other legislative provisions. At common law the Admiral had jurisdiction over treasons, felonies, robberies, murders and “confederacies”²³ committed in or upon the high seas or in rivers abroad “below bridges where the tide ebbs and flows and where great ships generally go”²⁴ together with a jurisdiction concurrent with that of the common law courts over estuaries in England and Wales. The Admiral’s jurisdiction was apparently confined to indictable offences and it appears probable that his jurisdiction over offences at sea was limited to those committed on board, or by means of, a ship.²⁵ Certain surviving statutory provisions appear to do no more than provide legislative confirmation of this jurisdiction. These include section 1 of the Offences at Sea Act 1799, under which offences committed on the high seas are made punishable as if they had been committed on land, and the provisions to be found chiefly in the 1861 consolidating legislation which assimilate indictable offences under those Acts which are committed within the Admiralty jurisdiction to offences committed on land.²⁶

16. Admiralty jurisdiction was extended by the Territorial Waters Jurisdiction Act 1878. By section 2 of that Act indictable offences committed in territorial waters, whether by a British subject or a foreigner and whether committed on a foreign ship²⁷ or not, were declared to be within the jurisdiction of the Admiral. The substantive change here was the provision it made permitting indictable offences committed by foreigners on board, or by means of, a foreign ship to be tried in England; but in these cases institution of proceedings requires the consent of the Secretary of State. Further, the Act does not affect the immunity of foreign public vessels,²⁸ their crew and contents, within territorial waters.²⁹ Finally, it should be noted that by section 7

²² The origins of the office of Admiral are obscure. It probably dates from the late 13th century and the holder of the office was eventually known as the Lord High Admiral. Prior to the Offences at Sea Act 1536 (repealed) felonies on the high seas were triable by the Court of Admiralty in accordance with civil law, without a jury. The 1536 Act provided for trial of such offences in accordance with common law procedures by specially appointed commissioners, in practice judges of the common law courts. The Admiralty Offences Act 1844 (repealed) provided for their functions to be taken over by the common law courts. See further, Stephen, *A History of the Criminal Law of England* (1883) Vol. II pp. 16–21, and, as to the later history of Admiralty criminal jurisdiction, Marston, “Crimes on board foreign merchant ships at sea; some aspects of English practice”, (1972) 88 L.Q.R. 357.

²³ See the Offences at Sea Act 1536, s. 1 (repealed).

²⁴ *R. v. Anderson* (1868) L.R. 1 C.C.R. 161; *Oteri v. The Queen* [1976] 1 W.L.R. 1272, 1276 (P.C.).

²⁵ As a practical matter, the only way in which a person could be on the high seas any appreciable distance from the shore in early times was by being on board ship. Thus in *R. v. Bates* (1968, unreported; see para. 44, below) where alleged offences on an anti-aircraft tower outside territorial waters were in issue, Chapman J. held that the jurisdiction of the Admiral was limited to offences on British ships, that Parliament had not legislated with regard to the site in question, and English courts therefore had no jurisdiction over it.

²⁶ Forgery Act 1861, s. 50; Offences against the Person Act 1861, s. 68; Malicious Damage Act 1861, s. 72. Corresponding sections are not to be found in the Forgery Act 1913, the Coinage Offences Act 1936 or the Theft Act 1968. The Unlawful Oaths Acts 1797 and 1812 contain provisions similar in effect to those of the 1861 Acts: see para. 93, below.

²⁷ “Ship” here includes a hovercraft by virtue of the Hovercraft (Application of Enactments) Order 1972, S.I. 1972 No. 971.

²⁸ i.e. ships publicly owned, including warships and unarmed ships reserved for governmental functions.

²⁹ *Chung Chi-Cheung v. The King* [1939] A.C. 160.

of the Act, for the purpose of any offence declared by the Act to be within the Admiralty jurisdiction, any part of the open sea within one marine league (that is, three miles) of the coast measured from low-water mark is deemed to be within territorial waters. This provision, since it is confined expressly to Admiralty jurisdiction, appears not to have affected the jurisdiction of the courts at common law which as we have noted extended to certain bays and estuaries treated as being within the body of adjacent counties.

17. It is important to note that the definition of territorial waters in the Act of 1878 was in terms intended to apply purely for the purposes of that Act. The Act did not abrogate the prerogative right of the Crown to make provision for these matters for all purposes outside its scope.³⁰ By the Territorial Waters Order in Council 1964³¹ that right was exercised to give effect to the Geneva Convention on the Territorial Sea and the Contiguous Zone.³² Briefly, this Order provides for the baseline from which the territorial waters adjacent to the United Kingdom are measured to be the low water line along the coast (including low tide elevations) but makes special provision in relation to bays (as defined by the Order) and certain parts of the Scottish coast line. Areas of water lying behind the line so drawn must by definition constitute internal waters. As a result, where this Order applies, the uncertainties which exist as to the meaning of internal waters at common law³³ are eliminated and, except where other express provisions apply such as that contained in the Act of 1878, the waters which by international law the government of the United Kingdom claims as the territorial waters of the United Kingdom are measured by reference to this baseline.

18. The development of the law to its present position outlined in the foregoing paragraphs indicates the considerable degree of uncertainty that there must be in any attempt to define precisely the territorial extent of the courts' jurisdiction to try criminal offences. At common law, as we have seen, it extends to bays, gulfs and the estuaries or mouths of great rivers *intra fauces terrae*. The Territorial Waters Jurisdiction Act 1878 confirmed that, for the purposes of that Act, Admiralty jurisdiction extends to indictable offences occurring within three miles of the low-water mark. Where, however, a summary offence (by which we mean an offence triable only in a magistrates' court) is capable of commission in territorial waters, the extent of those waters is measured by reference to the baseline defined by the Territorial Waters Order in Council 1964, which by no means always follows the low-water mark.³⁴ These differing provisions have on occasion caused difficulties in the past³⁵ and, in our view, are clearly in need of some reform.

³⁰ *R. v. Kent Justices, ex parte Lye* [1967] 2 Q.B. 153.

³¹ S.I. 1965 III p. 6452A.

³² (1958) Cmnd. 584.

³³ See para. 14, above.

³⁴ In some recent Acts, it is not clear upon what basis the territorial limits are to be measured. Under the Protection of Wrecks Act 1973, indictable offences created by the Act may be committed in "the sea within the seaward limits" of territorial waters, "the sea" including "any estuary or arm of the sea". In others, it seems clear that measurement is to be made by reference to the 1964 Order: see e.g. Marine etc. Broadcasting (Offences) Act 1967, Wireless Telegraphy Act 1967, s. 9(1) and Sea Fisheries Act 1968.

³⁵ See e.g. *R. v. Kent Justices, ex parte Lye* [1967] 2 Q.B. 153 and *Post Office v. Estuary Radio Ltd.* [1967] 1 W.L.R. 847 and [1968] 2 Q.B. 740 (C.A.).

B. Recommendations

19. The solution put forward in our Working Paper to the problem of how to restate the law in a coherent form involved abolishing the concept of Admiralty criminal jurisdiction, repealing the Territorial Waters Jurisdiction Act and providing statutory powers for defining the limits of territorial waters. Once the territorial limits were determined, the jurisdiction of the magistrates' courts and of higher courts over offences committed within them could be defined.

20. In formulating our present recommendations on these aspects of the law we have been guided by the overall purpose of achieving certainty in the territorial delimitation of the territory in which the criminal law of England and Wales applies. We are of course aware that the power to declare what is the territory of the State is one which, at present, is regarded as lying with the Crown in exercise of the prerogative. The view currently accepted by the courts as to this power was expressed by the Court of Appeal in *Lye's case*.³⁶ "[Determination of the boundaries of territorial waters] is a matter of sovereignty; it is a matter of an extension of sovereignty over the open seas, and, as such, is peculiarly a matter for the Crown from time to time under the prerogative to determine". But in so far as the criminal law is concerned, it seems to us that there would be advantages in making the delineation of the outward boundary of the territory a matter for determination by statute, particularly as this would bring certainty in a matter which is fundamental to the question of whether criminal liability has arisen in any particular case. In this connection it is relevant to note that in 1878 Parliament did in one respect limit the power of the prerogative by defining the territorial limits of Admiralty jurisdiction in relation to indictable offences.³⁷ Accordingly, our recommendations are cast in a form which will make for easy proof of the extent of territorial limits as at present determined; but they are also readily adaptable if it were to be decided that new statutory provisions should be introduced to govern the mode of delineating the baselines and the measurement of the extent of territorial waters.

1. THE TERRITORIAL BOUNDARY

21. The starting point of our recommendations is that the territorial area within which the criminal law of England and Wales runs should consist of England and Wales together with the adjacent waters lying within the outward limits of territorial waters. The limits of the territory should, we think, continue to be determined by reference to the baseline for which provision is made under the Territorial Waters Order in Council 1964.³⁸ So far as the criminal law is concerned, this policy should be given effect to by statutory provision making express reference to that Order.

³⁶ [1967] 2 Q.B. 153, 174 *per* Lord Parker C.J.

³⁷ There is a further question as to the validity and extent of prerogative powers to define the outward limits of the territory of the United Kingdom. While it was accepted as an existing power by the court in *Lye's case*, it seems only to have been asserted in relatively recent times: see Edeson, "The Prerogative of the Crown to delimit Britain's maritime boundary", (1973) 89 L.Q.R. 364.

³⁸ S.I. 1965 III p. 6452A.

22. We have mentioned that the outward limits of territorial waters are determined by reference to the baseline under the 1964 Order in Council. Waters lying behind the baseline are “internal waters”.³⁹ As we indicate further hereafter, it is unnecessary, for the purpose of delimiting the territorial extent of the criminal law, to make separate reference to internal waters. The positioning of the baseline is, nevertheless, of importance in the present context. At present evidence of its position may be found in the large-scale charts drawn up under the authority of the Hydrographic Department of the Ministry of Defence. Even so, room for doubt may present itself because of the peculiar configuration of a particular part of the coastline, so that where the baseline is positioned may become a matter for decision upon the conflicting evidence of expert witnesses, a decision which in a criminal case will be made in favour of the prosecution only if it proves its case in the usual way.⁴⁰

23. Our Working Paper suggested that these difficulties might be eliminated by the publication of charts having statutory force upon which the baseline would be marked, and by making such charts conclusive evidence as to the position of the baseline. Our consultations have persuaded us that this course, although in theory feasible, would present practical difficulties in the provision of updated charts taking account of alterations in the configuration of the coastline, and would also be unduly costly in terms of the resources required to carry it out.

24. Nevertheless, it remains necessary to make some provision which will ensure that detailed examination by the courts of conflicting expert testimony upon the position of the baseline is avoided for the future, infrequent though these cases may be. We have therefore considered making legislative provision for a certificate to be supplied by the Secretary of State which would provide the court with the necessary information for resolving any difficulty which might arise in deciding whether criminal conduct occurred in or outside territorial waters. One possibility would be to make provision for a certificate of the kind supplied in *The Fagernes*⁴¹ which would state whether a particular point, where it is alleged the conduct in question occurred, was within or outside territorial waters. However, it would be inappropriate for Government Departments to supply evidence directly connected with an issue in a criminal case on which the court must make its own decision as a matter of law and as to which there may be a dispute. There is an understandable reluctance on the part of departments to be involved in the provision of certificates of this character. Furthermore, the prosecution and defence may allege different positions or localities for the alleged offence, with the consequence that the contents of such certificates could become complex. But we think that there is nevertheless one basic piece of information on which it is appropriate for

³⁹ This is the term normally used, but it was unnecessary to employ it for the purposes of the Order in Council.

⁴⁰ In *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740 (C.A.), the plaintiff sought a civil remedy; thus even though this involved showing that the defendant's conduct amounted to a criminal offence, it was held, following *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247; that the plaintiff had to prove the location of the defendant in relation to internal and territorial waters only upon the balance of probabilities.

⁴¹ [1927] P. 311: the Home Secretary's certificate stated that “the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends” (*ibid.*, p. 319); but it is noteworthy that this was not a criminal case.

conclusive evidence to be sought from outside. This is the position of the baseline from which the width of the adjacent territorial waters is measured. Once this is conclusively established the court would be in possession of all the material which can properly be provided otherwise than by an assessment of the evidence before it in individual cases in order to seek to determine whether or not an alleged offence occurred within territorial waters. The *Estuary Radio* case has established that bay closing-lines⁴² are to be fixed by a purely cartographical test.⁴³ This is essentially a matter of measurement on charts drawn up by the Hydrographic Department, and as low-water mark is also best determined from those charts it seems that the best evidence of the location of the baseline is always likely to come from information supplied by that Department. We have therefore come to the conclusion that the difficulties under consideration would be best resolved by an evidential provision to the effect that, where in any criminal proceedings a question arises as to the location of any part of the baseline, a certificate issued by or under the authority of the Secretary of State giving that information should be conclusive evidence as to the matters it contains.⁴⁴ The certificate would in practice be made on information provided *ad hoc* by the Hydrographic Department; this would avoid the difficulties mentioned above.⁴⁵ The information would be in the form of a large-scale up-to-date chart with the baseline of the relevant part of the coast marked upon it or the relevant co-ordinates of latitude and longitude, or a combination of such data. This evidential provision would leave untouched the present law (that is, the Territorial Waters Order in Council), and would make for a simple method of proof in criminal proceedings. We recommend such a provision accordingly.

2. THE TERRITORIAL EXTENT OF THE COURTS' JURISDICTION TO TRY INDICTABLE AND SUMMARY OFFENCES

25. Having established for the purposes of the criminal law the territorial limits of England and Wales, it is now necessary to consider what should be the geographical limits, within that territory, of the courts' jurisdiction. In our Working Paper we proposed that any offence, whether summary or indictable, committed within the territory should be triable by any court in England and Wales within whose jurisdiction⁴⁶ the offender might be found. While the recommendations we now make do not differ in substance, the different rules which at present apply to indictable and summary offences suggest the need to accord them separate treatment here.

⁴² See Territorial Waters Order in Council 1964, S.I. 1965 III p. 6452A, Article 4.

⁴³ See [1968] 2 Q.B. 748, 759.

⁴⁴ Somewhat similar provisions are to be found in the Diplomatic Privileges Act 1964, s. 4 and the Consular Relations Act 1968, s. 11; and see also s. 9(4) of the Criminal Law Act 1977 (which provides for the Secretary of State to certify premises belonging to foreign missions etc. for the purpose of the offence of trespassing on premises of foreign missions) and s. 21 of the State Immunity Act 1978 (certificate of Secretary of State conclusive evidence on any question *inter alia*, whether country a State for purposes of Part I of the Act (Proceedings in United Kingdom by or against other States), whether any territory a constituent territory of a federal State for those purposes, or as to person(s) to be regarded for those purposes as head or government of a State).

⁴⁵ See para. 23, above. In practice the information would best be sought by the court at an early stage in the proceedings. We think it advisable that this new procedure should be made known to the profession by means of a Practice Note.

⁴⁶ The term "jurisdiction" was used here in the sense of venue within the territory.

(a) *Indictable offences*

26. By section 6 of the Courts Act 1971 the Crown Court has exclusive jurisdiction to try offences on indictment. In the context of that great majority of offences which are committed only if they take place within the territory of England and Wales, this therefore means that, except in so far as there may be a common law jurisdiction over bays and estuaries, the outward territorial limits of the court's jurisdiction is three miles from low-water mark measured in accordance with the Territorial Waters Jurisdiction Act 1878.⁴⁷ If our recommendations are accepted, for the future the outward limits of territorial waters will be delimited by reference to the baseline at present defined in the Territorial Waters Order in Council 1964.⁴⁸

27. Many indictable offences are of course triable either way, that is either on indictment or summarily, by virtue of the Criminal Law Act 1977. In all such cases, we think it would be quite illogical if the outward territorial limits of the jurisdiction of the magistrates' court were to differ from that of the Crown Court. As a matter of principle, it is therefore in our view clear that the seaward boundary of England and Wales for the purpose of the courts' jurisdiction in relation to any offence which may be tried on indictment must be the same, whether the offence is tried by a magistrates' court or by the Crown Court.

28. To eliminate the possibility of any lacuna in the territorial limits of the courts' jurisdiction, we recommend that the territorial limits of the courts' jurisdiction in relation to indictable offences should extend to matters occurring on, under or above waters within the outward limits of territorial waters. Section 2 of the Territorial Waters Jurisdiction Act 1878 refers to offences "on" the open sea within territorial waters, but we see no reason why for the future offences occurring, for example, in aircraft over territorial waters, or in the waters themselves or on the sea bed—for example, in diving operations—should not be explicitly covered in this way.

(b) *Summary offences*

29. The jurisdictional limits over offences which are triable only summarily probably does not in general extend at present beyond low-water mark. County or borough boundaries do not for most purposes extend beyond that mark⁴⁹ and it is within those boundaries that magistrates' courts for the relevant district have jurisdiction to issue process and try summary offences.⁵⁰ Where, however, it is expressly provided that an offence triable by magistrates may occur within territorial waters, an implied jurisdiction to try that offence is created.⁵¹ In addition, certain statutes have jurisdictional provisions in relation to summary offences occurring outside territorial waters.⁵²

⁴⁷ See para. 16, above.

⁴⁸ Para. 21, above.

⁴⁹ Local authorities have power to make byelaws extending jurisdiction one thousand yards beyond low water mark for purposes specified by s. 76 of the Public Health Act 1961.

⁵⁰ See Magistrates' Courts Act 1952, ss. 1 and 2.

⁵¹ *R. v. Kent Justices, ex parte Lye* [1967] 2 Q.B. 153, 178.

⁵² E.g. Sea Fisheries Act 1968, s. 14.

30. It will be recollected that for the future we are recommending that territorial waters, whose outward limits should be the outward limits of the territory for the purposes of the criminal law, should be measured from the baseline which is at present defined by the Territorial Waters Order in Council.⁵³ There is therefore as regards the general principle governing the matter under discussion a choice open to us: a territorial limitation upon the future jurisdiction of magistrates' courts in relation to summary offences which stops short at the baseline, or an extension of that jurisdiction to the outward limits of territorial waters. In favour of the first, it may be said that it accords more or less with the present position.⁵⁴ For a number of reasons, however, we doubt if this would be satisfactory.

31. It seems obvious that, if the seaward jurisdiction of magistrates' courts in relation to summary offences were to be restricted to the inward boundary of territorial waters (that is, the baseline), the territorial limits of the courts' jurisdiction would differ on our recommendations according to whether the offence alleged was purely summary in character or an indictable offence being tried summarily. There would, we think, have to be strong reasons of policy to justify the recommendation of this somewhat confusing and illogical position as a permanent feature of the criminal code. In fact, we know of no such reasons of policy. It may be objected that it would be inappropriate that some summary offences should for the future be capable of commission in an area of territory where hitherto they have not been. On closer examination, however, we believe that this objection is not serious. Summary offences sometimes make it clear that they can only be committed in a particular place—obstructing the highway⁵⁵ is an obvious example—and in these cases it is obvious that the territorial extension of the jurisdiction of magistrates' courts in relation to summary offences will have no effect. In other offences, while there would be no injustice if the prohibited conduct were to be the subject of proceedings in cases where it takes place in territorial waters, it might or might not be expedient for such proceedings to be instituted. If it is inexpedient, as it may well be in some instances, then the offences will simply not be prosecuted. For example, section 1 of the Litter Act 1958 provides that an offence is committed if any person deposits litter "in, into or from any place in the open air to which the public are entitled to have access without payment." It will be for the prosecuting authorities to decide whether for the future instances of this conduct occurring in territorial waters should be prosecuted.

32. Furthermore, there are some summary offences which ought to be subject to prosecution when they occur on board ship in territorial waters, but where at present there must be some doubt as to whether they are capable of being so prosecuted because of the restricted territorial jurisdiction of magistrates' courts. Among these would fall those summary offences of a less serious character included in criminal legislation creating in the main more serious indictable offences, which by virtue of Admiralty jurisdiction would be subject to prosecution at present within the three mile limit. We would cite, for

⁵³ See para. 21, above.

⁵⁴ We discuss further in para. 129 the assimilation of the provisions in s. 3(1) of the Magistrates' Courts Act 1952 concerning an "arm of the sea or other water lying between two or more local jurisdictions" with the more general definition of waters lying behind the baseline.

⁵⁵ Highways Act 1959, s. 121.

example, the offence of common assault punishable under section 42 of the Offences against the Person Act 1861 with a maximum fine of £200 together with two months' imprisonment. Such conduct when it occurs on board a cross-channel ferry in territorial waters may at present constitute no offence.⁵⁶ The doubts to which we have referred would be settled and any anomalies would be rectified, if the territorial limits for the purpose of the courts' jurisdiction in relation to indictable and summary offences were for the future to be the same in all cases. We recommend accordingly.

33. The territorial limits of the courts' criminal jurisdiction on our recommendations comprise the whole of the land area of England and Wales, and internal and territorial waters.⁵⁷ Wherever future legislation requires a reference to this area, it will be convenient to use a standard terminology and we recommend as an appropriate phrase "the ordinary limits of criminal jurisdiction".

(c) *Consent to institution of proceedings*

34. Section 3 of the Territorial Waters Jurisdiction Act 1878, as we have noted, requires the consent of the Secretary of State for the institution of proceedings against a person "who is not a subject of Her Majesty" and who commits an offence within territorial waters on board or by means of a foreign ship. The expression "by means of" was presumably included in order specifically to cover the fact situation arising in *R. v. Keyn*,⁵⁸ where the collision with the foreign ship resulted in the death of individuals aboard a British vessel.

35. Since the criminal law applying aboard ship is in general terms that of the flag State,⁵⁹ a provision for consent to institution of proceedings against a foreigner in respect of activities occurring on board a British ship could not be justified, whether the activities occur when the ship is within or outside the limits of territorial waters. But the very fact that the law of the flag State applies must result in two States concurrently having criminal jurisdiction whenever a foreign ship is within territorial waters, and nothing in our present recommendations will affect this. It seems to us, therefore, that some form of consent to the institution of proceedings will continue to be necessary. Our view is reinforced by the fact that consent is required in the similar provisions relating to offences on aircraft to be found in the Tokyo Convention Act 1967.⁶⁰ The scope of consent does however require re-examination in the light of modern conditions.

36. In modern statutes where consent to institution of proceedings is required the usual practice is to specify the consent of the Attorney General or Director of Public Prosecutions. For example, section 1 (2) of the Tokyo Convention Act 1967 requires the Director's consent when proceedings are

⁵⁶ Admiralty jurisdiction was probably limited to indictable offences: see para. 15, above. It is not certain whether s. 686 of the Merchant Shipping Act 1894, which provides for jurisdiction over offences on board ships at sea, extends to summary offences: see further, para. 55, below.

⁵⁷ Jurisdiction will also extend under our recommendations to lighthouses, lightships and tunnels outside territorial waters: see paras. 48-53, below.

⁵⁸ (1876) 2 Ex. D. 63.

⁵⁹ See further, para. 54, below.

⁶⁰ See paras. 36 and 71, below.

instituted in respect of offences occurring on aircraft (British-controlled or not) "in flight elsewhere than in or over the United Kingdom". We think that a new provision as to consent should similarly refer to the Director of Public Prosecutions. Furthermore, since our recommendations as to territory make reference to offences occurring on, under or above territorial waters,⁶¹ we think consent should be required, not only when aliéens commit offences on board or by means of a foreign ship but also when they commit them on board or by means of aircraft, other than British-controlled aircraft, over territorial waters.

37. Two other matters need further consideration in this context. In the first place, we think that consent to institution of proceedings should be required where the offence is committed either by an alien or by a citizen of another Commonwealth country. This is because persons who are British subjects by virtue of citizenship of another Commonwealth country do not attract English criminal law (otherwise than in respect of Merchant Shipping Act offences) to conduct abroad merely because they are British subjects.⁶² In this respect therefore their position is the same as aliens.

38. Secondly, it is necessary to define more precisely what is meant by a "foreign" ship. For the reason given above, it would be right in our view to include ships belonging to any country other than the United Kingdom, whether foreign or Commonwealth. But the requirement of consent cannot be excluded solely in relation to ships registered in the United Kingdom, since consent would then be needed in the case of offences on board naval ships and other unregistered ships having a close connection with this country.⁶³ It is necessary for our purposes to devise a new term covering all the classes of ships and vessels where consent will not be required. We think the appropriate term is "British-controlled vessel", and we examine in more detail below⁶⁴ in the context of offences on board ships precisely which vessels should be included in this new category.

39. We have recommended that the territorial limits should be the same for all offences and it therefore follows that the consent under discussion should be required irrespective of whether the offence is summary or indictable. But certain restrictions upon the requirement of consent are needed in the context of both these classes of offences. In the case of some indictable offences the consent of the Attorney General or the Secretary of State is required for the institution of proceedings; in these cases we do not think that there should be an additional requirement of consent by the Director. Again, in the case of some offences, proceedings may only be instituted by a particular authority, for example, a local authority. Where in a particular instance this type of offence falls within the scope of those offences for which we recommend institution of proceedings only by or with the consent of the Director, we think that the relevant authority should obtain that consent, although that authority should retain sole responsibility for the initial decision whether or not to prosecute. In sum therefore we recommend that proceedings for an offence committed on,

⁶¹ See para. 28, above.

⁶² See British Nationality Act 1948, s. 3.

⁶³ See e.g. Merchant Shipping Act 1894, ss. 3, 22 and 23.

⁶⁴ See para. 59, below.

under or above territorial waters aboard or by means of an aircraft or ship should require the consent of the Director of Public Prosecutions except—

- (a) where the offence takes place on or by means of a vessel or aircraft which is British-controlled;⁶⁵ or
- (b) where the offence is committed by a citizen of the United Kingdom and Colonies or one of the other restricted categories of persons for whom the United Kingdom is responsible; or
- (c) where institution of proceedings for the offence requires the consent of the Attorney General or Secretary of State.

Where in cases other than those falling within (c) the decision whether or not to institute proceedings lies solely with a particular authority, the fact that the consent of the Director may by virtue of our recommendation also be required in a particular case for the institution of proceedings should not affect the responsibility of the authority in deciding whether or not to institute proceedings.

3. SUMMARY

40. The recommendations made in the foregoing paragraphs are intended to put beyond doubt the territorial area of England and Wales to which the criminal law applies and to simplify the method of determining its outward limits in cases of difficulty. They also eliminate any doubt as to the jurisdiction of the appropriate courts in relation to indictable and summary offences. The recommendations provide that—

- (a) The territory of England and Wales for the purpose of the criminal law should consist of the entire area bounded by the outward limits of adjacent territorial waters. It should therefore include both territorial waters, as from time to time determined by reference to the baseline, and internal waters lying behind the baseline.
- (b) If in any criminal proceedings a question arises as to the position of any part of the baseline, a certificate issued by or under the authority of the Secretary of State giving that information should provide conclusive evidence as to the matters it contains. This information should be provided by the Hydrographic Department in the form of a large-scale chart showing the baseline of the relevant part of the coastline or the relevant coordinates of latitude and longitude, or both.
- (c) The territorial jurisdiction of the courts in relation to indictable offences should extend to all such offences occurring within the outward limits of territorial waters, determined in accordance with the provisions summarised in (a) above. The territorial jurisdiction of magistrates' courts should be extended to cover any summary offence occurring beyond the baseline and within the outward limits of territorial waters. The jurisdictional area so defined should in future legislation be referred to as "the ordinary limits of criminal jurisdiction".

⁶⁵ A "British-controlled aircraft" is defined by the Tokyo Convention Act 1967, s. 7.

- (d) The consent of the Director of Public Prosecutions should be required for the institution of proceedings in respect of any offence committed on, under or above territorial waters by persons who are citizens of any country other than the United Kingdom on or by means of any vessel or aircraft other than one which is British-controlled. This provision should not apply where by virtue of any enactment the consent of the Secretary of State or the Attorney General is required for the institution of proceedings for an offence.
- (e) The Territorial Waters Jurisdiction Act 1878 should be repealed,⁶⁶ while both the common law jurisdiction of the courts and the concurrent Admiralty criminal jurisdiction within the territory should be abolished.

III OTHER LOCATIONS TO BE TREATED AS WITHIN TERRITORIAL LIMITS

41. There are a number of cases where as a result of specific statutory provisions the criminal law extends to conduct of persons (whether citizens of the United Kingdom or not) outside the territory of England and Wales. Such legislative provisions have frequently been enacted with the specific object of implementing an International Convention to which the United Kingdom is party or of protecting a particular domestic interest.⁶⁷ In many of these cases the statute is concerned only to penalise the particular conduct dealt with by the relevant Convention. Other statutes, such as the Continental Shelf Act 1964, apply the whole of the criminal law to offences committed in particular areas designated by powers provided under the statute but outside the territory of the United Kingdom. A further body of legislation, to be found in the Merchant Shipping Acts 1894 to 1974 and the Tokyo Convention Act 1967, applies the criminal law to offences on British ships and British-controlled aircraft. Again, in relation to offences under the Merchant Shipping Acts, the legislation is concerned both with penalising particular conduct aboard British ships or conduct of certain persons within foreign countries, and with general provisions relating to offences at sea.⁶⁸

42. This paper, as we have already indicated, is not concerned with changes in legislation relating to specific offences which have some extraterritorial

⁶⁶ Sect. 2 of the 1878 Act (see para. 16, above) applies to the territorial waters of "Her Majesty's dominions" and the consent to institution of proceedings outside the United Kingdom is to be given by "the Governor of the part of the dominions in which such proceedings are proposed to be instituted". If it were decided to implement our recommendation in the context of the United Kingdom as a whole, consideration would have to be given to any implications our recommendations might have for territories outside the United Kingdom, and in particular for those territories for which the United Kingdom retains responsibility.

⁶⁷ E.g. Sea Fisheries Acts 1883 and 1968, and Fishery Limits Act 1964; Submarine Telegraph Act 1885; North Sea Fisheries Act 1893; Public Health Act 1961 (s. 76); Wireless Telegraphy Act 1949 (s. 6) and Wireless Telegraphy Act 1967 (s. 9); Civil Aviation Act 1949 (s. 59) and Air Navigation Order 1976 (Articles 85-86); Continental Shelf Act 1964; Marine etc. Broadcasting (Offences) Act 1967; Tokyo Convention Act 1967; Prevention of Oil Pollution Act 1971; Mineral Workings (Offshore Installations) Act 1971; Hijacking Act 1971; Protection of Aircraft Act 1973. As to the last two, see further para. 101, below; and see also paras. 84 and 115, below.

⁶⁸ The disciplinary provisions are contained in the Merchant Shipping Act 1970, ss. 27-32 (as amended by the Merchant Shipping Act 1974), together with regulations made under s. 34.

effect and we are therefore not recommending any amendments to the legislation noted above. In this part of the report our more detailed examination of the law is confined to two matters—

- A. Possible extensions of the territory (as that has been defined in part II) in which the criminal law in general would apply.
- B. Amendment of the general provisions relating to offences at sea under Admiralty jurisdiction and the Merchant Shipping Act 1894, and to offences on board aircraft.

A. Possible extensions of territory for the purposes of the criminal law

43. Our examination of the present position as to the territorial limits of the jurisdiction of the courts of England and Wales has shown that jurisdiction over indictable offences in territorial waters is limited by the terms of the Territorial Waters Jurisdiction Act 1878 and over other offences is limited to the areas of internal waters falling within the baseline as determined in accordance with the Territorial Waters Order in Council 1964. We have indicated that Admiralty jurisdiction over offences at sea was most probably limited to those committed on board, or by means of, a British ship. It follows that, except where specific statutory provision is made, no offence is committed when the activities concerned take place outside territorial waters unless they occur on board ship. We have mentioned that such provision has been made in respect of certain areas designated under powers given by recent statutes. Specifically, section 3 of the Continental Shelf Act 1964 provides for an act or omission on or within five hundred metres of an installation within a designated area which would if taking place in any part of the United Kingdom constitute an offence in that part to be treated as such an offence.⁶⁹ The installations concerned are those engaged in exploration and exploitation of the sea bed and subsoil, and the areas designated⁷⁰ lie outside territorial waters. These provisions are by section 8 of the Mineral Workings (Offshore Installations) Act 1971 extended to apply to offshore installations specified by the Act lying both within territorial waters and in designated areas. These installations are those which are engaged in underwater exploitation and exploration of mineral resources and which are either floating or attached to the seabed.⁷¹ By section 44 of the Petroleum and Submarine Pipelines Act 1975, the 1971 Act is amended to include in any reference in it to an offshore installation a reference to any other installation, whether floating or not, which is capable of being manned and is maintained in United Kingdom or “controlled” waters (that is territorial waters or those in designated areas) for use in connection with pipeline conveyance in or under the sea.

1. IS A GENERAL POWER TO EXTEND THE TERRITORY REQUIRED?

44. No general power at present exists to extend the criminal law to structures, other than those just described, off the coast outside territorial waters. That this has in the past given rise to difficulties is demonstrated by the

⁶⁹ See s. 3(1).

⁷⁰ By Order in Council under s. 1(7).

⁷¹ See Mineral Workings (Offshore Installations) Act 1971, ss. 1 and 8.

case of *R. v. Bates*.⁷² Charges were brought under the Firearms Act 1937 after shots had been fired from an anti-aircraft tower nearly three miles outside territorial waters at Trinity House personnel engaged in maintaining floating beacons. Chapman J. held that, while the jurisdiction of the Admiral was not confined to territorial waters, it did not extend to an artificial structure (not being a ship) outside territorial waters and, since the Firearms Act was “clearly an Act intended to operate only within the ordinary territorial limits and on British ships”, the prosecution failed.

45. It may be that the risk of a recurrence of such incidents on the particular kind of structure which figured in *Bates*'s case is not great. Certainly a different result would be reached in any future case if the breadth of the territorial sea were to be increased beyond its present three miles, since none of these types of structures, so far as we are aware, stands at a distance of more than a few miles from the coast. But in modern conditions it is quite possible that other structures or installations, such as oil terminals, floating docks or airports, will be established outside territorial limits, over which the courts' criminal jurisdiction does not at present extend. A lacuna in the territorial jurisdiction of the courts to try offences occurring on such structures would, in our view, be undesirable, for it would allow criminal conduct to go unpunished. We believe, therefore, that as and when any of these structures are built off the coast of this country, it would be desirable for the criminal law to be applied to them in a manner similar to that effected by section 3 of the Continental Shelf Act 1964, the operation of which we have outlined above.

46. We have considered whether it would be possible for some general enabling power under statute to provide for the application of the criminal law to be extended in the circumstances, and in the manner, described in the preceding paragraph. For example, we have examined the possibility of employing the technique of designating certain areas in which the criminal law should apply, the designation being effected in a manner similar to that used in the Continental Shelf Act. We have had to bear in mind, however, that the techniques employed in that Act are utilised in pursuit of objectives agreed upon by treaty with neighbouring countries. A unilateral designation of areas of the high seas, even for the limited purposes contemplated, might well be open to objection by other States. Alternatively, we have considered the simpler method of providing by statute that the criminal law of England and Wales should apply to any structure or installation on the high seas⁷³ (other than those dealt with already by the legislation referred to in paragraph 43) established either now or in the future in waters nearer to the coast of England and Wales than to that of any other country. But, in the absence of more precise knowledge of what these structures are and by whom they would be built, this could produce anomalous results. In the absence of international agreement it would be difficult to find a justification in international law for the English courts to be given jurisdiction over the activities of foreigners taking place on a structure built, for example, in the North Sea by nationals of a neighbouring State, merely because, geographically, it lay a mile nearer to the coast of England than to that of the State to whom those nationals belonged.

⁷² Essex Assizes, 21 October 1968 (unreported). See also *The Guardian*, 5 Sept. 1978.

⁷³ We deal separately with particular structures such as lightships below: see paras. 48, *et seq.*

47. We have concluded that at present it is not possible, nor even desirable, to recommend any general provision or power under statute to extend the application of the criminal law beyond the boundaries of the territory as we have defined it in part II of this report. No doubt at some time in the future new types of installations will be constructed at sea. We think that this will be the appropriate time to consider whether the application of the criminal law to them should be extended by means of specific legislation in order to deal comprehensively with them in the same way as has been done with high seas installations in the recent past.

2. OTHER SPECIFIC LOCATIONS

(a) Lighthouses

48. Artificial structures outside the territorial waters of the kind mentioned above are not the only installations in respect of which jurisdictional lacunae may at present exist. Where they are situated outside territorial waters, lighthouses fall within this description. Although the question does not appear to have arisen as yet in any decided case, it seems that no statutory provision gives the courts jurisdiction to deal with criminal activities occurring on them (apart from damage caused to the lighthouses themselves).⁷⁴ It might be argued that, since all such lighthouses were built by United Kingdom authorities and, so far as those situated around England and Wales and the "adjacent seas" are concerned, are by virtue of section 634 of the Merchant Shipping Act 1894 managed by Trinity House, English courts would feel entitled to treat activities on them as offences under the law of England and Wales. But, where they are so situated and are also outside territorial waters, the basis for any such assertion of jurisdiction would be obscure. There seems to be no ground for assimilating the position of a lighthouse to that of a ship; and, from the point of view of international law, the consensus seems to be that a coastal state may not treat a lighthouse in itself as island territory with a maritime belt.⁷⁵

49. As a practical problem, lighthouses are of minimal importance in this context. Two only seem to be of relevance, one built on a rock above high tide, another on submerged rocks,⁷⁶ both of them outside the three-mile limit. The instances in which the territorial jurisdiction of the courts as regards the criminal law will be in issue are therefore likely to be rare indeed. Nevertheless, we think that the position should be settled beyond the possibility of dispute by providing specifically that lighthouses maintained by Trinity House off the coast of England and Wales should be deemed to be part of the territory for the purpose of the application of the criminal law. If the breadth of territorial

⁷⁴ See Merchant Shipping Act 1894, ss. 666 and 684. Sect. 666 penalises anyone who wilfully or negligently (a) injures a lighthouse, buoy or beacon; (b) removes, alters or destroys a lighthouse, buoy or beacon; or (c) rides by, makes fast to, or runs foul of any lightship or buoy. See further, n. 82, below.

⁷⁵ Assuming, that is, that the lighthouse is built neither on rock which is above high-tide nor on a low-tide elevation; see n. 76, below, and see generally Oppenheim's *International Law* (8th ed., 1954) Vol. I, p. 501; O'Connell *International Law* (2nd ed., 1970) Vol. I, p. 482.

⁷⁶ The Eddystone, built upon part of the reef above highwater tides, and Wolf Rock. As regards the former, the Court of Arbitration in the Anglo-French Arbitration on the Continental Shelf, 18 July 1977, accepted that it should treat the Eddystone Rock as a relevant base point for delimiting the Continental Shelf boundary in the Channel, but expressed no opinion as to whether it constituted an island.

waters were to be increased, this specific provision might well be superfluous, since the lighthouses concerned off the coast of England and Wales would probably lie within waters so extended.

(b) *Lightships and other floating navigational structures*

50. Whether and to what extent the criminal law applies to lightships outside territorial waters is almost as problematical as the case of extraterritorial lighthouses. It is questionable whether, for the purpose of deciding whether conduct aboard them constitutes an offence under English law, these ships can be regarded as British ships under the Merchant Shipping Acts, since a "ship" by section 742 of the 1894 Act is defined to include "every description of vessel used in navigation".⁷⁷ Lightships, however, are usually stationary over a period of years and sometimes are not self-powered.⁷⁸ If they are not ships within the meaning of the 1894 Act, for the purposes of applying the criminal law the only possibility would be the extremely wide terms of section 1 of the Offences at Sea Act 1799⁷⁹ or the common law applying to ships.⁸⁰

51. As lightships are in the course of time replaced by unmanned installations, their significance in the present context is diminishing; and, as in the case of lighthouses, cases in which the issue of the courts' jurisdiction is likely to be in question are no more than remotely likely. For the avoidance of doubt, however, we favour a specific application of the criminal law to lightships and other structures serving as navigational aids outside territorial waters off the coast of England and Wales. We think this may be done simply by ensuring that the provision we have recommended as to lighthouses⁸¹ is interpreted in accordance with the definition of a "lighthouse" in the Merchant Shipping Act 1894,⁸² since that definition is wide enough to encompass lightships and other similar floating navigational aids.

(c) *Tunnels under the seabed*

52. The final problem which we examine in relation to extensions of territory is that of jurisdiction over workings tunnelled from the shore beneath the bed of the high seas. We distinguish these from workings which result from

⁷⁷ i.e. "the science or art of conducting a ship from place to place through the water" per Fry, L. J. in *The Warkworth* (1884) 9 P.D. 145, 148. The definition of a "lighthouse" in s. 742 of the Merchant Shipping Act 1894 is, however, wide enough to include a lightship; see para. 51, below.

⁷⁸ See e.g. *The Mac* (1882) 7 P.D. 126—unpowered mud dredger a ship within Merchant Shipping Act 1854, s. 458 (replaced by s. 546 of the 1894 Act) and *The Gas Float Whitton No. 2* [1896] P.D. 42—unpowered boat-shaped structure containing gas supporting a light not a ship within s. 458 of the 1854 Act.

⁷⁹ See para. 15, above.

⁸⁰ As explained in *R. v. Anderson* (1868) L.R. 1 C.C.R. 161.

⁸¹ See para. 49, above.

⁸² Sect. 742 provides that "Lighthouse" shall in addition to the ordinary meaning of the word include any floating and other light exhibited for the guidance of ships, and also any sirens and any other description of fog signals, and also any addition to a lighthouse of any improved light, or any siren, or any description of fog signal." Under s. 634 of the Merchant Shipping Act 1894 Trinity House superintendent and manage not only all lighthouses (in the aforementioned sense) in the seas adjacent to England and Wales but also buoys and beacons, defined by s. 742 as "all other marks and signs of the sea" other than lighthouses. Damage, removal or running foul of these objects, whether within or outside territorial waters, is penalised by s. 666 (see n. 74, above) and a general extension of criminal jurisdiction to them is not in our view necessary.

the exploitation at sea of the continental shelf, for the jurisdictional position in relation to offences committed on or near the machinery engaged in such exploitation is fully covered by existing legislation.⁸³ For many years there have existed mines tunnelled from the land but lying underneath the seabed and extending beyond the accepted limits of territorial waters.⁸⁴ Various powers in relation to the designated areas under which the mines are situated were given by the National Coal Board (Additional Powers) Act 1966, and they are regarded as mines to which the Mines and Quarries Act 1954 applies. This legislation would appear already to accord with international law since, quite apart from claims in respect of the continental shelf, the principle of the freedom of the high seas has no relevance in the context of occupation of the subsoil taking place by means of tunnelling from the shore through the subsoil lying underneath territorial waters;⁸⁵ there can therefore be no objection to the assertion of sovereign rights over such workings.

53. Having regard to our other proposals for defining the territory for the purpose of the criminal law, we think that, despite the fact that it is perhaps improbable that the courts' jurisdiction will be in issue, this question ought for the elimination of doubt to be resolved. We therefore recommend that submarine tunnels accessible from land in England and Wales and extending beyond the outward limits of territorial waters should be deemed to be part of the territory for the purposes of the criminal law. We emphasise here that we are concerned only with those tunnels accessible from England and Wales. No doubt appropriate international arrangements would have to be made in relation to any tunnels connecting England and Wales with any other country.

B. General provisions as to crimes on board ships and aircraft

1. SHIPS

(a) Present law

54. British ships have been described as "floating islands"⁸⁶ and as such notionally to be regarded as extensions of the territory of England. This picturesque metaphor is not well founded in legal principle.⁸⁷ The reason for the application of English criminal law to offences committed on British ships afloat⁸⁸ is that they fall under the protection of Her Majesty, so that all persons aboard, whatever their national status, are subject to her laws. This common

⁸³ See the Continental Shelf Act 1964, ss. 1(7) and 3(1) and the Mineral Workings (Offshore Installations) Act 1971, s. 8(1).

⁸⁴ Article 7 of the Geneva Convention on the Continental Shelf was inserted to make it clear that the Convention did not prejudice their position. It provides that the terms of the Convention "shall not prejudice the right of the coastal state to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil".

⁸⁵ See Oppenheim's *International Law* (8th ed., 1954), Vol. I, pp. 629-630.

⁸⁶ See e.g. Blackburn and Byles J.J. in *R. v. Anderson* (1868) L.R. 1 C.C.R. 161, 163 and 168.

⁸⁷ *Chung Chi-Cheung v. The King* [1939] A.C. 160; *R. v. Gordon Finlayson* [1941] 1 K.B. 171; *Oteri v. The Queen* [1976] 1 W.L.R. 1272, 1276 (P.C.).

⁸⁸ "It has always been the criminal law of England that was applied to persons on British ships within the jurisdiction of the Admiralty": *Oteri v. The Queen*, *ibid.*, at p. 1277. "Afloat" means on the high seas or in foreign rivers at a place below bridges where the tide ebbs and flows and where great ships generally go (*R. v. Anderson*, n. 86, above and *R. v. Devon Justices, ex parte D.P.P.* [1924] 1 K.B. 503). This jurisdiction may, of course, be subject to the concurrent jurisdiction of the local state, and its exercise may be withheld in the interests of comity.

law principle corresponds with the now accepted rule of international law that the law of the ship's flag applies.

55. The Merchant Shipping Acts 1894 to 1974 contain an important body of legislation dealing with the substantive criminal law relating to offences on British ships. In addition to the specific offences there created, now mostly to be found in the Merchant Shipping Act 1970, general provisions relating to offences at sea are to be found in sections 686(1) and 687⁸⁹ of the 1894 Act, the interpretation of which has caused difficulty. Section 686(1) provides for the trial of offences charged as having been committed—

- (a) by a British subject on board a British ship on the high seas or in any foreign port or harbour;
- (b) by a British subject on board a foreign ship “to which he does not belong”; and
- (c) by a non-British subject on board a British ship on the high seas.

If any such person “is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed”. Quite apart from this section, indictable offences committed on British ships on the high seas are covered by section 1 of the Offences at Sea Act 1799 and are punishable at common law.⁹⁰ Furthermore, it is now clear that offences falling within class (a) include all offences contrary to English law committed anywhere outside the United Kingdom “where great ships could go”⁹¹ at least in the case of indictable offences and (subject to the comments below) perhaps also in the case of summary offences.⁹² But in the case of offences committed by persons in class (b) it is uncertain whether section 686 refers to those few specific offences which, by statute, can be committed outside England⁹³ or whether it applies the whole of English criminal law to British passengers on foreign ships. In this connection, the expression “to which he does not belong”, which appears to be free of authority, would seem to refer to those British subjects aboard foreign ships who are not members of its crew. Offences by persons falling within class (c) generally raise fewer problems since, by accepted principles of international law, aliens aboard a British ship on the high seas are governed by the law of the flag. In relation to summary offences, however, there remains some uncertainty as to whether the section gives to magistrates' courts an extended territorial jurisdiction over all summary offences or whether it merely extends that jurisdiction in relation to the summary offences created by other sections of the Act of 1894. The more recent authority seems to favour the first view⁹⁴ but earlier authority takes the more limited view.⁹⁵

⁸⁹ Sect. 685, relating to the jurisdiction of magistrates' courts, is dealt with below, para. 130.

⁹⁰ See *R. v. Anderson* (1868) L.R. 1 C.C.R. 161.

⁹¹ See n. 88, above.

⁹² *R. v. Liverpool Justices, ex parte Molyneux* [1972] 2 Q.B. 384.

⁹³ E.g. treason, perjury, bigamy, homicide, foreign enlistment, official secrets, unlawful oaths and explosive substances offences. See paras. 85 *et seq.*, below.

⁹⁴ The decision in *Molyneux's* case (see n. 92, above) is not in terms restricted to indictable offences.

⁹⁵ *Robey v. Vladinier* (1936) 154 L.T. 87 where however the court's opinion as to the effect of s. 686 was not strictly necessary for the decision.

56. Another section of the 1894 Act giving rise to problems of interpretation is section 687, which deals with the rules to be applied to offences against property or persons committed ashore or afloat out of Her Majesty's dominions by persons who at the time of the offence are, or have been during the previous three months, employed on a British ship.⁹⁶ Whether the section is an offence-creating provision or one relating merely to the jurisdiction of the courts is not entirely clear. The statutory precursor of section 687, section 267 of the Merchant Shipping Act 1854, was held in *R. v. Dudley and Stephens*⁹⁷ to be an offence-creating section but, in the light of *R. v. Anderson*⁹⁸ where the question of its construction was expressly left open, it may well be that this was unnecessary for the decision in the first-named case. Nevertheless, having regard to its language, it must be regarded as at least doubtful whether this section can be treated as a provision merely relating to venue and trial. A further open question is whether it applies to aliens; the language of the section, especially if it is read in conjunction with section 686, suggests that it does. If so, this extension of the criminal jurisdiction of the courts in England and Wales over aliens, not only when they were employed on a British ship at the time when the offence was committed, but also within the previous three months, is clearly anomalous in modern conditions. Nevertheless it may well be that there is some practical advantage in retaining the jurisdiction in order to deal more expeditiously with an alien who has committed an offence at a time when he is actually employed on a British ship. This is a matter to which we refer again below.

(b) Recommendations

57. In our Working Paper⁹⁹ we proposed to remedy the unsatisfactory features of the law relating to offences on ships which we have described by abolishing the common law, repealing existing legislation and replacing both with comprehensive new provisions. This policy was widely approved by those who commented on it and no developments have occurred in the interim period which have called for its fundamental reconsideration. The recommendations we now make differ only in minor respects. We describe in detail first the new statutory provisions we recommend, applying the criminal law to ships in place of sections 686 and 687 of the Merchant Shipping Act 1894.

(i) Offences on board vessels which are British-controlled

58. We first recommend a provision to replace section 686 of the 1894 Act, applying to all persons on board a vessel which is British-controlled¹⁰⁰ anywhere outside the territory of the United Kingdom. Where the conduct of any such person would have constituted an offence if it had occurred in England and Wales, that person should be liable as if he had committed it there, and

⁹⁶ "All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall . . . be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England. . . ."

⁹⁷ (1884) 14 Q.B.D. 273, 281.

⁹⁸ (1868) L.R. 1 C.C.R. 161.

⁹⁹ Para. 26.

¹⁰⁰ See para. 59, below.

should be triable by any court in England and Wales within whose jurisdiction he is found.¹⁰¹

59. We have indicated that this provision should apply to conduct taking place on board "British-controlled" vessels. By the use of this expression, our purpose is to include certain ships which are British ships by reason of their registration in the United Kingdom under Part I and Part IV of the Merchant Shipping Act 1894¹⁰² and also certain other defined categories of ships and vessels having a close connection with the United Kingdom. We have already referred to these in the context of offences taking place on board ship in territorial waters.¹⁰³ The categories comprise—

- (a) ships registered in the United Kingdom under section 2 of the Merchant Shipping Act 1894 and fishing boats registered under section 373 of that Act;
- (b) ships which, although not registered in the United Kingdom, ought to be so registered, and are owned by citizens of the United Kingdom and Colonies or by companies established under the laws of the United Kingdom and having their principal place of business there;
- (c) ships in respect of which a provisional certificate under section 22 of the 1894 Act is in force;
- (d) ships in respect of which a temporary pass under section 23 of the 1894 Act is in force for the purpose of passing to and from a port in the United Kingdom;
- (e) vessels used solely on the rivers and coasts of the United Kingdom;
- (f) ships and vessels completed, or in course of completion, which have been or are being constructed in the United Kingdom, launched but not yet registered in this country or elsewhere; or
- (g) government ships as defined by section 80(3) of the Merchant Shipping Act 1906; or
- (h) Her Majesty's ships and vessels within the meaning of section 132 of the Naval Discipline Act 1957.

60. It will be noted that naval vessels are included under paragraph (h) of the foregoing definition. Offences on board naval vessels by service personnel and all persons authorised as visitors to such vessels and as passengers aboard

¹⁰¹ This means that, in relation to indictable offences, the Crown Court would have jurisdiction to try the defendant; and, in relation to summary offences, the magistrates' court for the county in which he is found. For reasons given in para. 12, above, the recommendation refers only to conduct which would constitute an offence in England and Wales, as does the recommendation in para. 66, below. Compare the Tokyo Convention Act 1967, s. 1(1), para. 71, below.

¹⁰² This covers both merchant ships and fishing boats.

¹⁰³ See para. 38, above. "Vessel" under s. 742 of the Merchant Shipping Act 1894 "includes any ship or boat, or any other description of vessel used in navigation"; "ship" "includes every description of vessel used in navigation not propelled by oars". These terms are used in this sense in relation to the categories of vessels (save those in category (h)) described in para. 59. "Fishing boat" under s. 370 means "a vessel of whatever size, and in whatever way propelled, which is for the time being employed in sea fishing or in the sea-fishing service". By s. 132 of the Naval Discipline Act 1957 "Her Majesty's ships" means commissioned ships flying the white ensign; "Her Majesty's vessels" means ships and vessels, other than Her Majesty's ships, engaged in the naval service of Her Majesty.

them are already penalised by virtue of the Naval Discipline Act 1957,¹⁰⁴ but this does not cover the unauthorised visitor (such as a stowaway) who commits offences. It may well be that Admiralty criminal jurisdiction would at present cover such persons, and for this reason¹⁰⁵ we think the definition of a vessel which is “British-controlled” should include naval vessels. This will in no way affect the criminal law in its application to naval personnel under the Naval Discipline Act, although it will of course mean that a dual jurisdiction will exist as regards offences on board ship by such personnel.

61. Two further matters require consideration in relation to the recommendation under discussion. The first of these relates to the possible requirement of consent by the Director of Public Prosecutions to the institution of proceedings in the case of offences by aliens on board British-controlled vessels. We mention this both because we suggested such a provision in our Working Paper and because a similar but still wider provision appears in the Tokyo Convention Act 1967 as regards offences by aliens on board aircraft outside the United Kingdom.¹⁰⁶ We have observed, however, that the law applying on board ship is normally that of the flag State, that is, in the case of ships registered in the United Kingdom the law of this country; and a provision for the Director’s consent would, we think, be unnecessary in the case of any offences committed on the high seas on board such ships. The main offence-creating provision we are recommending does of course cover the case of offences on board British-controlled vessels in foreign territorial or internal waters, including ports and harbours. Where any such offence affects the good order of the coastal State, that State may, in accordance with accepted international usage, wish to deal with the matter. Here again, however, if that State takes no action and any alien concerned with the offence is found in this country, we see no reason of policy which would require consent to institution of proceedings. Nor do we think consent is required in the event of an alien committing an offence on board a ship which, while not registered in the United Kingdom, belongs to those unregistered ships having a close connection with the United Kingdom included within the term “British-controlled” vessel.

62. Finally, we have considered the necessity for a provision similar to that appearing in the proviso to section 1(1) of the Tokyo Convention Act 1967,¹⁰⁷ which would exclude the general provision from applying to any act or omission expressly or implicitly authorised by or under English law when taking place outside the United Kingdom. There are perhaps valid reasons for the inclusion of the proviso in section 1(1) of the Tokyo Convention Act. But there are, we think, no provisions in the existing law¹⁰⁸ which would make a corresponding

¹⁰⁴ Sects. 117–118; see further paras. 82 and 83, below.

¹⁰⁵ The inclusion of naval vessels within the definition is important also in the context of hijacking (see para. 108, below) and also eliminates the possibility of the D.P.P.’s consent being required in any case involving an offence on a naval vessel which would otherwise fall within the terms of our recommendation in para. 39, above.

¹⁰⁶ Sect. 1(2); see further, para. 71, below.

¹⁰⁷ See para. 72, below.

¹⁰⁸ Sect. 70(2) of the Customs and Excise Act 1952 (added by the European Communities Act 1972, s. 4 and Sch. 4, para 2(4)) is a possible but by no means clear instance applying in the case of ships. Compare s. 70 applying to aircraft outside the United Kingdom, referred to at para. 72, below.

exception necessary in the case of offences on board ships, and we make no recommendation for such a provision.

63. The foregoing paragraphs detail those provisions which we think necessary for new legislation to replace section 686 of the Merchant Shipping Act. It will be noted that they take no account of persons in category (b) referred to in paragraph 55, that is, British subjects on board foreign ships to which they do not belong; offences by such persons are at present covered by section 686. We do not think such persons should be covered in any new provision. As we have stated already,¹⁰⁹ the accepted rule is that the law of the flag applies to all persons on board ship irrespective of nationality; as a corollary, in the absence of a demonstrable need, the law of an individual's nationality is inapplicable. We see no need for an exception to the general rule in this instance.

(ii) Offences on shore abroad by crew members

64. In so far as the provision discussed in the foregoing paragraphs would, amongst other matters, cover all offences against persons or property on board British-controlled vessels committed by all crew members, it would overlap very considerably with the existing provisions of section 687 of the Merchant Shipping Act 1894.¹¹⁰ That section does, however, deal in addition with offences against persons and property ashore "outside Her Majesty's dominions" by crew members, including those who had been crew members in the three months prior to the commission of the offence. We have remarked already that, while there were, no doubt, practical reasons for framing such a broad provision at the time when it was originally enacted,¹¹¹ it is difficult to justify its breadth in modern conditions. In the normal course all offences ashore, at any rate those involving injury to a person, or property belonging to a person, present in the State where the ship is berthed, are dealt with by the authorities of that State. In such cases the offence is not one which affects discipline on board ship and the witnesses, apart from the defendant himself, are in the State where the incident occurs. To some extent, therefore, there appear to be strong arguments in favour of not replacing section 687.

65. Different considerations apply, however, when, to take a simple example, one crew member steals the wallet of another member or of a passenger ashore, and this is perhaps not discovered until the parties concerned have returned aboard. All the circumstances here relate to the ship itself except the (perhaps fortuitous) location of the act of stealing, and it is highly improbable that the State authorities would have any interest in taking action in such a case. A provision which at least deals with acts of crew members ashore directed at fellow crew members seems therefore to be necessary. Furthermore, even in the situations outlined in the last paragraph there might be instances—for example, a fracas between crew members and the local populace—where the local authorities might consider it expedient to return the crew members to their ship as rapidly as possible instead of taking court proceedings. While such instances might be infrequent, it would, we think be an

¹⁰⁹ See para. 54, above.

¹¹⁰ See para. 56 and n. 96, above.

¹¹¹ It was first enacted in the Merchant Shipping Act 1854.

odd result if the courts in this country were, in an appropriate case, to be entirely unable to deal with the conduct of the crew members concerned when they came to this country.

66. These considerations lead us to the view that, if section 687 were to be repealed, some provision would be needed to replace it, although we think its scope should be somewhat narrower. In particular we think there is no room in modern legislation for a jurisdiction based on employment upon a British ship within the three months prior to the conduct in question. We think it will suffice if a new provision applies to persons employed at the time of the conduct on board a British-controlled vessel.¹¹² Conduct ashore¹¹³ in a place outside the United Kingdom on the part of such persons which would amount to an offence if taking place in England and Wales should make them liable as if it had taken place here, and be triable here accordingly.

67. We have considered again whether some form of consent to institution of proceedings is necessary and have concluded that it is not. It is true that in all the instances which might arise within the terms of the recommended provision there will be a jurisdiction concurrent with that of the authorities of the State where the ship is berthed, and in some cases, as we have indicated, those authorities may be expected to take primary responsibility for dealing with the offending conduct. But consent would in our view only be a necessary procedural complication if these concurrent jurisdictions were to be in some way conflicting or competitive. This however would not be the case here; if the coastal State took no action or found it expedient to return the crew member to his ship, it would then always be open to the authorities in England and Wales to take action whenever it was thought necessary or appropriate.

(iii) Foreign ships operating within the territory

68. We have stated that we take the view that jurisdiction over offences on board ship should not be extended to criminal conduct by United Kingdom citizens on board foreign ships on the high seas. We did however suggest in our Working Paper¹¹⁴ that a possible exception might be made to cover acts done by citizens of the United Kingdom and Colonies on board foreign ships outside territorial waters on journeys between different parts of the United Kingdom and between the United Kingdom and other neighbouring countries. In the light of the comments received on this suggestion and after reconsideration we do not recommend that an exceptional basis of jurisdiction should be created to cover journeys to neighbouring countries. We are aware that the conduct of, for example, football crowds on cross-Channel ferries may give cause for concern; but a general provision of the kind canvassed in our Working Paper is not in our view the appropriate remedy, since there seems to be no rational basis upon which to justify a distinction in law between journeys by sea or by air to foreign countries which are geographically proximate to the United Kingdom and journeys to those which are more distant. In any event, such an

¹¹² As defined in para. 59, above.

¹¹³ We think the provision should also apply to conduct aboard ships belonging to other flag States present in the port where the British-controlled vessel in question is. If the conduct in question occurs on board another British-controlled vessel in port, it will be covered by our recommendation in para. 58, above.

¹¹⁴ Para. 24.

extension of jurisdiction could hardly be effected without appropriate international agreement.

69. Different considerations would apply, however, were the journey of the foreign ship in question to take place solely between ports within England and Wales.¹¹⁵ In this limited context there would be strong practical reasons for applying the criminal law to citizens of the United Kingdom and Colonies, irrespective of whether the ship's voyage took it outside territorial waters.¹¹⁶ Of course, any extended application of the criminal law would have to be narrowly circumscribed in order to exclude, for example, foreign liners calling at several ports in this country, or foreign ships calling at more than one port before commencing a voyage abroad. Were this extension of the criminal law considered necessary, these difficulties might be surmounted by provision of powers to specify the classes of ships and the particular routes to which this extended application of the criminal law should apply. But while this problem may be one of substance in the context of the United Kingdom as a whole,¹¹⁷ we believe it to be of no practical importance at present in so far as England and Wales alone is concerned. We therefore make no recommendation in this report.

(iv) Abolitions and repeals

70. The new statutory provisions which we have recommended in the foregoing paragraphs will make it unnecessary to rely upon the old concept of the Admiralty criminal jurisdiction to establish the jurisdiction of the criminal courts in relation to conduct occurring upon ships which have their closest connection with the United Kingdom. Accordingly, we recommend that it be abolished. We further recommend the repeal of the old statutory provisions which it seems do little more than confirm that jurisdiction, namely, the Offences at Sea Act 1799, the surviving sections of certain major 19th century enactments¹¹⁸ and similar sections in other legislation.¹¹⁹ Finally, we recommend the repeal of sections 686 and 687 of the Merchant Shipping Act 1894.

2. AIRCRAFT

71. By contrast with the position respecting British ships, the law relating to offences on board British-controlled aircraft¹²⁰ in flight outside the United Kingdom is the subject of quite recent comprehensive legislation. Section 1(1)

¹¹⁵ Or between ports in different parts of the United Kingdom. As we explained in para. 12, above, we are not in this report concerned with the position in Scotland and Northern Ireland; but it is relevant to note that a specific instance has been drawn to our attention of a foreign vessel regularly plying between Larne and Stranraer.

¹¹⁶ So long as it remained in territorial waters our recommendations as to territory would in any event cover it: see paras. 21 *et seq.*, above.

¹¹⁷ See n. 115, above.

¹¹⁸ The Malicious Damage Act 1861, the Forgery Act 1861 and the Offences against the Person Act 1861 all apply in Northern Ireland. Each contains a section referring to "offences . . . committed within the jurisdiction of the Admiralty of England or Ireland". In the draft clauses (Appendix A) the words "England or" in each section are repealed in Sch. 2, so that the sections continue in force as so amended in Northern Ireland.

¹¹⁹ E.g. Unlawful Oaths Acts 1797, s. 6 and 1812, s. 7.

¹²⁰ Defined in s. 7 of the Tokyo Convention Act 1967, read with the Air Navigation Order 1976 S.I. No. 1783.

of the Tokyo Convention Act 1967¹²¹ states that—

“Any act or omission taking place on board a British-controlled aircraft whilst in flight elsewhere than in or over the United Kingdom which, if taking place in or in a part of the United Kingdom, would constitute an offence under the law in force in, or in that part of, the United Kingdom shall constitute that offence.”

The effect of this is clearly to extend the criminal law of all parts of the United Kingdom to conduct occurring on British-controlled aircraft whilst in flight. Section 1(2) imposes an important restriction by requiring (except in the case of certain specific aviation offences) the consent of the Director of Public Prosecutions before the institution of proceedings for offences committed on an aircraft (whether British-controlled or not)¹²² whilst in flight outside the United Kingdom. Section 1(3) contains a provision for the purpose of conferring jurisdiction upon the courts whereby any offence which it covers is deemed to have been committed in any place in the United Kingdom in which the offender may for the time being be.

72. Section 1(1) of the Act is subject to the proviso, which we have mentioned already in the context of ships, that—

“... this sub-section shall not apply to any act or omission which is expressly or implicitly authorised by or under [U.K.] law when taking place outside the United Kingdom.”

It is rare in United Kingdom legislation to find a provision which authorises acts or omissions taking place outside the United Kingdom which would otherwise be offences, since in principle, unless the contrary appears expressly or by necessary implication, Acts of Parliament relating to criminal offences are not concerned with matters taking place beyond United Kingdom territorial limits.¹²³ The purpose of the proviso is to prevent an offence being created when a statute or the common law expressly or impliedly authorises the act or omission in question. There is, for example, in section 70 of the Customs and Excise Act 1952 one provision which indicates that a particular activity on board an aircraft constitutes an offence in some circumstances but not in others. This section penalises the breaking of customs seals on aircraft while in the United Kingdom but does not penalise such activities when they have left the country. Whether or not the proviso is strictly necessary, we do not recommend any alteration to it in the present context.¹²⁴ We are further satisfied that the provisions of the Act here outlined are adequate to deal with the commission of offences on British-controlled aircraft in flight elsewhere than over the United Kingdom.¹²⁵ Accordingly we make no recommendation in regard to this aspect of the law.

¹²¹ The Act gives effect in the United Kingdom to the Convention of that name, (1964) Cmd. 2261.

¹²² Sect. 1(2) read with the definitions in s. 7.

¹²³ This is a matter to which we revert below, para. 74.

¹²⁴ Compare, as to offences on board ships, para. 62, above.

¹²⁵ Our remarks here apply, *mutatis mutandis*, to offences on board hovercraft. By virtue of Article 5 of the Hovercraft (Application of Enactments) Order 1972, S.I. 1972 No. 971, references in the Tokyo Convention Act 1967 to aircraft or activities or places connected therewith are extended to hovercraft or places connected with hovercraft. For references to “flight”, there is thereby substituted references to “journey”. Thus, s. 1 of the 1967 Act applies with this modification to hovercraft and offences on board them. A “British-controlled” hovercraft for the purposes of this section is defined by reference to s. 7 of the 1967 Act, as modified by the above-mentioned Order, read with the provisions as to registration in the United Kingdom of the Hovercraft (General) Order 1972 S.I. No. 674.

C. Summary

73. In regard to offences taking place in particular locations outside territorial limits (as that has been defined in part II), and on board ships and aircraft we recommend as follows—

- (a) Any lighthouse situated outside territorial waters off the coast of England and Wales should be deemed to be part of the territory for the purpose of applying the criminal law of England and Wales; and lightships and other similar floating navigational structures so situated should also be regarded as part of the territory for this purpose.
- (b) Any tunnels beneath territorial waters adjacent to England and Wales, extending beyond the outward limits of those waters and accessible only from land in England or Wales, should be deemed to be part of the territory for the purpose of applying the criminal law.
- (c) New provisions are required dealing with offences committed on board ships and on shore abroad, replacing Admiralty criminal jurisdiction outside territorial limits.¹²⁶
 - (i) The first should apply to all persons on board a British-controlled vessel anywhere outside the territory of England and Wales. Where the conduct of any such person would have constituted an offence if it had occurred in England and Wales, that person should be liable as if he had committed it there, and should be triable by any court in England and Wales within whose jurisdiction he is found.
 - (ii) The second should apply to any person employed at the relevant time on board a British-controlled vessel. Conduct ashore in a place outside the United Kingdom¹²⁷ on the part of such a person which would amount to an offence if taking place in England and Wales should make him triable for that offence in any court in England and Wales within whose jurisdiction he is found.
 - (iii) A “British-controlled vessel” should include ships and fishing boats registered in the United Kingdom and certain other defined categories of vessels having a close connection with the United Kingdom,¹²⁸ together with all United Kingdom naval vessels.

¹²⁶ The recommendation for abolition of Admiralty criminal jurisdiction is expressed, in common with all the recommendations in this report, in terms of changes to the law of England and Wales. If it is implemented on a United Kingdom basis, it may be necessary to consider the effect of abolition upon the exercise of this jurisdiction elsewhere than in the United Kingdom. Consideration would also be needed of its effect on the Admiralty Offences (Colonial) Act 1849, s. 1 and the Slave Trade Act 1824, s. 9, two provisions of United Kingdom application which contain specific reference to Admiralty jurisdiction in the colonies and elsewhere. Similarly, since our clauses apply to England and Wales only, we recommend repeal of the references in the Consular Relations Act 1968, s. 15 to the Territorial Waters Jurisdiction Act 1878 and the Merchant Shipping Act 1894, ss. 685 and 686 (see Sch. 2 to the clauses); but were our recommendations for repeal of these Acts to be extended to the United Kingdom, it would be necessary to substitute for these references a reference to the new provisions in our clauses designed to replace these provisions of the 1878 and 1894 Acts.

¹²⁷ Including on board a non-British-controlled vessel in the same port as the vessel on which he is employed.

¹²⁸ These are set out in full in para. 59, above; see also n. 103, above.

- (iv) Admiralty criminal jurisdiction outside the territory should be abolished, and existing legislation in this field should be repealed. This includes in particular sections 686 and 687 of the Merchant Shipping Act 1894 and various older provisions.¹²⁹

In consequence British subjects on board foreign ships outside the United Kingdom to which they do not belong will in general not be penalised.

- (d) No new provisions are required to deal with offences on British-controlled aircraft or hovercraft outside the United Kingdom.

IV EXCEPTIONS TO THE TERRITORIAL APPLICATIONS OF THE CRIMINAL LAW

74. Having considered in detail both what are the territorial limits for the purpose of the criminal law, and other locations deemed to be part of the territory for that purpose, we now examine those cases where the criminal law is not applied upon a territorial basis. Particular kinds of conduct by persons outside the territory of England and Wales are sometimes specifically made an offence under English law. On the other hand certain people within the territory are immune from the jurisdiction of the courts in England and Wales. These different categories are examined in the following paragraphs and, in addition, we describe separately certain offences of an international character. Our treatment of some of these topics is relatively brief since we have few recommendations for change; in fact, our recommendations are limited to two fields requiring reform of archaic or outdated provisions, relating to the liability of Crown servants abroad and to piracy. Nevertheless, for reasons already indicated,¹³⁰ we consider it useful to cover all relevant aspects of the law rather than to examine only those few in which some change seems necessary.

A. Application of the criminal law to offences committed outside England and Wales

75. The criminal law, as we have indicated is not applied solely by reference to territory or analogous locations. Complementing that basis of application, there are cases where by personal circumstances individuals may be subject to English criminal law, in part or in whole, in respect of their conduct abroad. Two broad categories may be distinguished: first, where persons belong to a particular class of individuals abroad to whom the whole, or at any rate a large part, of the criminal law of England and Wales is applied; and, secondly, where persons have a particular connection with the United Kingdom, most usually where they are British subjects, and are made liable for particular offences when they are committed abroad. We examine these categories in turn.

¹²⁹ i.e. Offences at Sea Act 1799 (the whole Act), Unlawful Oaths Acts 1797, s. 6 and 1812, s. 7; and the Forgery Act 1861, s. 50, Offences against the Person Act 1861, s. 68, and Malicious Damage Act 1861, s. 72, in so far as the three last-mentioned provisions refer to the Admiralty of England.

¹³⁰ See para. 9, above.

1. APPLICATION OF THE CRIMINAL LAW TO PERSONS OUTSIDE ENGLAND AND WALES WHO CONSTITUTE A PARTICULAR CLASS

(a) *Crown Servants abroad*

76. Certain statutes make provision for the application of domestic criminal law to the conduct of British Crown servants serving outside England and Wales:

- (1) The earliest of these, the Act of 11 Will. 3 c. 12 (1698–9)¹³¹ makes special provision for the trial in England of offences contrary to “the laws of this realm” or contrary to laws in force in a colony, committed by governors and commanders-in-chief in colonial territories under their jurisdiction.
- (2) The Criminal Jurisdiction Act 1802 provides for the prosecution in England of any person in the service of the Crown in any civil or military station, office or capacity out of Great Britain who commits out of Great Britain any offence in the execution or under colour or in the exercise of any such station, office, capacity or employment.
- (3) The Sale of Offices Act 1809, section 14 specifically provides for the prosecution in England of offences against that Act committed by any governor or secretary in any of the dominions or colonies.
- (4) The Criminal Justice Act 1948, section 31 provides that—
“Any British subject employed under His Majesty’s Government in the United Kingdom in the service of the Crown, who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which if committed in England, would be punishable on indictment, shall be guilty of an offence . . . , and subject to the same punishment, as if the offence had been committed in England.”¹³²

77. Both the 1802 Act and the 1948 Act appear to apply the whole of the criminal law to the conduct of Crown servants outside England and Wales but, whereas the 1802 Act applies that law to conduct anywhere outside Great Britain, the 1948 Act applies it only to conduct in a foreign (as distinct from another Commonwealth) country. These two Acts make unnecessary the specific provisions of the Act of 1698–9 and section 14 of the 1809 Act. There is another minor difficulty arising from the fact that the Act of 1948 (c. 58) and the British Nationality Act 1948 (c. 56) received the Royal Assent upon the same day. This raises the question as to whether, and to what extent, section 3 of the British Nationality Act, which limits the criminal liability of British subjects who are not citizens of the United Kingdom and Colonies, operates to exclude such persons from the ambit of section 31 of the Criminal Justice Act 1948.

78. There is clearly scope here for rationalisation and reform. The initial question, however, is whether in modern conditions it is possible to justify an

¹³¹ “An Act to punish Governors of Plantations in this Kingdom for Crimes by them committed in the Plantations.”

¹³² A similar provision applying in Scotland is to be found in the Criminal Justice (Scotland) Act 1949, s. 29(2).

assertion of jurisdiction over this whole class of people abroad and the application to them of the criminal law of England and Wales. Since the conduct to be penalised may constitute an offence according to the local law, would it not be appropriate to leave it to be dealt with by the courts of the host State? We think there are sound reasons of policy for a provision applying to Crown servants abroad. It is important for the international standing of the country for it to be able to impose effective sanctions against criminal conduct upon persons whom it sends abroad in its service. This is particularly so where the offending conduct occurs when the person concerned is acting or purporting to act in the course of his employment. In these cases the authorities in the host State are relieved of any possible embarrassment in having to take proceedings. Furthermore, the possibility of proceedings in this country ensures that the offending conduct need not go unpunished either in those cases where the host State has no interest in pursuing the matter, or in those cases where, although it has such an interest, it is unable to take proceedings because it is thought appropriate by the authorities in the United Kingdom to assert diplomatic immunity in the particular case. Where the conduct is in no way connected with the Crown servant's employment, it remains open to the authorities of the host State to declare his presence to be no longer acceptable.

79. In considering the scope of a new provision, perhaps the most important problem requiring consideration is whether it should apply the whole of the criminal law of England and Wales or whether it should be more limited. The provision should in our view be confined like the 1948 Act to indictable offences since it is only the more serious types of misconduct in respect of which it will be appropriate to take proceedings in this country. Even so, it is possible that not all conduct which could be the subject of proceedings on indictment in this country will be encompassed by a provision limited in this way. There are clearly some acts or omissions occurring outside England and Wales which are so much identified with their locality that they cannot be translated into any equivalent English offence.¹³³ Conversely, if the act penalised is by its nature one that can only be committed in England and Wales,¹³⁴ or if the offence can only be committed by reference to some particular place,¹³⁵ the provision will have no application. But we think the possibilities of these problems arising will be minimised if the provision is in terms limited to indictable offences.¹³⁶

80. The other necessary elements of the provision may be outlined more briefly. The provision should in our view extend to conduct not only in foreign countries but to conduct occurring anywhere outside the United Kingdom, thereby including conduct in Commonwealth countries. Further, the doubt mentioned as to the width of the nationality provision must be resolved. We consider that the new legislation should apply only to the conduct of citizens of the United Kingdom and Colonies. The only rational alternative in modern conditions would be to make it applicable to all persons in the service of the

¹³³ Cf. *Cox v. Army Council* [1963] A.C. 48, 71, *per* Lord Radcliffe.

¹³⁴ *Ibid.*, at p. 68, *per* Lord Simonds.

¹³⁵ *Ibid.*, at p. 73, *per* Lord Morris.

¹³⁶ An "indictable offence" under the Criminal Law Act 1977, s.64(1) means, wherever it appears in an enactment, "an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way".

Crown irrespective of nationality, and although it is possible to conceive of theoretical situations in which it would be desirable to invoke the provision in the case of conduct abroad by aliens serving the Crown,¹³⁷ we consider that very positive evidence of the usefulness of such a wide provision would be needed before extending the whole of the criminal law of England and Wales relating to indictable offences to persons living abroad who are not citizens of the United Kingdom and Colonies. In the absence of such evidence, we think the new provisions should be confined in the manner proposed. It is in any event our understanding that section 31 of the 1948 Act has apparently never been invoked in the case of persons living abroad who were not citizens of the United Kingdom and Colonies.

81. Accordingly we recommend that new legislation should provide that any citizen of the United Kingdom and Colonies employed in the service of the Crown under Her Majesty's Government in the United Kingdom who, outside the United Kingdom, when acting or purporting to act in the course of that employment, does or omits to do any act which, if done or omitted in England and Wales, would constitute an indictable offence, shall be guilty of that offence and shall be punishable as if the offence had been committed in England and Wales. We further recommend the repeal of the Act of 1698, the Criminal Jurisdiction Act 1802, section 14 of the Sale of Offices Act 1809, and section 31 of the Criminal Justice Act 1948.

(b) Service Personnel

82. There are provisions in the Army Act 1955 and the Air Force Act 1955 which make provision for "civil offences" abroad. A "civil offence" under section 70(2) of both these Acts "means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law"; and by section 70(1) of the respective Acts anyone subject to military or air-force law who commits a civil offence, whether in the United Kingdom or elsewhere, is guilty of an offence against the section. These provisions have the effect of making conduct abroad by a member of these arms of Her Majesty's Forces punishable under English law and triable by court-martial, if that conduct would have been an offence had it taken place in England and Wales.¹³⁸ As we pointed out when discussing the provisions applying to Crown servants abroad,¹³⁹ provisions such as these cannot, for the reasons we there referred to, apply the whole of English criminal law to servicemen abroad. Section 42 of the Naval Discipline Act 1957 is differently worded. It provides simply for the punishment of those subject to naval discipline under the Act who are guilty of a "civil offence" (similarly defined). In practice, no problems arise from the operation of these provisions, all of which enable courts-martial to try civil offences abroad, and we do not therefore consider it necessary to recommend amendments to them.

(c) Civilians accompanying Her Majesty's Forces

83. Until 1957 civilian dependants and employees accompanying the Forces were subject to military law in two situations only; first, when troops

¹³⁷ Special provisions already exist in relation to official secrets: see para. 89, below.

¹³⁸ *R. v. Page* [1954] 1 Q.B. 170, a decision on s. 41 of the Army Act 1881, which was re-enacted by s. 70 of the Act of 1955.

¹³⁹ See para. 79, above.

were on active service, that is, engaged in operations against an enemy elsewhere than in the United Kingdom or in operations for the protection of life and property, and secondly, when they were in military occupation of a foreign country. But this limited application of military law to civilians was substantially widened by section 209(2) in each of the Army Act 1955 and the Air Force Act 1955 (which came into force in 1957).¹⁴⁰ Such civilians can now be tried by a court-martial, or summarily as provided by the Acts, whenever they commit a "civil offence".¹⁴¹ The civilians subject to these provisions are set out in general terms in the Fifth Schedule to each of these Acts, the principal group being persons serving Her Majesty or otherwise employed in such capacities connected with Her Majesty's Forces as are specified by Regulation. The Regulations¹⁴² made under these Schedules specify civilians employed in virtually any capacity (administrative, judicial, executive, clerical etc.); civilians employed by NATO, and nearly thirty organisations such as the WRVS and the British Red Cross Society operating with British forces overseas; wives and members of families of serving soldiers; relatives staying on holiday with a Service family; authorised Press correspondents; and even members of concert parties. In practice jurisdiction is not claimed under the foregoing provisions over offences by aliens abroad. But, quite apart from this practical restriction upon the scope of jurisdiction, it might be argued that, except in time of war or under active service conditions, the civilians accompanying Her Majesty's Forces referred to above who are citizens of the United Kingdom should, subject to any local jurisdictional claim, be entitled to demand trial by jury in respect of any indictable offence with which they are charged.¹⁴³ This would however create formidable difficulties in practice. A trial by jury would necessarily involve expense and delay in obtaining the presence in this country of witnesses of the offence abroad, and even more importantly their attendance, in the absence of international agreement, would not be compellable. Furthermore, it frequently happens that a serviceman and a civilian within the specified categories are jointly charged with the same offence, and it would be neither logical nor perhaps practicable for them to be tried in different courts. We do not explore these matters in greater detail as we think that the safeguards inherent in the system of courts-martial appeals now makes any argument that these civilians should be entitled to trial by jury far less cogent.

(d) *Statutes implementing international conventions*

84. Reference has already been made¹⁴⁴ to extension of the territorial application of English law by legislation for the purpose of implementing certain international conventions. As a further example under the present general heading of the application of the criminal law to particular classes abroad, we mention here another such application to be found in the Antarctic

¹⁴⁰ The Naval Discipline Act 1957, s. 118(2) which came into force on 1 January 1959 effected similar changes with regard to naval personnel.

¹⁴¹ See para. 82, above.

¹⁴² The Civilians (Application of Part II of the Army Act 1955) Regulations 1956 (A.O. 123 of 1956), amended by A.O. 135 of 1957. These Regulations are not published as statutory instruments.

¹⁴³ See further on this subject "Courts-Martial, Civilians and Civil Liberties" by Gordon Borrie, (1969) 32 M.L.R. 35.

¹⁴⁴ Para. 41, above; see further para. 115, below.

Treaty Act 1967, because it establishes a workable approach and a precedent in domestic legislation which might be followed in the regulation of conduct outside existing state territory. By section 5 of this Act certain persons are made criminally liable for their conduct whilst in Antarctica for the purpose of exercising their functions. The persons so liable are those specified in section 1(3)¹⁴⁵ who are designated by the United Kingdom Government as observers or who are "exchanged scientists" together with members of their staff. Any such person who commits what would be an offence under the law of any part of the United Kingdom, if committed in that part, is made liable as if he had so committed it in that part. In the interests of the conservation of the local flora and fauna a number of specific offences are also created by section 1(1) which may be committed by any of the categories of persons specified in section 1(3), such as wilfully killing or molesting mammals or birds or gathering native plants or driving vehicles in protected areas.

2. APPLICATION OF THE CRIMINAL LAW TO SPECIFIED CONDUCT OF PERSONS ABROAD HAVING A PARTICULAR CONNECTION WITH THE UNITED KINGDOM

85. Some offences in the law of England and Wales operate extraterritorially in regard to certain classes of people. The particular connection with this country which makes individuals liable under English law for such offences committed abroad is, in the majority of cases, possession of British subject status. Jurisdiction based on nationality is widely claimed under civil law systems but is limited in the law of England and Wales to certain offences which are all now the subject of statutory provisions. Not all British subjects are however liable under these provisions. Section 3 of the British Nationality Act 1948 has the effect of limiting the criminal liability of British subjects in respect of conduct outside the United Kingdom (otherwise than in respect of Merchant Shipping Act offences) to those cases where they are citizens of the United Kingdom and Colonies. Other connections with the United Kingdom also make persons liable in particular instances: for example, persons owing allegiance to the Crown may be subject to the law of treason even though that allegiance arose through the temporary acceptance of the protection of the Crown.¹⁴⁶ In respect of some other offences residence in the United Kingdom¹⁴⁷ or within Her Majesty's dominions¹⁴⁸ may on occasion be the test; and in addition to citizens of the United Kingdom and Colonies other limited categories of persons having a close connection with the United Kingdom may be specified as being liable under particular legislation.¹⁴⁹ In all cases it is necessary to examine the precise wording of the relevant statute to perceive the extent of its application.

¹⁴⁵ Under s. 1(3), these are specified categories of United Kingdom nationals and any person who owns or is the master or crew member of a British ship registered in the United Kingdom. There may be a further extension by Order in Council of the persons to whom s. 1 applies—see s. 7.

¹⁴⁶ See *Joyce v. D.P.P.* [1946] A.C. 347; treason and allied offences are currently under examination by the Law Commission: see Working Paper No. 72 (1977).

¹⁴⁷ Exchange Control Act 1947, s. 1(1).

¹⁴⁸ See Slave Trade Act 1824, s. 9.

¹⁴⁹ See e.g. Immigration Act 1971, s. 25(1) and (5).

86. The legislation to which we have referred in the preceding paragraph is reviewed in rather more detail below, and we give particular consideration to those aspects of it which seem to be in need of further examination. We do not however consider it appropriate to make recommendations for amendments to this legislation in this report. Some of the difficulties to which we make reference, such as the apparent anomalies in the Representation of the People Act 1949,¹⁵⁰ are of minor importance and may best be rectified, if need be, in the context of the legislation concerned when it is next reviewed as a whole. Other legislation¹⁵¹ is, or has recently been, under review, and the possible anomalies existing in it may best be dealt with when new legislation covering the relevant matters is being examined.

(a) *Offences affecting public order, institutions or security*

(i) Electoral offences

87. Two sections of the Representation of the People Act 1949 exhibit certain difficulties of application. Section 80 of the 1949 Act (as amended by section 9(5) of the Representation of the People Act 1969) makes it an offence for “any person” (not, in this context, explicitly limited to citizens of the United Kingdom) to use television or wireless stations abroad to influence voters at parliamentary or local government elections and would therefore seem to penalise aliens for their conduct while abroad. This question was discussed in the Committee stage of the Bill¹⁵² which became the Representation of the People Act 1948, and it seems from the debates that, so far as it operated extraterritorially, the intention of the then government was to create an offence only on the part of British subjects.¹⁵³ In our view, this intention was not realised. It is doubtful whether any rule of statutory construction would limit the term “any person” in legislation to a British subject in the absence of any specific indication to this effect. Thus section 80 as at present drafted seems capable of applying to aliens abroad who use transmitters outside the United Kingdom for the prohibited purposes. We have already stated that we are making no recommendations in this report for amendments to this Act. But if it was intended to limit section 80 to an offence on the part of British subjects, the intention was not achieved; and this may well be considered a ground for its amendment in the future.

88. The other question, perhaps more important, relates to the territorial scope of the offences under the 1949 Act. Although it may well have been the intention of the legislature, it seems doubtful whether the various activities penalised under the offence-creating provisions of the Act constitute offences under the Act when they take place abroad, except in the case of the conduct prohibited by section 80 to which we have already referred. Section 38 of the Representation of the People Act 1918 provided that—

“where any person commits out of the United Kingdom any act which if that act had been committed in the United Kingdom would have rendered that person liable to prosecution and punishment under . . . this Act, that person shall be liable to be proceeded against and punished as though the

¹⁵⁰ See para. 87, below.

¹⁵¹ E.g. that relative to the law of treason and official secrets; see paras. 89 and 93, below.

¹⁵² Hansard, House of Commons, (1948) Vol. 449, Cols. 1723–38, 1892 and 1895.

¹⁵³ *Ibid.*, col. 1895.

act had been committed in the United Kingdom at any place where that person may for the time being be.”

This made it quite clear that the Act penalised certain activities, whether they took place in this country or abroad. But the corresponding provision in the 1949 Act, section 155, is not so drafted as to state what acts done outside the United Kingdom constitute offences under the Act. As amended by section 21(1) of the 1969 Act, it merely provides that proceedings under the Act for an offence by a British subject or citizen of the Republic of Ireland committed abroad may be taken before the court having jurisdiction in the place where he is for the time being. It has been stated that “section 155(1) extends to any offence under the Act and is apparently intended to meet the case of an offence committed abroad by an absent voter”,¹⁵⁴ but, although we believe it was intended to preserve the pre-existing position, on the true construction of the Act it may well be that the only offence on which section 155 can presently operate is that created by section 80. If it is thought desirable to preserve the policy underlying the 1918 Act, it follows that consideration ought at a convenient time to be given to the redrafting of section 155 to clarify the position.

(ii) Official secrets

89. Section 10(1) of the Official Secrets Act 1911 provides that the Act shall apply to all acts which are offences under the Act when committed in Her Majesty’s dominions, or when committed by British “officers” or subjects elsewhere. Whilst it seems clear that, by virtue of section 3 of the British Nationality Act 1948, the expression “British subjects” in this context is limited to citizens of the United Kingdom and Colonies, the expression “British officer” is not defined.

90. Section 10(1) of the Act applies, as it states, to all offences under the Act, including those under section 2, concerned with the wrongful communication of secret and confidential information. This section has been the subject of examination and of recommendations by the Departmental Committee under the chairmanship of Lord Franks.¹⁵⁵ While the Committee did not consider in detail the overseas extent of the new provisions which it proposed, it did express the view that “in the case of the provisions of the Official Secrets Act on defence, foreign relations, the currency and the reserves, and Cabinet documents, it seems to us right that the servant of the Crown and the subject of the Crown should take with him everywhere in the world his duty under the Act to protect secrets of the State”. The Committee summed up their views by stating that, subject to the recommendations to be made in the present report and to other necessary consultations, section 10 of the 1911 Act should apply to the proposals made in its report.¹⁵⁶

91. We think it desirable that the ambiguity in the term “British officer” should be resolved. In the case of offences by Crown servants abroad¹⁵⁷ we

¹⁵⁴ Parker’s *Election Agent and Returning Officer* (6th ed. 1959) p. 323.

¹⁵⁵ (1972) Cmnd. 5104, Report of Departmental Committee on Section 2 of the Official Secrets Act 1911; see also (1978) Cmnd. 7285, Reform of Section 2 of the Official Secrets Act 1911.

¹⁵⁶ *Ibid.*, paras. 261–262.

¹⁵⁷ See para. 80, above.

took the view that the very wide provisions, which in effect made Crown servants abroad subject to the whole of the criminal law of England and Wales relating to indictable offences, should not extend to all persons irrespective of nationality unless compelling arguments based upon practical experience could be adduced in favour of such extended liability. Different considerations apply in the restricted field of national security. Whether that field is defined as it is at present, or whether it is subject to amendment as a result of future legislation, we believe that, for the reasons given by the Franks Committee, persons entering Crown service should be subject to liability under the Official Secrets Acts (that is, the Acts of 1911 and 1920) whatever their nationality and wherever they may be, bearing in mind that in conformity with current practice they are upon entry made aware of their liability under the Acts.

92. We stated earlier in this report¹⁵⁸ that we did not consider it an appropriate vehicle for making minor changes in legislation not concerned with the general principles of liability for criminal offences. For that reason our draft clauses do not embody any recommendation for changes in section 10 of the Official Secrets Act 1911. The proper place for that is, we believe, in legislation dealing with official secrets. Were such legislation to be introduced, we would as we have indicated favour an amendment to the words in section 10(1) of the 1911 Act, "or when committed by British officers or subjects elsewhere", to make it clear that the Act applies to offences committed anywhere by all persons employed in the service of the Crown under Her Majesty's Government in the United Kingdom.

(iii) Other legislation

93. Other offences under the present heading may be dealt with more briefly. Under the Treason Act 1351 any person owing allegiance to the Crown who engages in or supports treasonable activities, whether within the realm or elsewhere, is guilty of treason.¹⁵⁹ This and related enactments may still be of importance extraterritorially in some situations. Treason and allied offences are now under review by the Law Commission.¹⁶⁰ Offences relating to the administering and taking of unlawful oaths, created by the Unlawful Oaths Acts 1797 and 1812, are, it seems, punishable in England wherever and by whomsoever committed. However, they have a close relationship with treason and it is possible, therefore, that in spite of the apparent generality of their scope no one who is not a citizen of the United Kingdom and Colonies (with the possible exception of others owing allegiance to the Crown) can be charged with an offence under them committed abroad. Sections 2 and 3 of the Explosive Substances Act 1883, as substituted by the Criminal Jurisdiction Act 1975, provide for the punishment of certain offences committed outside the United Kingdom. Section 2 penalises anyone in the United Kingdom or (if a citizen of the United Kingdom and Colonies) in the Republic of Ireland who causes an explosion likely to endanger life or seriously injure property. Section 3 penalises anyone in the United Kingdom or (if a citizen of the United Kingdom and Colonies) elsewhere who does an act with intent to cause, or conspires to cause, an explosion in the United Kingdom or the Republic of Ireland likely to

¹⁵⁸ See para. 86, above.

¹⁵⁹ *Joyce v. D.P.P.* [1946] A.C. 347.

¹⁶⁰ Working Paper No. 72 (1977).

endanger life or seriously injure property; or who makes or possesses explosive substances with that intent. We mention finally the Immigration Act 1971 under section 25 of which it is an offence for anyone to make or carry out arrangements for securing or facilitating the entry of illegal entrants into the United Kingdom, a provision which applies to things done outside the United Kingdom by citizens of the United Kingdom and Colonies¹⁶¹ and certain others having a close connection with the United Kingdom, such as British subjects without citizenship and British protected persons.¹⁶²

(b) Offences relating to revenue and exchange control

94. The Customs and Excise Act 1952 contains various provisions relating to offences which may be committed within three nautical miles of the coast of the United Kingdom by masters of foreign vessels. Section 1(1)(c) of the Exchange Control Act 1947 makes it an offence for a British resident without proper authorisation to deal in gold or currency notes outside the United Kingdom. There are further provisions in the Income and Corporation Taxes Act 1970¹⁶³ penalising certain activities, "whether within or outside the United Kingdom", but in none of this legislation do we make any recommendation for change.

(c) Offences under the Offences against the Person Act 1861

95. The Criminal Law Revision Committee is examining offences against the person other than bigamy.¹⁶⁴ We do not therefore put forward any recommendations for change in the sections of the Offences against the Person Act 1861 having an extraterritorial operation but note them merely in briefest outline. Section 4 penalises incitement or solicitation to murder any person anywhere. There is some authority for the proposition that no-one can be prosecuted under this section unless some overt act is done in England or within the jurisdiction of the Admiralty.¹⁶⁵ Section 9 penalises a subject of Her Majesty¹⁶⁶ who commits or is accessory to homicide on land abroad, whatever the nationality of the victim, while section 10 deals with homicide where the conduct causing death takes place in one country and the death occurs in another. Section 57 makes it an offence for any person, being married, to marry again anywhere,¹⁶⁷ provided that, if the second marriage is contracted elsewhere than in England or Northern Ireland, the defendant was a "subject of Her Majesty".

¹⁶¹ See s. 25(5).

¹⁶² There are also certain provisions falling under the present heading in the Perjury Act 1911 which operate extraterritorially (ss. 1(5) and 8) but these are under review by the Commission as part of its work on Offences against the Administration of Justice.

¹⁶³ See s. 482(5).

¹⁶⁴ The Law Commission has the offence of bigamy in its programme for review. The Criminal Law Revision Committee's provisional proposals are contained in its Working Paper on Offences against the Person (August 1976), paras. 168-181 of which consider the extraterritorial aspects of the law.

¹⁶⁵ See *Russell on Crime* (12th ed., 1964) Vol. 1, p. 613. We recommend abolition of Admiralty criminal jurisdiction in paras. 40 and 73, above.

¹⁶⁶ By s. 3 of the British Nationality Act 1948 this means British subjects who do not have that status by virtue of the citizenship of another Commonwealth country; see para. 85, above.

¹⁶⁷ It was held in *Earl Russell's Case* [1901] A.C. 446 that the expression in s. 57 "in England or Ireland or elsewhere" meant anywhere at all.

(d) *Other legislation*

96. We mention but do not discuss further other examples of the extraterritorial operation of particular statutory offences. Under section 21 of the Trade Descriptions Act 1968, accessories in England to false representations made abroad are made liable in regard to certain false trade descriptions if the false representations would have constituted an offence if made in England. Certain other offences have a specified foreign element, for example, offences of procuring contrary to sections 2, 3, 9, 22, 23 and 29 of the Sexual Offences Act 1956, which are committed where the conduct intended to be procured is to occur "in any part of the world". Another example in this category is homosexual acts by merchant seamen which, by virtue of section 2 of the Sexual Offences Act 1967, are still punishable on board a United Kingdom merchant ship wherever it may be, even though such acts between consenting adults in private are no longer punishable in England and Wales.¹⁶⁸

B. Persons immune from the jurisdiction of the courts in England and Wales in respect of criminal conduct

97. Apart from the Sovereign, who is immune from the criminal process, most individuals who possess personal immunity from the criminal process in the United Kingdom in respect of some or all of their activities have that immunity upon the basis of international convention or agreement. This report is not concerned with these aspects of the law and we therefore do no more than indicate the broad classes of individuals who possess this immunity. These classes include—

- (a) A sovereign or other head of State, members of his family forming part of his household and his private servants, who are all entitled to immunity by virtue of the State Immunity Act 1978.
- (b) Persons entitled to immunity under the Diplomatic Privileges Act 1964.
- (c) Persons entitled to immunity under the Consular Relations Act 1968.
- (d) Persons entitled to immunity by Orders in Council made under the Diplomatic and other Privileges Act 1971 (that is, representatives from Commonwealth countries having consular functions).
- (e) International organisations and persons connected with them. Statutes dealing with this branch of immunity include the Commonwealth Secretariat Act 1966 and the International Organisations Act 1968 (as amended by the Diplomatic and other Privileges Act 1971).
- (f) Persons protected from United Kingdom jurisdiction under the Visiting Forces Act 1952.

98. The Consular Relations Act 1968, section 5, gives power to make provision by Order in Council¹⁶⁹ with regard to offences by the master or a member of the crew of any ship belonging to a State specified in the order committed on board such ship. Proceedings for such offences are generally not

¹⁶⁸ These offences are under consideration by the Criminal Law Revision Committee who are reviewing sexual offences.

¹⁶⁹ This power has been exercised in several instances to give effect to various bilateral consular conventions.

to be entertained in the United Kingdom except at the request or with the consent of a consular officer of the State concerned. This restriction does not apply to a "grave crime" as defined in section 1(2) of the Act (that is, one attracting a maximum sentence of five years or a more severe sentence) and to certain other specified offences.

C. International crimes and crimes analogous thereto

1. INTERNATIONAL CRIMES

(a) Piracy

(i) Present Law

99. There are certain offences, regarded as offences against the law of nations, which the courts in England have jurisdiction to try wherever committed. Of these, perhaps the most important, and certainly the most firmly established by international law, is piracy; but precisely what constituted this offence was until quite recently less clear. Indeed, although under English law piracy *jure gentium* committed by anyone anywhere on the high seas is an indictable offence, until the passing of the Tokyo Convention Act 1967 English law provided no clear definition of this offence.¹⁷⁰ Nevertheless the authorities and statutes dealing with piracy sufficed to show that it could take two main forms, covering—

- (a) masters and crews of vessels who engaged in unlawful acts of violence at sea directed against other vessels, their masters, crews and cargoes;
- (b) crews and passengers who engaged in unlawful acts of violence against the vessel to which they belonged, its masters or officers or its cargo.

A common element in both these forms of piracy was intent to rob.

100. Section 4 of the Tokyo Convention Act 1967 declares that, for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the Geneva Convention on the High Seas 1958 set out in the Act are to be treated as constituting part of the law of nations; and any such court having jurisdiction in respect of piracy committed on the high seas is to have jurisdiction in respect of piracy committed by or against an aircraft wherever committed. The Schedule to the Act sets out the following provisions of the 1958 Convention—

Article 15

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 passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

¹⁷⁰ In the case of *In re Piracy Jure Gentium* [1934] A.C. 586, the Privy Council examined and criticised suggested definitions, but did not hazard one of its own. Earlier authority is to the effect that piracy is merely robbery on the high seas (see *Attorney General for Hong Kong v. Kwok-a-Sing* (1873) L.R. 5 P.C. 179, 199).

- (2) Any act 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-paragraph (1) or sub-paragraph (2) of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Paragraph (b) of Article 15 is distinguished from paragraph (a) by its reference to a "place outside the jurisdiction of any state", which may refer to an island constituting *terra nullius* or unoccupied territory.¹⁷¹ In either case, however, the acts in question must be directed against another ship or aircraft or persons or property on board them.

101. More recent statutory provisions give effect to international conventions concerned with violence on board aircraft. The Hijacking Act 1971 gave effect in English law to the Convention for the Suppression of Unlawful Seizure of Aircraft 1970.¹⁷² This defines hijacking as the unlawful seizure or exercise of control, by the use of force or threats of any kind, by a person on board an aircraft in flight; and the offence is committed whatever the nationality of the offender or the State of registration of the aircraft, or wherever it occurs. If the aircraft is used in a foreign military, customs or police service, or if it takes off and lands in the State of registration, the offence is only committed if the offender is a citizen of the United Kingdom and Colonies or a member of one of the other narrowly defined categories of persons having a connection with the United Kingdom, or his act is committed in this country.¹⁷³ Hijacking is punishable with life imprisonment. Another Convention, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, deals with sabotage and acts of violence, other than hijacking, against civil aircraft and aviation facilities. Legislation in pursuance of this Convention is contained in the Protection of Aircraft Act 1973. These statutes appear to us to have dealt comprehensively with violence on board aircraft in so far as it is possible for domestic legislation to do so.

102. Whether an offence of piracy at common law exists in any way independent of piracy *jure gentium* must be regarded as doubtful. Certainly, some changes in what was previously accepted in English law as piracy were apparent in Articles 15-17 of the High Seas Convention, but it is generally

¹⁷¹ See Yearbook of the International Law Commission (1956) Vol. 2, p. 282 (commentary on Article 39).

¹⁷² (1971) Cmnd. 4577.

¹⁷³ Sect. 1(2).

accepted that the content of English law as to what constituted piracy *jure gentium* must be determined from time to time by the current state of international law on the subject.¹⁷⁴ In consequence, the better view seems to be that by reason of the ratification of the Convention and the terms of the legislation giving effect to these particular articles the law of piracy to be applied by the courts is that provided by the definitions contained in the Convention, and that so far as the law of England and Wales is concerned section 4 of the 1967 Act has the effect of providing a comprehensive definition of piracy *jure gentium*.¹⁷⁵ If this is correct, then the developments described in the foregoing paragraphs would appear to have rendered acts of violence by crew and passengers against the ship and its officers¹⁷⁶ no longer piracy *jure gentium* triable as such by the courts in this country. In the absence of any common law offence, this means that the hijacking of ships is punishable under English law only in so far as it is an offence under one or other of the ancient statutes relating to piracy described below, or when other activities taking place in the course of the operation constitute offences triable in this country. Further, it seems that what constitutes the "high seas" must also now be defined by reference to the Geneva Convention on the High Seas 1958.¹⁷⁷

103. As we have mentioned, there is in the law of England and Wales a body of ancient statute law relating to piracy. The earliest, the Piracy Act 1698, penalises British subjects engaged in piracy against other British subjects (section 7) and, among others, commanders of ships turning pirate and revolt of the crew against the master (section 8). The latter provision, which is far from clear in its terms, may conflict with the Geneva Convention of 1958 in so far as it appears to penalise the seizure on the high seas of a foreign ship by aliens, whether by its crew or its passengers. The piracy Act 1721 penalises, first, trading with pirates, which is treated as piracy (section 1) and, secondly, the failure of officers and crew to defend themselves against piratical attacks, which is punishable by forfeiture of wages and imprisonment (section 6). Section 2 of the Piracy Act 1837 makes "piracy" a capital offence when accompanied by violence to the person and section 3 penalises the various statutory forms of piracy with life imprisonment. Whether "piracy" in section 2, unqualified as it is in section 3 by reference to statute, means piracy *jure gentium* is not clear.¹⁷⁸

¹⁷⁴ This is clear from *In re Piracy Jure Gentium* [1934] A.C. 586, as the Privy Council based its report on the premise that piracy was a crime defined by international law and that, in determining its content, the Board could (as in fact it did) draw upon all sources of international law.

¹⁷⁵ See e.g. Smith and Hogan *Criminal Law* (4th ed., 1978), pp. 786-787. It is noteworthy that, while in *Cameron v. H.M. Advocate* 1971 S.C. (J.C.) 50 a different view was expressed (see e.g. Lord Wheatley at p. 61), the acts which were the subject of the charge of piracy occurred partly within territorial waters. The case may therefore be viewed as an authority upon the offence of piracy in the common law of Scotland as distinct from the offence of piracy *jure gentium* on the high seas.

¹⁷⁶ See para. 99(b), above.

¹⁷⁷ Article 1 of the Convention states that "the term 'High Seas' means all parts of the sea that are not included in the territorial sea or internal waters of a State". But see *Archbold* (39th ed., 1976) para. 3055: piracy "must be proved to have been committed within the jurisdiction of the Court of Admiralty", as to which, see para. 15, above.

¹⁷⁸ There is also the Piracy Act 1850, s. 6 of which penalises as perjury the giving of false evidence in an examination, deposition or affidavit in courts dealing with ships and other property taken from pirates by Her Majesty's ships. This is being considered in the context of the Law Commission's examination of Offences against the Administration of Justice.

(ii) Recommendations

104. The law in this area appears to us to demand attention in three respects. In the first place, the archaic language of the ancient statutes relating to piracy is entirely unsuited to modern conditions. Some of their provisions, for example, those in the Act of 1721, are now of doubtful value. Others, because of their vagueness, raise doubts as to whether all the situations which should be dealt with when acts of violence take place on ships registered in the United Kingdom are satisfactorily covered. For these reasons we recommend that these statutes should be repealed, together with section 6 of the Territorial Waters Jurisdiction Act 1878.¹⁷⁹ For the elimination of doubt, we also recommend the abolition of any offence of piracy at common law distinct from piracy *jure gentium*, if any such offence exists.

105. The second aspect of the law requiring clarification is the penalty attaching to piracy *jure gentium*. International law leaves to each state the penalty to be imposed for an offence *jure gentium*. Although certain offences of piracy under statute do as we have noted possess specific penalties, and although piracy accompanied by violence against the person is a capital offence, it is not clear what the penalty is at present in English law for piracy *jure gentium*.¹⁸⁰ Some text writers¹⁸¹ assume that the Offences at Sea Act 1799¹⁸² applies, so that if piracy *jure gentium* is charged as murder, theft etc., it may be punished in the same way as those offences. But it would be difficult to interpret this Act as applying either to piracy by foreigners directed at foreign ships or to piracy involving aircraft.¹⁸³ We have in any event recommended the repeal of all these old statutes for other reasons. To clarify the position, we recommend a specific provision penalising piracy *jure gentium* with a maximum sentence of life imprisonment, and to accord with the position under the Hijacking Act 1971 we further recommend that proceedings for the offence should not be instituted save with the consent of the Attorney General.

106. The third aspect of the law requiring examination is the hijacking of ships. Since it is very doubtful whether piracy at common law exists independently of piracy *jure gentium*, as from time to time defined by international law, the change which has apparently taken place in what constitutes piracy *jure gentium* seems to have left no penalties in the law of England and Wales attaching to such hijackings. It is true that, having regard to our recommendations as to offences on board ship,¹⁸⁴ a wide range of activities would be subject to punishment: for example, section 12 of the Theft Act 1968, relating to taking a conveyance without authority, applies to vessels, while a wide range of violence against persons is covered by the Offences against the Person Act 1861. But the provisions just mentioned are not appropriate in relation to the actual hijacking of a ship by those on board it where other offences are not committed in the course of it, and in any case they do not apply to such conduct by British subjects on board foreign ships on the high seas. Furthermore, since

¹⁷⁹ The Act is recommended for repeal in para. 40, above. Sect. 6 merely ensures that the Act's other provisions do not prejudice the trial of piracy *jure gentium*.

¹⁸⁰ See the discussion in Smith and Hogan, *Criminal Law* (4th ed., 1978) p. 790.

¹⁸¹ E.g. Archbold (39th ed., 1976) para. 3053; *Russell on Crime* (12th ed., 1964) p. 1539.

¹⁸² See para. 15, above.

¹⁸³ See Article 15 of the Geneva Convention on the High Seas 1958, para. 100, above.

¹⁸⁴ See para. 73, above.

the piratical acts defined by Article 15 of the Geneva Convention on the High Seas constitute piracy *jure gentium* only when they take place on the high seas, a charge of piracy is not available when the activities occur in territorial waters.¹⁸⁵

107. We recommend that there should be a new offence dealing with the hijacking of ships. We make it clear at the outset however that this new offence will in no way alter the operation of section 4 of the Tokyo Convention Act 1967, which as we have stated provides for a definition of piracy *jure gentium* when it is tried by a court in England and Wales. The new offence is intended to have effect only as part of the domestic criminal law of England and Wales.

108. In line with the main offence-creating provision of the Hijacking Act 1971 (applying to aircraft), the offence of hijacking a ship should make it an offence for any person, irrespective of his nationality, on board a ship to seize or exercise control over it unlawfully, by the use of force or threats. Where this occurs anywhere outside the territory of the United Kingdom,¹⁸⁶ the offence would apply in the case of the hijacking of vessels which are British-controlled as we have defined them.¹⁸⁷ Where, however, the hijacking occurs in territorial or internal waters around England and Wales, we see no necessity for any such limitation (subject to one qualification to which we refer below).¹⁸⁸ It is true that, according to Article 19 of the Geneva Convention on the Territorial Sea and Contiguous Zone,¹⁸⁹ the “criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea”. But that limitation applies only when the purpose is “to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage”. It does not, it seems to us, prevent proceedings being taken against the offenders if they are found in this country. Nevertheless, since political complications may easily arise in the context of this offence, we think that the precedent of the Hijacking Act 1971 should be adhered to¹⁹⁰ and that the Attorney General’s consent should be required for the institution of any proceedings for the offence.

109. We have mentioned above that there is one qualification to be made to the classes of ships to which the hijacking offence is to apply when it occurs in territorial waters. Article 16 of the Geneva Convention on the High Seas 1958 assimilates to piracy piratical acts by a warship or government ship whose crew has mutinied and taken control of it. The offence we recommend above would apply when the conduct occurs on board all ships in territorial waters, but we think that it is desirable to ensure that the courts should not try offences where they are committed on board a warship or other public ship in the service of

¹⁸⁵ See para. 102 and n. 177, above.

¹⁸⁶ While this recommendation, in accordance with the policy expressed in para. 12, above, is intended to create an offence triable by the courts in England and Wales only, the whole of the United Kingdom must be specified here; failure to do so would result in the hijacking of a foreign ship in territorial waters adjacent to Scotland being triable as hijacking in England and Wales but not in Scotland.

¹⁸⁷ See para. 59, above.

¹⁸⁸ See para. 109, below.

¹⁸⁹ See (1958) Cmnd. 584.

¹⁹⁰ See s. 5(1)(a) of the 1971 Act.

another country unless the flag State waives its jurisdiction. The recommendation we make requiring the Attorney General's consent to the institution of all proceedings for this offence will in our view ensure that this consideration is taken into account.

110. We have considered whether to extend the hijacking offence to citizens of the United Kingdom and Colonies who participate in the hijacking of ships which are not British-controlled vessels outside the United Kingdom. This, again, would correspond with the provisions of the Hijacking Act 1971 in so far as that Act penalises such individuals who hijack certain foreign aircraft outside the United Kingdom.¹⁹¹ The 1971 Act was, as we have noted, passed in order to implement in the law of this country an international convention to which the United Kingdom had become a party. That consideration does not apply in the instant case; and such conduct would in any event be subject to such penalties as may be imposed by the criminal law of the flag State.¹⁹² Nevertheless if a citizen of the United Kingdom and Colonies were to escape from the flag State to this country it seems to us that it would be a curious and indefensible lacuna if charges could not be brought against him for conduct which forms a close parallel to piracy itself, and if reliance had to be placed solely on the possibility of extradition—especially if no extradition treaty were to be in force with the flag State. For this reason, we recommend that the offence should penalise citizens of the United Kingdom and Colonies, together with other individuals having their closest connection with the United Kingdom, who engage in the hijacking of ships which are not British-controlled vessels on the high seas.

111. Finally as regards the elements of this offence, it is necessary to ensure that those in England and Wales who incite, aid or abet acts of hijacking outside the United Kingdom do not go unpunished. The principal difficulty here is that, as the offence we recommend is an offence only against English law, we have not, in the absence of international agreement, been able to cover the hijacking of foreign ships on the high seas save where citizens of the United Kingdom and Colonies are involved. Thus assisting in England and Wales the hijacking of foreign ships on the high seas would not in the ordinary course constitute aiding or abetting the offence, since in these instances no offence is committed. This difficulty may be circumvented if the policy of the Hijacking Act 1971 is followed, penalising those who in England and Wales induce or assist in acts outside the United Kingdom which would constitute the offence of hijacking if the jurisdictional requirements of that offence were satisfied.

112. In parallel with the offences created by the Hijacking Act 1971, we recommend that the offence of hijacking ships described in the preceding paragraphs should be subject to a maximum sentence of life imprisonment.¹⁹³ The offence should be extraditable, and should therefore be added to the list of extradition crimes in Schedule 1 to the Extradition Act 1870 and to the descriptions of offences in Schedule 1 to the Fugitive Offenders Act 1967.

¹⁹¹ See para. 101, above.

¹⁹² See para. 54, above.

¹⁹³ The Report of the Advisory Council on the Penal System (1978) recommends reduction of the maximum sentence for hijacking an aircraft from life to seven years' imprisonment: see Appendix A, Table 2, p. 155.

113. We have considered also whether it is necessary to make provision for new offences, which would apply in territorial waters adjacent to England and Wales, corresponding to piracy as defined by the Articles scheduled to the Tokyo Convention Act 1967, since, as we have noted,¹⁹⁴ piracy *jure gentium* according to that definition can only be committed on the high seas. For various reasons, we do not think any further provisions are needed. In the first place, if the hijacking offence which we recommend above is so drafted as to penalise the seizure by force of the ship by anyone on board, we think that offence will itself be sufficiently widely drawn to encompass seizure of the ship by persons who come aboard it from another; and this, therefore, will cover almost all conduct which would have amounted to piracy had it occurred on the high seas. Secondly, any other situations would, in our view, be adequately met by other serious offences. For example, if a vessel were so seriously damaged that it sank in territorial waters in consequence of a piratical attack, a charge under section 1(2)(b) of the Criminal Damage Act 1971 of destroying or damaging property, reckless of the danger to the lives of others, would doubtless be available. This, like the hijacking offence we propose, carries a maximum penalty of life imprisonment, and other offences carrying heavy penalties would also be relevant, such as offences against the person, firearms offences and conspiracy to commit such offences. Finally, when so many offences would be available, we would not favour the creation of any new offence employing terms such as “depredation for private ends” to be found in the Geneva Convention on the High Seas,¹⁹⁵ which in English criminal law are novel and of uncertain extent. Accordingly, we make no recommendation for the creation of any offence save that relating to the hijacking of ships already described.

(b) Other crimes having an international character

114. Briefer mention may be made of certain other offences having an international character, to none of which we make recommendations for change. Section 1 of the Geneva Conventions Act 1957 provides that “grave breaches” (as defined in section 6) of specified articles of the Conventions scheduled to the Act¹⁹⁶ by whomsoever and wheresoever committed constitute offences against English law. The Act contains provisions which confer jurisdiction on the United Kingdom courts and which also require that proceedings should be instituted by or on behalf of the Director of Public Prosecutions. The Misuse of Drugs Act 1971 (in this respect re-enacting earlier legislation) gives effect to certain Conventions relating to dangerous drugs. Section 20 of the Act provides specifically that “a person commits an offence if in the United Kingdom he assists in or induces the commission in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place”; and section 36 defines what for this purpose is a “corresponding law”. Another Convention is given domestic effect by the Genocide Act 1969, the Schedule to which sets out Article II of the

¹⁹⁴ See para. 106, above.

¹⁹⁵ See para. 100, above.

¹⁹⁶ Sch. 1: Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Sch. 2: Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Sch. 3: Convention relative to the treatment of prisoners of war; Sch. 4: Convention relative to the protection of civilian persons in time of war. “Grave breaches” include wilful killing, torture and inhuman treatment; see also Article 74 of additional protocol 1 to the Geneva Convention 1949.

Genocide Convention 1948, listing five different kinds of acts commission of which, with the intent prescribed by the Article, constitutes the offence of genocide. But, unlike the Geneva Conventions, the Genocide Convention does not require states to make punishable genocide committed outside their territorial limits, and the Act of 1969 contains nothing providing for its extraterritorial operation or for the appropriate jurisdiction of the United Kingdom courts if it had had such operation. It seems clear, therefore, that acts of genocide committed abroad by a citizen of the United Kingdom are not as such offences against English law.¹⁹⁷

115. Those crimes of an international character so far mentioned are all offences according to English law by reason of specific statutory provisions. It is also worth noting that various Conventions signed by the United Kingdom in recent years will, if ratified, increase the number of those types of crime and are, indeed, the subject of very recent legislation. We do no more than mention in this context, first, the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents,¹⁹⁸ punishing attacks on heads of State and diplomatic agents, under which states undertake to include these as extraditable crimes in any extradition treaty in force between parties to the Convention and to penalise not only such acts occurring on their territory or committed anywhere by their nationals, but also such acts by any person present in a party to the Convention which does not extradite him.¹⁹⁹ Another is the European Convention on the Suppression of Terrorism, drawn up by the Council of Europe and signed by the United Kingdom, along with sixteen other member states, in January 1977. Member states undertake to treat hijacking and sabotaging of aircraft²⁰⁰ and some other serious offences as non-political for the purpose of extradition treaties in force between them, and to deem these activities to be extraditable offences in such treaties. The Suppression of Terrorism Act 1978 enables the United Kingdom to ratify this Convention, by conferring jurisdiction upon United Kingdom courts over the offences covered by the Convention when committed in a Convention country whatever the nationality of the offender, and over those offences committed by nationals of Convention countries outside those countries where the same offence, if committed by a citizen of the United Kingdom and Colonies outside the United Kingdom, would have been triable here in corresponding circumstances. These examples serve to demonstrate the degree to which by international agreement certain activities are ceasing to be treated on a purely territorial basis.

2. OFFENCES ANALOGOUS TO INTERNATIONAL CRIMES

116. There are certain statutory offences which, in character, are closely akin to the international crimes already examined. Whilst it is true that some of

¹⁹⁷ But see s. 1(6) and (7) of the Act (amending the Army and Air Force Acts 1955 (s. 70)) and the Naval Discipline Act 1957 (ss. 42 and 48) as to genocide abroad committed by members of the armed forces. Genocide abroad by a British subject might in any event be triable in England and Wales as murder.

¹⁹⁸ (1975) Cmnd. 6176.

¹⁹⁹ The Internationally Protected Persons Act 1978 gives effect to this Convention in the United Kingdom.

²⁰⁰ As defined by the two Conventions relating to these activities; see para. 101, above.

these offences are in need of review in the light of modern conditions, we do not think it the right course to make recommendations concerning them in the present context since, as in the case of official secrets and other matters dealt with earlier, they involve amendments to legislation dealing with detailed matters of policy in a particular area of the law, with which the present report is not in the main concerned. The oldest and perhaps most important of these offences is slaving, an extraditable offence. The suppression of slavery is the subject of many treaties to which the United Kingdom is a party.²⁰¹ Section 9 of the Slave Trade Act 1824 penalises British residents who engage in slaving on the high seas and section 26 of the Slave Trade Act 1873 contains the appropriate procedural provisions. The Foreign Enlistment Act 1870 contains offences of an international character which may be committed either by any person within Her Majesty's dominions, or by citizens of the United Kingdom within or without Her Majesty's dominions. But, while the Act makes reasonably clear which of its provisions operate territorially and which extraterritorially, there are grounds for maintaining that it requires reconsideration with regard to its application to modern conflicts. For example, it is uncertain whether "war" in section 4 includes international police action and whether "military or naval service" includes service in an air force.²⁰² Slaving and foreign enlistment are not the only examples of offences of an international character²⁰³ but for the reasons advanced above we make no recommendations for the amendment of any of these statutes.

D. Summary

117. This part of the report, which has surveyed in outline those provisions in English criminal law which are not applied, or not applied solely, upon a territorial basis, has indicated that there are some areas of the law where, because of ambiguities or lack of clarity, some reform is desirable. Since however the report is concerned in the main with matters of broad principle, we have thought it appropriate to make recommendations in only three of these areas: (a) the liability of Crown servants abroad for criminal conduct, (b) piracy and (c) the hijacking of ships²⁰⁴—

- (a) We recommend a new provision to replace older and obsolete legislation about the liability of Crown servants outside the United Kingdom. This should provide that any citizen of the United Kingdom and Colonies employed in the service of the Crown under Her Majesty's Government in the United Kingdom who, outside the United Kingdom, when acting or purporting to act in the course of that employment, does or omits to do any act which, if done or omitted in England and Wales, would constitute an indictable offence, shall be guilty of that offence and shall be punishable as if the offence had been committed in England and Wales.

²⁰¹ For a list of such treaties see Halsbury's *Laws of England* 3rd ed., Vol. 38, p. 221(g).

²⁰² Changes in the law were recommended in the Report of the Committee of Privy Councillors appointed to inquire into the recruitment of mercenaries, (1976) Cmnd. 6569.

²⁰³ See also e.g. Behring Sea Award Act 1894 and Orders pursuant thereto; and the provisions as to procuring (which includes "white slavery") in the Sexual Offences Act 1956, referred to in para. 96, above. The latter are under review by the Criminal Law Revision Committee.

²⁰⁴ See paras. 81 and 104–113, above.

- (b) We recommend that there should be a specific penalty for piracy *jure gentium* of life imprisonment, and that proceedings for the offence should not be brought save with the consent of the Attorney General. The ancient statutes relating to piracy should be repealed.
- (c) We recommend a new offence of hijacking a ship. The act of hijacking occurs when a person unlawfully, by the use of force or threats, seizes the ship or exercises control of it; and the act should be penalised if—
 - (i) anyone hijacks any ship in internal or territorial waters adjacent to England and Wales; or
 - (ii) anyone hijacks a British-controlled vessel outside the territorial waters of the United Kingdom; or
 - (iii) a citizen of the United Kingdom and Colonies (or others for whom the United Kingdom has responsibility) hijacks any ship outside the territorial waters of the United Kingdom; or
 - (iv) anyone in England and Wales, or in territorial or internal waters adjacent to England and Wales, induces or assists in an act of hijacking outside the United Kingdom.

The maximum penalty should be life imprisonment and the institution of proceedings for the offence should require the consent of the Attorney General.

V PROCEDURAL PROVISIONS

118. The preceding parts of this report have established what should for the future be the territorial limits for the purposes of the criminal law and have described certain notional extensions of territory. They have further outlined those cases forming exceptions to the territorial application of the criminal law. We now consider whether any consequential amendments are needed to current legislation to give effect to the recommendations we have already made. Our conclusions concern in the main amendments to the Magistrates' Courts Act 1952 to ensure that the courts' territorial jurisdiction fully covers the territory of England and Wales, as we have for present purposes defined it.

A. Jurisdiction of the courts to issue process and try offences in the territory

119. Since the jurisdiction of the courts to try indictable and summary offences was considered separately above,²⁰⁵ these categories are treated individually in the present context, although, as our summary of recommendations below indicates,²⁰⁶ the procedural amendments we recommend apply for the most part to all offences alike.

1. INDICTABLE OFFENCES

(a) *Issue of process*

120. The only court which can try offences on indictment is the Crown Court; that court has, under section 6 of the Courts Act 1971, jurisdiction in proceedings on indictment for offences wherever committed. All that is

²⁰⁵ See paras. 25 *et seq.*, above.

²⁰⁶ See para. 133, below.

required in the present context therefore is a provision which will, for procedural purposes, ensure that the Court's jurisdiction is such as to enable it to try any indictable offence occurring within the whole area bounded by the outward limits of territorial waters. The first procedural requirement is adequate provision in relation to issue of process; and, in fact, proper provision in this regard is all that is required to ensure that the Crown Court will have the necessary jurisdiction. At present, the offences in respect of which a summons or warrant may be issued are set out in section 1(2) of the Magistrates' Courts Act 1952. None of the paragraphs of that subsection expressly cover the case of offences committed in internal or territorial waters, for which new provisions are still necessary.

121. We believe that the procedural gap referred to may best be dealt with by the addition of a new paragraph in section 1(2) of the Magistrates' Courts Act 1952, enabling a justice to issue a summons or warrant in respect of an offence committed anywhere on, under or above the sea waters adjacent to England and Wales within the outward limits of territorial waters. County boundaries, as we have noted, stop short for most purposes at low water mark, but in those parts of the coast where bay-closing and other straight baselines form part of the baseline established by the Territorial Waters Order in Council 1964,²⁰⁷ there are considerable areas of sea water forming internal waters between low water mark and the baseline. The provision we here recommend therefore covers both internal and territorial waters, but for present purposes it is unnecessary expressly to mention both.

(b) Trial

122. We have mentioned that the Crown Court has sole jurisdiction to try offences on indictment wherever committed. By section 6 of the Courts Act, that jurisdiction includes proceedings on indictment for offences within the jurisdiction of the Admiralty. This part of section 6 needs to be repealed having regard to our recommendation for the abolition and replacement of Admiralty criminal jurisdiction. No further provision regarding trial of offences is needed for the purpose of implementing our recommendations. The jurisdiction of a magistrates' court as examining justices is specified in section 2(3) of the 1952 Act: the court has jurisdiction over "any offence committed by a person who appears or is brought before the court, whether or not the offence was committed within the county". Whether an offender appears or is brought before the court depends upon whether the justices have jurisdiction to issue a summons or warrant,²⁰⁸ and that jurisdiction is specified in section 1(2). We have made recommendations for the amendment of section 1(2) which will ensure that the jurisdiction to issue process covers indictable offences occurring anywhere in sea waters adjacent to England and Wales within the outward limits of territorial waters, and the jurisdiction of examining magistrates will, therefore, cover all such offences. By virtue of the Crown Court's exclusive jurisdiction over offences tried on indictment, all offences occurring within such waters would, after enactment of our recommendations, be committed for trial in that court.

²⁰⁷ See para. 17, above.

²⁰⁸ Except where an arrest is made without warrant, when the choice of court depends on the police making the arrest.

123. Indictable offences triable summarily (that is, offences triable either way under the Criminal Law Act 1977) require separate mention. Magistrates' courts have, under section 2(4) of the 1952 Act (as amended by the 1977 Act), jurisdiction to try summarily an offence triable either way in any case in which under subsection (3) they would have jurisdiction as examining magistrates. We have seen in the last paragraph that the proposed amendment to section 1(2) in regard to issue of process will enable the magistrates to act as examining justices in relation to any offence committed in internal or territorial waters. Thus, this amendment will also ensure that magistrates' courts will have jurisdiction under section 2(4) to try all offences so committed which are triable either way. No further amendments to the Act are therefore required to achieve this result.

2. SUMMARY OFFENCES

124. At present, as we have indicated,²⁰⁹ summary offences are capable of commission in territorial waters only in certain cases specified by statute. In some instances the necessary procedural requirements are provided by a section in the relevant statute, which deems the offence to have been committed in any place in the United Kingdom for the purpose of proceedings and incidental matters. In other instances, the jurisdiction of the magistrates' court is only implied.²¹⁰

125. Our recommendations now envisage that any summary offence may be capable of commission in all sea waters up to the outward limits of territorial waters.²¹¹ For procedural purposes, the recommendation we have made as to indictable offences²¹² should, we think, apply equally to summary offences; issue of process should be possible in respect of all summary offences committed in such waters.

126. By section 2(1) of the Magistrates' Courts Act 1952, magistrates' courts have jurisdiction to try all summary offences committed within the relevant county. Even assuming the implementation of our recommendations, prosecution of summary offences committed in adjacent sea waters is not likely to be frequent; but it seems clear that explicit provision is needed to enable magistrates' courts to try such cases. We have considered two possible forms which such a provision might take. One possibility lies in amending section 2(1) of the 1952 Act to provide in addition for the magistrates' court of the county in the waters adjacent to which the offence took place to have jurisdiction to try it. This would however entail complication, for it would be necessary to provide further that, where it was uncertain whether the waters in which the offence took place were more nearly adjacent to one county than another, then the magistrates' courts for either should have jurisdiction to try. But, as we have noted,²¹³ provisions exist already in legislation whereby for procedural purposes certain summary offences committed in territorial waters are deemed to have been committed anywhere in the country; and, having regard to the

²⁰⁹ See para. 29, above.

²¹⁰ E.g. Wireless Telegraphy Act 1949, s. 1; see *R. v. Kent Justices, ex parte Lye* [1967] 2 Q.B. 153, and para. 29, above.

²¹¹ See para. 33, above.

²¹² See para. 121, above.

²¹³ See para. 29 and n. 52, above.

relative infrequency with which summary offences committed in internal or territorial waters are likely to be prosecuted, we favour a simpler provision on similar lines. Accordingly, we recommend that a new provision be added to section 2 of the 1952 Act, to the effect that magistrates' courts shall have jurisdiction to try summary offences taking place anywhere within any sea waters up to the outward limits of territorial waters.

3. POLICE POWERS

127. In order that the police may carry out their duties in the whole of the area bounded by the outward limits of territorial waters, it is necessary that their powers should be effective throughout the area so delimited. At present, by virtue of section 18(1) of the Police Act 1964, members of a police force have "all the powers and privileges of a constable throughout England and Wales". We recommend that "England and Wales" for the purposes of this provision should include all waters bounded by the outward limits of territorial waters.

4. OTHER PROVISIONS

128. While the preceding paragraphs describe the new provisions which in our view are required to give effect to our recommendations concerning the territory, there are certain other already existing provisions which we believe need examination. These do not so much conflict with our recommendations as appear outdated in their terminology.

129. The first of these provisions is section 3(1) of the Magistrates' Courts Act 1952, which provides that—

"Where an offence has been committed on the boundary between two or more local jurisdictions, or within five hundred yards of such a boundary, or in any harbour, river, arm of the sea or other water lying between two or more jurisdictions, the offence may be treated for the purpose of the preceding provisions of this Act as having been committed in any of those jurisdictions".

It appears from this subsection that, if an offence is committed in waters lying between two or more jurisdictions, for example in the Thames estuary, it enables justices of the adjacent counties to issue process, although precise boundaries are lacking, unless it is assumed that jurisdiction under the subsection can extend no further than the low water mark.²¹⁴ Under our recommendations, magistrates' courts are to have jurisdiction to issue process in respect of any offence committed in sea waters up to the outward limit of territorial waters, and there will be a corresponding jurisdiction to try any offence by the appropriate court, that is, either the Crown Court or the magistrates' court. Precisely what areas are covered under section 3(1) by the term "arm of the sea" is, as we have indicated, by no means certain, but it seems clear enough that, in so far as our recommendations refer to all sea waters, including those lying behind the base line from which territorial waters are

²¹⁴ This would accord with the Territorial Waters Jurisdiction Act 1878, which measures the outward limits of territorial waters from low water mark: see para. 16, above. But, as we noted at paras. 14 and 18, jurisdiction at common law extends to bays, gulfs and estuaries within the bodies of adjacent counties.

measured, they would in any event include the areas of the sea referred to in section 3(1). The continued presence of a somewhat archaic expression after the implementation of our recommendations would in our view risk confusion. We therefore consider that the words “arm of the sea of other water” in section 3(1) should be repealed.

130. The other provision which we have considered in the present context is section 685 of the Merchant Shipping Act 1894.²¹⁵ According to the sidenote, this deals with “jurisdiction over ships lying off the coast”. Subsection (1) does, however, go further and provides for the jurisdiction of magistrates’ courts over ships in certain navigable inland (as distinct from internal) waters, such as lakes and rivers. In so far as the section deals with the jurisdiction of magistrates’ courts over persons on board vessels in sea waters, it would appear to be wholly covered by the procedural provisions we have recommended; and, in so far as it deals with the jurisdiction of magistrates’ courts within the land portion of the territory as we have defined it, its provisions are now effectively covered by those of the Magistrates’ Courts Act 1952 referred to in earlier paragraphs. Accordingly, since it now serves no useful purpose, we recommend the repeal of section 685 in its entirety.

B. Evidence

131. There is already provision in section 691 of the Merchant Shipping Act 1894 for the taking of depositions abroad by consular officers, and for their admissibility in evidence in subsequent criminal proceedings. Although there is no explicit limitation on the type of proceedings to which the section relates, it may well be that it was intended to refer only to the cases dealt with by section 689, which gives consular officers the power to make enquiries on oath in cases falling under sections 686 and 687 where the offence has been committed by a master of a British ship, and if necessary place the offender under restraint and make arrangements for his return. These powers do not extend to offences by passengers. Wider powers of inquiry are provided by section 5 of the Tokyo Convention Act 1967 in relation to offences on board aircraft.²¹⁶

²¹⁵ Sect. 685(1) states: “Where any district within which any court, justice of the peace, or other magistrate, has jurisdiction either under this Act or under any other Act or at common law for any purpose whatever is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such court, justice, or magistrate shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the court, justice, or magistrate.” Sect. 685(2) provides that the jurisdiction under subsection (1) is in addition to that under the Summary Jurisdiction Acts, now replaced by the Magistrates’ Courts Act 1952.

²¹⁶ Sect. 5(1) provides that “Where in any proceedings before a court in the United Kingdom for an offence committed on board an aircraft the testimony of any person is required and the court is satisfied that the person in question cannot be found in the United Kingdom, there shall be admissible in evidence before that court any deposition relating to the subject matter of those proceedings previously made on oath by that person outside the United Kingdom which was so made—

- (a) in the presence of the person charged with the offence; and
- (b) before a judge or magistrate of a country such as is mentioned in section 1(3) of the British Nationality Act 1948 as for the time being in force, or which is part of Her Majesty’s dominions, or in which Her Majesty for the time being has jurisdiction, or before a consular officer of Her Majesty’s Government in the United Kingdom.”

132. The new and simplified recommendations which we have made in relation to offences on board British-controlled vessels²¹⁷ in our view make desirable the introduction of a provision similar to section 5 of the Tokyo Convention Act 1967. Such a provision would apply in the case of all offences occurring on board British-controlled vessels. We see no need for a limitation to offences on vessels outside the United Kingdom. There may be equal difficulty in obtaining the evidence of a person outside the United Kingdom whether the offence occurs on the high seas or in territorial waters of the United Kingdom while the vessel is en route to another country. Analogously with section 5 of the 1967 Act, the provision should render admissible in evidence, in the case of persons outside the United Kingdom whose testimony is required, depositions relating to all offences on board British-controlled vessels taken in the presence of the person charged with the offence before judges or magistrates in other Commonwealth countries or before British consular officials abroad. We recommend such a provision accordingly.

C. Summary

133. In relation to proceedings for offences committed within territorial limits, we recommend—

- (a) The addition of a new paragraph to section 1(2) of the Magistrates' Courts Act 1952 (which sets out the offences in respect of which a summons or warrant may be issued by the justices) to enable a justice to issue a summons or a warrant in respect of any offence committed anywhere on, under or above sea waters up to the outward limits of territorial waters.
- (b) Amendment of section 2 of the Magistrates' Courts Act to give magistrates' courts jurisdiction to try summary offences committed anywhere in the sea waters referred to in subparagraph (a).
- (c) To ensure the effective exercise of police powers, defining "England and Wales" in section 19(1) of the Police Act 1964 to include all sea waters adjacent thereto up to the outward limits of territorial waters.
- (d) The repeal of the words "arm of the sea or other water" in section 3(1) of the Magistrates' Courts Act 1952, and of section 685 of the Merchant Shipping Act 1894.

In relation to offences committed in or outside the United Kingdom on board British-controlled vessels, we recommend a general provision to render admissible in evidence, in the case of persons outside the United Kingdom whose testimony is required, depositions relating to those offences taken in the presence of the person charged with the offence before a judge or magistrate in any other Commonwealth country or before a British consular official abroad.

VI COMPREHENSIVE SUMMARY OF RECOMMENDATIONS

134. (1) For the purpose of defining the territorial limits within which the criminal law of England and Wales should apply and also to clarify the territorial jurisdiction of the courts in relation to summary and indictable offences we *recommend* that—

²¹⁷ See para. 73, above.

- (a) The territory of England and Wales for the purpose of the criminal law should consist of the entire area bounded by the outward limits of adjacent territorial waters. It should therefore include both territorial waters, as from time to time determined by reference to the baseline, and internal waters lying behind the baseline (paragraph 21 and clauses 1(1) and (3) and 2(1)).
 - (b) If in any criminal proceedings a question arises as to the position of any part of the baseline, a certificate issued by or under the authority of the Secretary of State giving that information should provide conclusive evidence of the matters it contains. This information should be provided by the Hydrographic Department in the form of a large-scale chart showing the baseline or the relevant co-ordinates of latitude and longitude, or both (paragraphs 22–24 and clause 2(2)).
 - (c) The territorial jurisdiction of the courts in relation to indictable offences should extend to all offences occurring within the outward limits of territorial waters, determined in accordance with the provisions summarised in (a) above. The territorial jurisdiction of magistrates' courts should be extended to cover any summary offence occurring beyond the baseline but within the outward limits of territorial waters. The jurisdictional area so defined should in future legislation be referred to as "the ordinary limits of criminal jurisdiction" (paragraphs 26–33 and clause 1(1) and (3)(b)).
 - (d) The consent of the Director of Public Prosecutions should be required for the institution of proceedings in respect of any offence committed on, under or above territorial waters by persons who are citizens of any country other than the United Kingdom on or by means of any vessel or aircraft other than one which is British-controlled. This provision should not apply where by virtue of any enactment the consent of the Secretary of State or the Attorney General is required for the institution of proceedings for an offence (paragraphs 35–39 and clause 3).
 - (e) The Territorial Waters Jurisdiction Act 1878 should be repealed, while both the common law jurisdiction of the courts and the concurrent Admiralty criminal jurisdiction within the territory should be abolished (paragraph 40 and clauses 1(3)(a), 13(1) and (2)(a)).
- (2) In regard to offences taking place in locations outside territorial limits, as defined above, and on board ships and aircraft, we *recommend* that—
- (a) Any lighthouse situated outside territorial waters off the coast of England and Wales should be deemed to be part of the territory for the purpose of the application of the criminal law of England and Wales; and lightships and other similar floating navigational structures so situated should also be regarded as part of the territory for this purpose (paragraphs 48–51 and clause 1(2)(b) and (4)).
 - (b) Any tunnels beneath territorial waters adjacent to England and Wales, extending beyond the outward limits of those waters and accessible only from land in England and Wales, should be deemed to be part of the territory for the purpose of applying the criminal law (paragraphs 52–53 and clause 1(2)(a)).

- (c) New provisions are required to deal with offences committed on board ships and on shore abroad, replacing Admiralty criminal jurisdiction outside territorial limits—
- (i) The first should apply to all persons on board a British-controlled vessel anywhere outside the territory of England and Wales. Where the conduct of any such person would have constituted an offence if it had occurred in England and Wales, that person should be liable as if he had committed it there, and should be triable by any court in England and Wales within whose jurisdiction he is found (paragraphs 58–63 and clause 4(1)(a) and (2)).
 - (ii) The second should apply to any person employed at the relevant time on board a British-controlled vessel. Conduct ashore in a place outside the United Kingdom on the part of such a person which would amount to an offence if taking place in England and Wales should make him triable for that offence in any court in England and Wales within whose jurisdiction he is found (paragraphs 64–67 and clause 4(1)(b) and (2)).
 - (iii) A “British-controlled vessel” should include ships and fishing boats registered in the United Kingdom, and certain other defined categories of vessels having a close connection with the United Kingdom, together with all United Kingdom naval vessels (paragraphs 59–60 and clause 9).
 - (iv) Admiralty criminal jurisdiction outside the territory should be abolished, and existing legislation in this field should be repealed. This includes in particular sections 686 and 687 of the Merchant Shipping Act 1894 and various older provisions (paragraph 70 and clause 13(1) and (2)(a)).
- (d) No new provisions are required to deal with offences on British-controlled aircraft or hovercraft outside the United Kingdom (paragraphs 71–72).
- (3) In relation to provisions of the law which are not applied upon a territorial basis, we make recommendations only in regard to (a) offences by Crown servants abroad, (b) piracy and (c) the hijacking of ships.
- (a) We *recommend* a new provision to replace older and obsolete legislation about the liability of Crown servants outside the United Kingdom. This should provide that any citizen of the United Kingdom and Colonies employed in the service of the Crown under Her Majesty’s Government in the United Kingdom who, outside the United Kingdom, when acting or purporting to act in the course of that employment, does or omits to do any act which, if done or omitted in England and Wales, would constitute an indictable offence, shall be guilty of that offence and shall be punishable as if the offence had been committed in England and Wales (paragraphs 76–81 and clause 8).

- (b) We *recommend* that there should be a specific penalty for piracy *jure gentium* of life imprisonment, and that proceedings for the offence should not be brought save with the consent of the Attorney General. The ancient statutes relating to piracy should be repealed (paragraphs 104–105 and clauses 7 and 13(1)).
- (c) We *recommend* a new offence of hijacking a ship. The act of hijacking occurs when a person unlawfully, by the use of force or threats, seizes the ship or exercises control of it; and the act should be penalised if—
- (i) anyone hijacks any ship in internal or territorial waters adjacent to England and Wales; or
 - (ii) anyone hijacks a British-controlled vessel outside the territorial waters of the United Kingdom; or
 - (iii) a citizen of the United Kingdom and Colonies (or others for whom the United Kingdom has responsibility) hijacks any ship outside the territorial waters of the United Kingdom; or
 - (iv) anyone in England and Wales or in territorial or internal waters adjacent to England and Wales, induces or assists in an act of hijacking outside the United Kingdom.

The maximum penalty should be life imprisonment and the institution of proceedings for the offence should require the consent of the Attorney General (paragraphs 106–113 and clause 5).

(4) Certain new provisions as to jurisdiction and procedure are necessary to give effect to the foregoing summarised recommendations. Accordingly, in relation to proceedings for offences committed within territorial limits, we *recommend*—

- (a) The addition of a new paragraph to section 1(2) of the Magistrates' Courts Act 1952 (which sets out the offences in respect of which a summons or warrant may be issued by the justices) to enable a justice to issue a summons or warrant in respect of any offence committed anywhere on, under or above sea waters up to the outward limits of territorial waters (paragraphs 120–121 and 125 and clause 12 and Schedule 1, paragraph 2).
- (b) Amendment of section 2 of the Magistrates' Courts Act 1952, to give magistrates' courts jurisdiction to try summary offences committed anywhere in the sea waters referred to in (a) above (paragraph 126 and clause 12 and Schedule 1, paragraph 3).
- (c) To ensure the effective exercise of police powers, defining "England and Wales" in section 19(1) of the Police Act 1964 to include all sea waters adjacent thereto up to the outward limits of territorial waters (paragraph 127 and clause 12 and Schedule 1, paragraph 5).
- (d) The repeal of the words "arm of the sea or other water" in section 3(1) of the Magistrates' Courts Act 1952, and of section 685 of the Merchant Shipping Act 1894 (paragraphs 129–130 and clause 13(1)).

In relation to offences committed in or outside the United Kingdom on board British-controlled vessels, we *recommend* a general provision to render admissible in evidence, in the case of persons outside the United Kingdom whose testimony is required, depositions relating to those offences taken in the presence of the person charged with the offence before a judge or magistrate in

any other Commonwealth country or before a British consular official abroad (paragraphs 131–132 and clause 6).

(Signed) MICHAEL KERR, *Chairman*.
STEPHEN EDELL.
W. A. B. FORBES.
NORMAN S. MARSH.
PETER NORTH.

J. M. CARTWRIGHT SHARP, *Secretary*

10 August, 1978

Criminal Jurisdiction Bill

DRAFT CLAUSES AND SCHEDULES

ARRANGEMENT OF CLAUSES

Clause

1. Territorial extent of criminal jurisdiction of courts in England and Wales.
2. Territorial waters.
3. Requirement of consent of Director of Public Prosecutions to institution of certain proceedings for offences committed on, under or above territorial waters.
4. Offences on board British-controlled vessels and offences by persons employed on British-controlled vessels.
5. Hijacking ships.
6. Evidence.
7. Piracy.
8. Indictable offences committed abroad by Crown servants.
9. British-controlled vessels.
10. British-controlled aircraft.
11. Meaning of "associated class".
12. Minor and consequential amendments.
13. Repeals and abolitions.
14. Citation.

SCHEDULES:

Schedule 1—Minor and consequential amendments.

Schedule 2—Enactments repealed.

EXPLANATORY NOTES

General

1. The clauses indicate how effect may be given to the recommendations in the report. Those recommendations are expressed in terms of changes to the law of England and Wales only. In some instances, however, in order that these recommendations may be fully effective, it will be necessary to consider the implications which they may have for other parts of the United Kingdom. The notes draw attention to the instances where this consideration is relevant in regard to particular clauses, all of which are, like the recommendations to which they relate, drafted to apply only to England and Wales.

DRAFT CLAUSES

Territorial
extent of
criminal
jurisdiction
of courts in
England and
Wales.

1.—(1) Proceedings on indictment and summary proceedings may be brought—

- (a) for offences committed on, under or above any land or water within the territorial waters baseline, and
- (b) for offences committed on, under or above any land or water outside that baseline but within the seaward limits of territorial waters.

(2) Proceedings on indictment and summary proceedings may also be brought for offences committed outside the seaward limits of territorial waters—

- (a) in a submarine tunnel accessible only from land in England or Wales, or
- (b) in a lighthouse under the management of the Trinity House and situated off the coast of England or Wales.

(3) The territorial limits of the jurisdiction of the courts administering the criminal law of England and Wales shall be determined in accordance with subsections (1) and (2) above, except to the extent that they fall to be determined in accordance with any other enactment; and accordingly—

- (a) any rules for determining them not contained in an enactment are abolished, and
- (b) in any provision which creates an offence and is contained in or made by virtue of an enactment passed after this Act “the ordinary limits of criminal jurisdiction” means the limits of jurisdiction specified in subsections (1) and (2) above.

1894 c. 60.

(4) In subsection (2) above “lighthouse” has the meaning assigned to it by section 742 of the Merchant Shipping Act 1894.

EXPLANATORY NOTES

Clause 1

1. This clause sets out the territorial area within which the criminal law of England and Wales applies.

2. This area is defined as—

(i) all the land and water within the territorial waters baseline, established by the Territorial Waters Order in Council 1964, or any order replacing it; (*subsection (1) (a)*), and

(ii) all the land and water between that baseline and the seaward limits of territorial waters (*subsection (1) (b)*).

and subsections (1) and (3) provide that proceedings on indictment and summary proceedings may be brought in respect of any offence against the law of England and Wales committed anywhere within that area.

3. *Subsection (2)* provides that proceedings may be brought for offences occurring outside the seaward limits of territorial waters, first, in tunnels accessible only from land in England or Wales and, secondly, on lighthouses under the management of Trinity House off the coast of England and Wales. By virtue of *subsection (4)* (definition of “lighthouse”) the latter includes lightships and certain other floating navigational structures.

4. *Subsection (3)* abolishes any common law rules for determining the territorial limits of the jurisdiction of the courts in England and Wales for the purposes of the criminal law, but preserves the courts’ jurisdiction under any other legislation; thus the subsection has no effect on, for example, the jurisdiction to try particular offences committed abroad (such as treason or murder), or offences by specified classes of persons abroad (such as Crown servants—see clause 8), or any offences committed in specified areas outside the territorial limits (as in areas designated under the Continental Shelf Act 1964). *Subsection (3)* also provides that in any future legislation “the ordinary limits of criminal jurisdiction” means the limits of jurisdiction specified in subsections (1) and (2).

5. Clause 1, taken with clauses 2 and 3, is intended to replace the Territorial Waters Jurisdiction Act 1878. Since that Act applies to the whole of the United Kingdom, appropriate amendments to this clause would be required were it thought desirable that it should have effect anywhere outside England and Wales.

DRAFT CLAUSES

Territorial
waters.

2.—(1) In this Act—

“territorial waters” means the part of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man which is adjacent to England and Wales;

“territorial waters baseline” means the part of the United Kingdom baseline which is adjacent to England and Wales; and

• “United Kingdom baseline” means the baseline established by the Territorial Waters Order in Council 1964 or by any subsequent Order of Her Majesty made in Council under Her royal prerogative for establishing a baseline from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured.

(2) If in any proceedings on indictment or summary proceedings any question arises as to the location of the territorial waters baseline, a certificate relating to its location issued by or under the authority of the Secretary of State shall be conclusive evidence of the facts stated in it.

EXPLANATORY NOTES

Clause 2

1. *Subsection (1)* defines “territorial waters”, “territorial waters baseline” and “United Kingdom baseline” for the purpose of clause 1 and of the other clauses. “Territorial waters” are here confined to waters adjacent to England and Wales.

2. *Subsection (2)* makes provision for a certificate by or under the authority of the Secretary of State to be given in any criminal proceedings whenever any question arises as to the location of the baseline. The certificate will provide conclusive evidence of any facts stated in it (for example, the position of a particular part of the baseline marked on a chart) and will thereby eliminate difficulties which have arisen in relation to this issue in the past: see *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740.

DRAFT CLAUSES

Requirement of consent of Director of Public Prosecutions to institution of certain proceedings for offences committed on, under or above territorial waters.

3.—(1) Subject to subsections (2) and (3) below, proceedings for an offence committed on or by means of a ship or aircraft and on, under or above territorial waters shall not be instituted except by or with the consent of the Director of Public Prosecutions.

(2) Subsection (1) above does not apply—

- (a) where the ship or aircraft is a British-controlled vessel or aircraft; or
- (b) where the proceedings are against a citizen of the United Kingdom and Colonies or a person who falls within an associated class; or
- (c) where the offence is one for which by virtue of any enactment proceedings cannot be instituted except by or with the consent of the Secretary of State or a person authorised by him in that behalf or by or with the consent of the Attorney General.

(3) Subsection (1) above applies to an offence for which by virtue of any enactment proceedings cannot be instituted except by or on behalf of an authority other than the Secretary of State, the Attorney General or the Director of Public Prosecutions, but as if the words “by or” were omitted.

EXPLANATORY NOTES

Clause 3

1. This clause provides for the consent of the Director of Public Prosecutions to institution of proceedings in England and Wales in certain cases where another State might have an equal claim to jurisdiction.

2. By *subsections* (1) and (2) consent is required where an offence is committed on or by means of a ship or aircraft and on, under or above territorial waters, except where—

- (a) the ship or aircraft is a British-controlled vessel or aircraft; or
- (b) proceedings are against a citizen of the United Kingdom and Colonies or a member of an associated class; or
- (c) under other legislation the consent of the Attorney General or the Secretary of State is required for institution of proceedings.

3. *Subsection* (3) provides that where proceedings for a particular offence may only be instituted by some authority other than the Director, the Attorney General or the Secretary of State, the consent of the Director must also be obtained to institute such proceedings if the offence falls within subsection (1).

4. Vessels and aircraft which are “British-controlled” are defined in clauses 9 and 10, and a person who belongs to an “associated class” is defined in clause 11.

DRAFT CLAUSES

Offences on board British-controlled vessels and offences by persons employed on British-controlled vessels.

4.—(1) Conduct outside the United Kingdom which would constitute an offence against the law of England and Wales if it took place in England or Wales shall also constitute that offence—

- (a) if it takes place on a British-controlled vessel, or
- (b) if it is conduct on the part of a person employed at the time on a British-controlled vessel and takes place—
 - (i) on shore, or
 - (ii) on board a vessel which is not British-controlled but is in the same port as the vessel on which he is employed.

(2) A person may accordingly be charged, in any place in England or Wales where he may happen to be, with any offence constituted by the conduct in question.

EXPLANATORY NOTES

Clause 4

1. This clause makes new provision for offences on British-controlled vessels and by those employed on them, replacing sections 686 and 687 of the Merchant Shipping Act 1894 and the Admiralty criminal jurisdiction over offences at sea.

2. *Subsection (1)(a)* covers offences on British-controlled vessels defined in clause 9.

3. *Subsection (1)(b)* covers offences on shore or on non-British-controlled vessels abroad by persons employed at the time on British-controlled vessels.

4. *Subsection (2)* enables charges to be brought anywhere in England or Wales for offences outside the United Kingdom committed on British-controlled vessels.

5. The provisions apply only if the proscribed conduct would have constituted an offence if taking place in England or Wales. Amendments to the clause would be needed if it were considered desirable to apply its provisions to parts of the United Kingdom other than England and Wales.

DRAFT CLAUSES

Hijacking
ships.

5.—(1) A person on board a ship who unlawfully, by the use of force or by threats of any kind, seizes the ship or exercises control of it commits the offence of hijacking the ship if—

(a) it is within the ordinary limits of criminal jurisdiction; or

(b) it is outside the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man, but the Crown Court has jurisdiction under subsection (2) below.

(2) The Crown Court has jurisdiction under this subsection—

(a) if the ship is a British-controlled vessel, or

(b) if the person charged with the offence is a citizen of the United Kingdom and Colonies or a person who falls within an associated class.

(3) A person who—

(a) commits the offence of hijacking a ship; or

(b) within the ordinary limits of criminal jurisdiction induces or assists the commission outside the United Kingdom of an act which would be the offence of hijacking a ship if the Crown Court had jurisdiction under subsection (2) above;

shall be liable on conviction on indictment to imprisonment for life.

(4) Proceedings for an offence under this section shall not be instituted except by or with the consent of the Attorney General.

(5) The offence of hijacking a ship shall be deemed to be included—

(a) in the list of extradition crimes contained in Schedule 1 to the Extradition Act 1870; and

(b) among the descriptions of offences set out in Schedule 1 to the Fugitive Offenders Act 1967.

(6) In this section “the ordinary limits of criminal jurisdiction” has the meaning assigned to it by section 1(3)(b) above.

1870 c. 52.

1967 c. 68.

EXPLANATORY NOTES

Clause 5

1. This clause creates a new offence of hijacking a ship. The act of hijacking occurs when a person unlawfully, by the use of force or threats, seizes the ship or exercises control of it; and an offence is committed if—

- (a) anyone hijacks any ship within the ordinary limits of criminal jurisdiction as defined by clause 1; or
- (b) anyone hijacks a British-controlled vessel anywhere outside the territorial waters of the United Kingdom; or
- (c) a citizen of the United Kingdom and Colonies or a person within an associated class hijacks any ship outside the territorial waters of the United Kingdom; or
- (d) anyone within the ordinary limits of criminal jurisdiction induces or assists in an act of hijacking outside the United Kingdom

(clause 5(1),(2),(3)(b) and (6)).

2. By *subsection* (3) an offence under this clause is triable only on indictment, and the maximum sentence on conviction is life imprisonment; in this it is identical to the offence of hijacking an aircraft under the Hijacking Act 1971.

3. The consent of the Attorney General to the institution of proceedings is required by *subsection* (4). This follows the precedent of section 5(1) of the Hijacking Act 1971.

4. *Subsection* (5) provides that the offence of hijacking a ship is to be extraditable.

5. The definitions of a “British-controlled vessel” and of persons within “an associated class” are in clauses 9 and 11.

6. The clause creates an offence only in the law of England and Wales, and is therefore confined, as explained by paragraph 1, to hijacking either within territorial waters adjacent to England and Wales or outside the territorial waters of the United Kingdom. Amendments would therefore be necessary if it were thought desirable to apply these provisions to parts of the United Kingdom other than England and Wales; and power to extend the provisions by Order in Council would be required if it were desired to apply them to the Channel Islands or the Isle of Man (compare section 6(2) of the Hijacking Act 1971).

DRAFT CLAUSES

Evidence.

6.—(1) Where in any proceedings before a court in England or Wales for an offence committed aboard a British-controlled vessel the testimony of any person is required and the court is satisfied that the person in question cannot be found in the United Kingdom, there shall be admissible in evidence before that court any deposition relating to the subject matter of those proceedings previously made on oath by that person outside the United Kingdom which was so made—

- (a) in the presence of the person charged with the offence; and
- (b) before a judge or magistrate of a country—

1948 c. 56.

- (i) such as is mentioned in section 1(3) of the British Nationality Act 1948 as for the time being in force, or
- (ii) which is part of Her Majesty's dominions, or
- (iii) in which Her Majesty for the time being has jurisdiction, or
- (c) before a consular officer of Her Majesty's Government in the United Kingdom.

(2) Any such deposition shall be authenticated by the signature of the judge, magistrate or consular officer before whom it was made who shall certify that the person charged with the offence was present at the taking of the deposition.

(3) It shall not be necessary in any proceedings to prove the signature or official character of the person appearing so to have authenticated any such deposition or to have given such a certificate, and such a certificate shall, unless the contrary is proved, be sufficient evidence in any proceedings that the person charged with the offence was present at the making of the deposition.

(4) If a complaint is made to such a consular officer as aforesaid that any offence against the law of England and Wales has been committed outside the United Kingdom, that officer may inquire into the case upon oath.

(5) Nothing in this section shall prejudice the admission of any evidence which is admissible apart from this section.

(6) In this section "deposition" includes any affidavit, affirmation or statement made upon oath.

EXPLANATORY NOTES

Clause 6

1. This clause makes admissible in evidence in proceedings in England and Wales relating to offences committed on British-controlled vessels certain depositions made abroad. It is modelled on section 5 of the Tokyo Convention Act 1967 (which makes similar provision in regard to offences on board aircraft outside the United Kingdom).

2. Unlike the corresponding provision in the Tokyo Convention Act 1967, this clause is limited to proceedings before the courts in England and Wales and does not extend to proceedings instituted in other parts of the United Kingdom.

DRAFT CLAUSES

Piracy.

7.—(1) A person who commits piracy (on the high seas or by or against an aircraft) shall be liable on conviction on indictment to imprisonment for life.

(2) Proceedings for piracy shall not be instituted except by or with the consent of the Attorney General.

EXPLANATORY NOTES

Clause 7

1. *Subsection (1)* provides for a maximum penalty of life imprisonment for the offence of piracy according to the law of nations.

2. *Subsection (2)* provides that no proceedings for that offence shall be instituted without the consent of the Attorney General.

DRAFT CLAUSES

Indictable
offences
committed
abroad by
Crown
servants.

8. Any citizen of the United Kingdom and Colonies employed in the service of the Crown under Her Majesty's Government in the United Kingdom who, outside the United Kingdom, when acting or purporting to act in the course of his employment does or omits anything the doing or omission of which in England or Wales would constitute an indictable offence shall be guilty of that offence.

EXPLANATORY NOTES

Clause 8

1. This clause makes fresh provision for indictable offences committed by Crown servants outside the United Kingdom, in place of section 31 of the Criminal Justice Act 1948 (which makes similar provision for such offences when committed “in a foreign country”).

DRAFT CLAUSES

British-controlled vessels.

1894 c. 60.

1906 c. 48.

1957 c. 53.

9.—(1) A vessel is British-controlled for the purposes of this Act if it is—

- (a) a ship registered in the United Kingdom under section 2 of the Merchant Shipping Act 1894;
- (b) a ship not registered under that section, but required to be so registered, which is owned—
 - (i) by a citizen of the United Kingdom and Colonies, or
 - (ii) by a company established under and subject to the laws of some part of the United Kingdom, and having its principal place of business in the United Kingdom;
- (c) a ship in relation to which a provisional certificate is in effect under section 22 of the Merchant Shipping Act 1894 (ships becoming British-owned abroad);
- (d) a ship in relation to which a temporary pass under section 23 of that Act is in effect for it to pass, without being previously registered, from any port in the United Kingdom to any other port there;
- (e) a British fishing boat registered under section 373 of that Act;
- (f) a government ship within the meaning of subsection (3) of section 80 of the Merchant Shipping Act 1906 (whether or not it is registered under subsection (1) of that section);
- (g) one of Her Majesty's ships or Her Majesty's vessels as defined in section 132 of the Naval Discipline Act 1957;
- (h) a vessel employed solely in navigation on the rivers or coasts of the United Kingdom; or
- (j) a vessel launched after completion or partial completion in the United Kingdom and not registered either in the United Kingdom or elsewhere.

(2) In subsection (1) above—

“fishing boat” has the meaning assigned to it by section 370 of the Merchant Shipping Act 1894; and

“ship” and “vessel”, except in paragraph (g), have the meanings assigned to them by section 742 of that Act.

EXPLANATORY NOTES

Clause 9

1. This clause defines which vessels are “British-controlled” for the purpose of the clauses.

2. They include ships registered in the United Kingdom under section 2 of the Merchant Shipping Act 1894; fishing boats registered under section 373 of that Act; certain other defined categories of ships and vessels having their closest connection with the United Kingdom; government ships; all ships and vessels in the service of the Royal Navy; and all vessels used in navigation on the rivers or coasts of the United Kingdom.

3. *Subsection (2)* provides that, except for ships and vessels in the service of the Royal Navy, “ship”, “vessel” and “fishing boat” have the meanings assigned to them by the Merchant Shipping Act 1894.

DRAFT CLAUSES

British-
controlled
aircraft

- 10.** An aircraft is British-controlled for the purposes of this Act—
- (a) if it is for the time being registered in the United Kingdom; or
 - (b) if it is not for the time being registered in any country but either the operator of the aircraft or each person entitled as owner to any legal or beneficial interest in it—
 - (i) is a person qualified to be the owner of a legal or beneficial interest in an aircraft registered in the United Kingdom; or
 - (ii) resides or has his place of business in the United Kingdom;
or
 - (c) if, being for the time being registered in some other country, it is for the time being chartered by demise to a person who or to persons each of whom satisfies the requirements aforesaid.

EXPLANATORY NOTES

Clause 10

1. This clause defines aircraft which are “British-controlled” for the purpose of clause 3. The definition is based on that contained in section 7 of the Tokyo Convention Act 1967.

DRAFT CLAUSES

Meaning of
"associated
class".
1948 c. 56.

11. A person falls within an associated class for the purposes of this Act if he is—

- (a) a British subject by virtue of section 2 of the British Nationality Act 1948 (continuance of certain subjects of the Republic of Ireland as British subjects);
- (b) a British subject without citizenship by virtue of section 13 or 16 of that Act (British subjects whose citizenship had not been ascertained at commencement of the Act and persons who had ceased to be British on loss of British nationality by a parent);
- (c) a British subject by virtue of the British Nationality Act 1965; or
- (d) a British protected person within the meaning of the British Nationality Act 1948.

1965 c. 34.

EXPLANATORY NOTES

Clause 11

1. This clause defines which persons fall within an “associated class” for the purpose of clauses 3 and 5.

DRAFT CLAUSES

Minor and consequential amendments.

12. The minor and consequential amendments specified in Schedule 1 to this Act shall have effect.

EXPLANATORY NOTES

Clause 12

1. This clause gives effect to the consequential amendments to the Acts set out in Schedule 1, and to other minor amendments set out in that Schedule.

DRAFT CLAUSES

Repeals and
abolitions.

13.—(1) The enactments specified in Schedule 2 to this Act (which include enactments that were obsolete or unnecessary before the passing of this Act) are repealed to the extent specified in the third column of that Schedule.

(2) There are hereby abolished—

- (a) the jurisdiction of the Admiralty of England in respect of any offence; and
- (b) any offence of piracy under the common law of England and Wales, other than an offence which is also piracy under the law of nations.

EXPLANATORY NOTES

Clause 13

1. *Subsection (1)* gives effect to the repeals set out in Schedule 2.
2. *Subsection (2)* abolishes—
 - (a) Admiralty criminal jurisdiction; and
 - (b) in so far as it exists, any offence of piracy at common law distinct from the offence of piracy under the law of nations. The jurisdiction of the courts to deal with the last-mentioned offence is not affected by this provision.

DRAFT CLAUSES

Citation.

14. This Act may be cited as the Criminal Jurisdiction Act 1978.

EXPLANATORY NOTES

Clause 14

1. This provides a short title suitable for adoption if the draft clauses were to be enacted.

DRAFT CLAUSES

Section 12.

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS

1893 c. 17.

North Sea Fisheries Act 1893

1. In section 9 of the North Sea Fisheries Act 1893 (definitions) in the definition of “territorial waters”, for the words from “territorial”, in the second place where it occurs, to the end of the definition there shall be substituted the words “the part of the territorial waters adjacent to the United Kingdom which is adjacent to England and Wales”.

1952 c. 55.

Magistrates’ Courts Act 1952

2. In section 1(2) of the Magistrates’ Courts Act 1952 (which lists the cases in which a justice of the peace may issue a summons or warrant) the following paragraph shall be inserted after paragraph (a):—

“(aa) If the offence was committed or is suspected to have been committed anywhere on, under or above the sea and within the seaward limits of territorial waters; or”.

3. In section 2(1) of that Act (jurisdiction to deal with charges) after the word “county”, in the second place where it occurs, there shall be inserted the words “or at any point in the sea up to the seaward limits of territorial waters”.

4. In section 126(1) of that Act (general interpretation) after the definition of “Sum enforceable as a civil debt” there shall be inserted the following definition:—

“‘Territorial waters’ means that part of the territorial waters adjacent to the United Kingdom which is adjacent to England and Wales;”.

1964 c. 48.

Police Act 1964

5. At the end of section 19(1) of the Police Act 1964 (jurisdiction of constables) there shall be added the words “and throughout the sea up to the seaward limits of that part of the territorial waters adjacent to the United Kingdom which is adjacent to England and Wales;”.

1971 c. 23.

Courts Act 1971

6. In section 6(1) of the Courts Act 1971 (exclusive jurisdiction in trial on indictment) after the word “indictment” there shall be inserted the words “for an offence, wherever committed”.

1974 c. 37.

Health and Safety at Work etc. Act 1974

7. In section 84(4) of the Health and Safety at Work etc. Act 1974 (extent and application of Act) in paragraph (d), for the words from “the” to “prosecutions)” there shall be substituted the words “Criminal Jurisdiction Act 1978 (requirement of consent of Director of Public Prosecutions to institution of proceedings for certain offences committed on, under or above territorial waters)”.

EXPLANATORY NOTES

Schedule 1

1. This sets out the amendments to existing legislation consequential upon the draft clauses together with other minor amendments. In particular the amendments to the Magistrates' Courts Act 1952 effected by paragraphs 2, 3 and 4 enable magistrates' courts to issue process in respect of any offence, and also to try any summary offence, committed on, under or above the sea waters specified by clause 1 as being within the territorial area of the jurisdiction of the courts administering the criminal law of England and Wales.

DRAFT CLAUSES

SCH. 1
1975 c. 71.

Employment Protection Act 1975

8. In section 127(3) of the Employment Protection Act 1975 (power to extend employment legislation) in paragraph (e), for the words from “the”, in the first place where it occurs, to “prosecutions)” there shall be substituted the words “Criminal Jurisdiction Act 1978 (requirement of consent of Director of Public Prosecutions to institution of proceedings for certain offences committed on, under or above territorial waters)”.

1978 c. 26.

Suppression of Terrorism Act 1978

9. In section 4(7)(a) of the Suppression of Terrorism Act 1978 (jurisdiction in respect of offences committed outside United Kingdom) for the words “within the jurisdiction of the Admiralty” there shall be substituted the words “under section 4(1)(a) of the Criminal Jurisdiction Act 1978”.

1978 c. 44.

Employment Protection (Consolidation) Act 1978

10. In section 137(3) of the Employment Protection (Consolidation) Act 1978 (power to extend employment protection legislation) in paragraph (e), for the words from “the”, in the first place where it occurs, to “prosecutions)” there shall be substituted the words “Criminal Jurisdiction Act 1978 (requirement of consent of Director of Public Prosecutions to institution of proceedings for certain offences committed on, under or above territorial waters)”.

EXPLANATORY NOTES

DRAFT CLAUSES

SCHEDULE 2

Section 13.

ENACTMENTS REPEALED

Chapter	Title or Short Title	Extent of Repeal
11 Will. 3. c. 7.	Piracy Act 1698.	The whole Act.
11 Will. 3. c. 12. (1698-9)	An Act to punish governors of Plantations in this Kingdom for Crimes by them committed in the Plantations.	The whole Act.
8 Geo. 1. c. 14.	Piracy Act 1721.	The whole Act.
37 Geo. 3. c. 123.	Unlawful Oaths Act 1797.	In section 6, the words "on the high seas or".
39 Geo. 3. c. 37.	Offences at Sea Act 1799.	The whole Act.
42 Geo. 3. c. 85.	Criminal Jurisdiction Act 1802.	The whole Act.
49 Geo. 3. c. 126.	Sale of Offices Act 1809.	Section 14.
52 Geo. 3. c. 104.	Unlawful Oaths Act 1812.	In section 7, the words "on the high seas".
7 Will. 4 & 1 Vict. c. 88.	Piracy Act 1837.	The whole Act.
24 & 25 Vict. c. 97.	Malicious Damage Act 1861.	In section 72, the words "England or", in both places where they occur.
24 & 25 Vict. c. 98.	Forgery Act 1861.	In section 50, the words "England or", in both places where they occur.
24 & 25 Vict. c. 100.	Offences against the Person Act 1861.	In section 68, the words "England or", in both places where they occur.
41 & 42 Vict. c. 73.	Territorial Waters Jurisdiction Act 1878.	The whole Act.
57 & 58 Vict. c. 60.	Merchant Shipping Act 1894.	Sections 685, 686 and 687.
11 & 12 Geo. 6 c. 58.	Criminal Justice Act 1948.	Section 31.
15 & 16 Geo. 6. & 1 Eliz. 2. c. 55.	Magistrates' Courts Act 1952	In section 3(1), the words "arm of the sea or other water".
1967 c. 58.	Criminal Law Act 1967.	In Schedule 2, paragraph 15.
1968 c. 18.	Consular Relations Act 1968.	In section 15, the words "the Territorial Waters Jurisdiction Act 1878 or section 685 or section 686 of the Merchant Shipping Act 1894".
1971 c. 23.	Courts Act 1971.	Section 6(2).
1971 c. 61.	Mineral Workings (Offshore Installations) Act 1971.	Section 10(6).
1975 c. 74.	Petroleum and Submarine Pipelines Act 1975.	Section 29(6).

EXPLANATORY NOTES

Schedule 2

1. The repeals listed in Schedule 2 include those which are consequential upon the provisions of the clauses.

APPENDIX B

Organisations and individuals who commented on the Law Commission's Study Paper (1968) and Working Paper No. 29 (May 1970), "Territorial and Extraterritorial Extent of the Criminal Law."

Organisations and Government Departments

Association of Chief Police Officers of England and Wales

H.M. Customs and Excise

Department of Trade

Director of Public Prosecutions

Foreign and Commonwealth Office

General Council of the Bar

Home Office

Hydrographic Department, Ministry of Defence

Inland Revenue

Institute of Legal Executives

Justices' Clerks' Society

Law Society

The Magistrates' Association

The Solicitor, Metropolitan Police

Norton, Rose, Botterell & Roche (Mr. M. A. Brown)

Police College, Bramshill

Scottish Law Commission

Society of Conservative Lawyers

Society of Public Teachers of Law

Treasury Solicitor's Department

Individuals

Professor G. H. Gordon

Mr. W. A. Leitch, C. B.

Professor Manuel López-Rey

Professor Glanville L. Williams

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