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*This article considers the international criminal offences which have been incorporated into the law of England and Wales, and the challenges to bringing, and defending against, proceedings for these offences.*

## **Introduction**

The announcement by the prosecutor of the International Criminal Court (ICC) that she is re-opening a preliminary examination of the conduct of British forces in Iraq<sup>1</sup> has brought into sharp focus the UK's regime for implementing international criminal law. Indeed, "[t]he internationalisation of criminal law and criminal process" has been a particularly "important trend"<sup>2</sup> of the last decade or so since the ICC started to put the words of its founding Statute into action. The UK's regime coalesces primarily around four pieces of legislation: the International Criminal Court Act 2001 (ICCA), the War Crimes Act 1991 (WCA), the Geneva Conventions Act 1957 (GCA) and the Criminal Justice Act 1988 (CJA).<sup>3</sup> Between them, these Acts created dozens of new criminal offences.<sup>4</sup> Thus far, this legislation has been little used. At the time of writing, it has resulted in the conviction of three defendants, all in the last fifteen

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<sup>1</sup> ICC Prosecutor, "Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq" May 13, 2014, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/opt-statement-iraq-13-05-2014.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/opt-statement-iraq-13-05-2014.aspx) [Accessed July 22, 2014], following the European Center for Constitutional and Human Rights and Public Interest Lawyers' Communication to the Office of the Prosecutor of the International Criminal Court, "The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008" January 10, 2014, [http://www.ecchr.de/index.php/united-kingdom.html?file=tl\\_files/Dokumente/Universelle%20Justiz/UKICC-Communication-2014-01-10\\_public.pdf](http://www.ecchr.de/index.php/united-kingdom.html?file=tl_files/Dokumente/Universelle%20Justiz/UKICC-Communication-2014-01-10_public.pdf) [Accessed July 22, 2014]. See also W.A. Schabas, "Complementary in Practice: Creative Solutions or a Trap for the Court?" in M. Politi and F. Gioia (eds), *The International Criminal Court and National Jurisdictions* (Farnham: Ashgate, 2008), pp.44-5.

<sup>2</sup> C. Walker, "Defence: appellants protesting against war in Iraq – defendants committing criminal offences of damage or aggravated trespass at military bases" [2007] Crim. L.R. 66, 68.

<sup>3</sup> International criminal law textbooks often also include piracy and aggression as international crimes. For lack of space, amongst other reasons, these offences will not be considered in this article.

<sup>4</sup> War crimes trials in the aftermath of WW2 also took place by virtue of a Royal Warrant. This warrant is still in force but has not been used since 1949 and it seems unlikely that it would be relied upon to bring criminal proceedings today. See A.P.V. Rogers, "War Crimes Trials under the Royal Warrant: British Practice 1945-1949" (1990) 39 I.C.L.Q. 780.

years. In 1999, Anthony Sawoniuk was convicted under the WCA of two counts of murder which occurred in Belorussia under Nazi occupation in 1942.<sup>5</sup> In 2005, Faryadi Zardad was convicted of conspiracy to torture under the CJA in relation to conduct in Afghanistan in the 1990s.<sup>6</sup> In 2006 Donald Payne, a British soldier, was convicted under the ICCA of the war crime of inhuman treatment in relation to detainees in Iraq.<sup>7</sup> There have been no convictions under the GCA.<sup>8</sup>

The consent of the Attorney General or the DPP is required to prosecute any of the offences created by these Acts,<sup>9</sup> and for some of them, where the alleged conduct was committed outside the UK, the consent of the DPP is needed before an arrest warrant can be issued.<sup>10</sup> However, even where there is a willingness to bring such proceedings, there are also practical obstacles to prosecuting, and defending against, such cases in the courts of England and Wales. It is the purpose of this article to examine those obstacles. This article first considers questions of jurisdiction and substantive law in relation to the different criminal offences created by each of the Acts. It also examines the role that incorporating international crimes into domestic law has in relation to the principle of complementarity before the ICC. The article then considers the challenges to prosecuting and defending against proceedings for international crimes in the courts of England and Wales. This includes examining challenges in relation to immunities, amnesties, evidence and the use of the normal domestic criminal procedure for the trial of these cases. Many of these matters have been the subject of much academic debate in the last decade or so. This article concludes that the nature of international crimes, and the difficulties with the legislative schemes used to incorporate them into domestic law, have significantly complicated the challenge of prosecuting and defending against such offences.

## **The International Criminal Court Act 2001**

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<sup>5</sup> *Sawoniuk* [2000] 2 Cr. App. R. 220; [2000] Crim L.R. 506. See also D. Hirsh, "The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination" (2001) 10 *Social & Legal Studies* 529.

<sup>6</sup> UN Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Fifth periodic report of States parties due in 2008, United Kingdom of Great Britain and Northern Ireland*, May 21, 2012, CAT/C/GBR/5, p.44 et seq. See also R. Smith, "A World of Difference" (2013) 163 N.L.J. 54; E. Metcalfe, "Torture and the Boundaries of English Law" (2005) 2(2) *Justice Journal* 79, 79-80.

<sup>7</sup> N. Rasiyah, "The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice" (2009) 7 J.I.C.J. 177, 178 and 181. See also J. Samiloff, "War Crimes and the Law of the Land" (2006) 156 N.L.J. 1573.

<sup>8</sup> There were also no convictions under the Genocide Act 1969 prior to its repeal by the ICCA: R. Cryer and O. Bekou, "International Crimes and ICC Cooperation in England and Wales" (2007) 5 J.I.C.J. 441, 442.

<sup>9</sup> ICCA s.53(3); WCA s.1(3); CJA s.135; GCA s.1A(3)(a).

<sup>10</sup> The offences of torture under the CJA and the offences under the GCA, or offences ancillary to these offences, fall into this category by virtue of the Magistrates' Court Act 1980 s.1, as amended by the Police Reform and Social Responsibility Act 2011 s.153(1). See G. Bindman, "Bringing Tyrants to Book" (2012) 162 N.L.J. 44, 45 and S. Williams, "Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions" (2012) 75 M.L.R. 368.

The enactment of the ICCA created 61 substantive offences in English criminal law.<sup>11</sup> They comprise genocide, various forms of crimes against humanity and various war crimes.<sup>12</sup> In addition, the legislation explicitly criminalises the “ancillary” offences of aiding, abetting, counselling, procuring, inciting, assisting another, attempting, conspiring to commit, or concealing the commission of any of the substantive offences.<sup>13</sup> The ICCA also establishes the criminal liability of “commanders and other superiors” for the failure to prevent the commission of the substantive and ancillary offences by their subordinates.<sup>14</sup>

### *Complementarity*

The ICCA aimed to implement in English law the offences criminalised by the Rome Statute.<sup>15</sup> The Statute established the ICC as “a permanent institution ... [with] power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute”.<sup>16</sup> The Preamble to the Statute affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished”. However, the jurisdiction of the ICC “is based on the premise that states will share the burden of the investigation, prosecution and adjudication of core international crimes by undertaking proceedings at the national level.”<sup>17</sup> Cases will therefore be tried before the ICC if they are sufficiently grave and the complementarity principle is satisfied.<sup>18</sup> This principle provides that cases are admissible before the ICC where the state with jurisdiction “is unwilling or unable genuinely to carry out the investigation or prosecution”.<sup>19</sup> The justification for the adoption of an international criminal jurisdiction which is complementary to national ones is to respect the sovereignty of those states willing and able to prosecute international crimes; to ensure, insofar as possible, local accountability by bringing prosecutions in the state in which the conduct was committed; and to protect the ICC’s scarce resources.<sup>20</sup>

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<sup>11</sup> ICCA Pt 5 and Sch.8. When counting, genocide has been treated as one offence which can be committed in five different ways, but the various different forms of crimes against humanity and war crimes as separate offences.

<sup>12</sup> ICCA s.51. The crime of aggression is not included and does not yet fall within the Rome Statute’s jurisdiction. See ICC Review Conference of the Rome Statute Resolution RC/Res.6 adopted at the 13<sup>th</sup> plenary meeting of the State Parties, June 11, 2010.

<sup>13</sup> ICCA s.52 and s.55.

<sup>14</sup> ICCA s.65.

<sup>15</sup> Also referred to as ‘the Statute’.

<sup>16</sup> Rome Statute art. 1.

<sup>17</sup> O. Bekou, “Crimes at Crossroads: Incorporating International Crimes at the National Level” (2012) 10 J.I.C.J. 677, 677.

<sup>18</sup> Rome Statute art. 17. See Schabas, “Complementary in Practice: Creative Solutions or a Trap for the Court?” in *The International Criminal Court and National Jurisdictions* (2008), pp.43-7.

<sup>19</sup> Rome Statute art. 17(1)(a), see also art. 17(1)(b).

<sup>20</sup> S. Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford: Hart, 2012), p.13; A.D.P. Brady and J. Mehigan, “Universal Jurisdiction for International Crimes in Irish Law” (2008) XLIII *Irish Jurist* 59, 59; H. van der Wilt, “National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals” (2010) 10 I.C.L.R. 209, 210; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus

Prosecutions for the conduct covered by international criminal law could be brought using ordinary domestic offences with extra-territorial application.<sup>21</sup> After all, some have argued that the Rome Statute does not impose any obligation on state parties to adopt the criminal offences contained therein.<sup>22</sup> This means that states could still make use of their regular domestic offences when prosecuting conduct which would amount to a crime under the Statute. However, others take the view that the Statute contains an implied obligation to incorporate the crimes therein into domestic law.<sup>23</sup> Either way, it is speculated that the ICC is less likely to find a state unwilling or unable to prosecute if the relevant offences have been so incorporated and therefore defendants can be prosecuted for the same crime nationally or internationally.<sup>24</sup> Where state parties are reliant on their ordinary domestic crimes, they may be more likely to be found unwilling or unable. That view seems to have been echoed by the government which introduced the ICC Bill. At the second reading in the House of Lords Baroness Scotland, explaining that the government intended to be “able and willing”, stated: “[t]he offences created in ... the Bill, therefore, reflect the offences in the ICC statute itself, so that our courts will always be in a position to try these offences themselves.”<sup>25</sup> Thus, the more closely domestic law reflects and implements the law under the Rome Statute, the less likely it is that the UK will be found unwilling or unable to prosecute.<sup>26</sup> Yet, despite the stated aim of the ICCA, the UK authorities have not always opted to prosecute under the Act, in some cases

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Nijhoff, 2008), pp.15-8 and A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *Cassese's International Criminal Law* (Oxford: OUP, 2013), p.298.

<sup>21</sup> Indeed, this appears to have happened in some UK cases: see G. Simpson, “The Death of Baha Mousa” (2007) 8 *Melbourne J.I.L.* 340, 348; *Blackman* [2014] EWCA Crim 1029 at [58]. The entire criminal law of England and Wales is extra-territorial in relation to UK service personnel: Armed Forces Act 2006 s.42; See also J. Blackett, *Rant on the Court Martial and Service Law* (Oxford: OUP, 2009), para.2.04. For individuals who are not subject to UK service jurisdiction, some ordinary criminal offences have extra-territorial effect (murder, for example, by virtue of the Offences against the Person Act 1861 s.9), but most do not. See P.J. Richardson (ed), *Archbold Criminal Pleading Evidence and Practice* (London: Sweet and Maxwell, 2014), para.2-33 et seq. and M. Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: OUP, 2003), pp.202-203.

<sup>22</sup> Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), p.16; Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2004), p.86; R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2005), p.171; G. Werle, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005), pp.74-5; Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008), pp.473-474; D. Robinson, “The Rome Statute and its Impact on National Law” in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002), Vol.2, p.1861.

<sup>23</sup> J.K. Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law” (2003) 1 *J.I.C.J.* 86, 92 et seq.; D. Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004), p.338. See also D. Ormerod, *Smith and Hogan's Criminal Law*, 13<sup>th</sup> edn (Oxford: OUP, 2011), p.21.

<sup>24</sup> Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2004), p.86 and pp.90-1; and H. Kreicker, “National Prosecution of Genocide from a Comparative Perspective” (2005) 5 *I.C.L.R.* 313, 322-323 but cf. K. Dörmann and R. Geiß, “The Implementation of Grave Breaches into Domestic Legal Orders” (2009) 7 *J.I.C.J.* 703, 718-9.

<sup>25</sup> *Hansard*, HL Vol. 620, col. 928 (January 15, 2001).

<sup>26</sup> A. Zahar and G. Sluiter, *International Criminal Law*, (Oxford: OUP, 2008), p.489.

relying on ordinary criminal offences instead.<sup>27</sup> Furthermore, as we shall see, the Act seems to have been designed to achieve a conservative compromise, maintaining as much domestic law and procedure as possible, whilst incorporating the minimum of the Rome Statute necessary to achieve complementarity.<sup>28</sup> It is in this context that we shall consider those that fall within the jurisdiction of the domestic courts under the ICCA.

### *Jurisdiction*

In international legal terms, states may generally exercise prescriptive jurisdiction on three bases:<sup>29</sup> over those within their territory; over those who hold their nationality; or exceptionally, universally, over anyone, anywhere.<sup>30</sup> The offences criminalised under the ICCA are extra-territorial in that they apply to conduct committed or intended to be committed outside of England and Wales (as well, of course, to conduct within the territory). But, this extra-territorial jurisdiction is limited. The domestic courts may only exercise it where the accused is a UK national, a UK resident or is subject to UK service jurisdiction.<sup>31</sup> The ICCA therefore reflects both territorial and “enhanced” nationality jurisdiction.<sup>32</sup> The exclusion from the jurisdiction of “transitory visitors” merely present in the UK was justified on the basis that such people “do not intend to use the UK as a ‘safe haven’ and therefore should not be prosecuted before English courts.”<sup>33</sup>

In respect of residence, the courts have jurisdiction where the individual in question was resident here at the time the extra-territorial offence was committed or has become “resident subsequent to the commission of the offence”.<sup>34</sup> The concept of UK residence was clarified by

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<sup>27</sup> See fn.21 above.

<sup>28</sup> Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.341 and p.351. See also R. Cryer and P.D. Mora, “Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 804.

<sup>29</sup> Under the *Lotus* principle, a state cannot exercise enforcement jurisdiction in another’s territory except where permitted by international law. But, there is nothing to stop states from exercising prescriptive jurisdiction over acts that happen outside their territory unless a specific rule of international law prohibits it: *The SS Lotus*, Judgment No.9, (1927) PCIJ Ser A, No. 10, Judgment of September 7, 1927.

<sup>30</sup> J. Crawford, *Brownlie’s Principles of Public International Law* (Oxford: OUP, 2012), pp.458-460, p.467 et seq. and pp.687-688; Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), pp.19-28. For analysis of the debate on different forms of universal jurisdiction, see Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, (2005), p.85 et seq.

<sup>31</sup> ICCA s.51(2)(b) and s.52(4)(b).

<sup>32</sup> Zahar and Sluiter, *International Criminal Law*, (2008), p.501, fn.85; Cassese, Gaeta, Baig, Fan, Gosnell and Whiting, *Cassese’s International Criminal Law* (2013), p.276.

<sup>33</sup> Williams, “Arresting Developments? Restricting the Enforcement of the UK’s Universal Jurisdiction Provisions” (2012) 75 M.L.R. 368, 374-375. See also Cryer and Mora, “Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 810. For criticism of this view, see Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.347 et seq.

<sup>34</sup> Williams, “Arresting Developments? Restricting the Enforcement of the UK’s Universal Jurisdiction Provisions” (2012) 75 M.L.R. 368, 374; ICCA s.51(2)(b), s.52(4)(b), and s.68.



virtue of an amendment to the ICCA introduced through the Coroners and Justice Act 2009.<sup>35</sup> This means that UK residence now includes at least ten different categories of individual: those with indefinite leave to remain in the UK; those in the UK who have applied for indefinite leave to remain; those in the UK with leave to enter or remain for the purposes of work or study; those who have made a human rights or asylum claim which has been granted; those who are in the UK and have made a human rights or asylum claim (whether granted or not); dependents of those who have made asylum, human rights claims or applications for indefinite leave to remain who are either in the UK or where the claim/application has been granted; those liable to deportation or removal but who cannot be deported/removed on human rights grounds “or for practical reasons”; those in the UK appealing a deportation order; illegal entrants; and those lawfully detained in the UK.<sup>36</sup>

Unsurprisingly, many of these provisions are defined in the ICCA by specific reference to immigration law.<sup>37</sup> When considering whether any other person is resident for the purposes of the ICCA, the court must also have regard to the period and purpose for which the person has been or intends to be in the UK, their family and other connections and any residential property interests.<sup>38</sup> The clarification provided by this amendment to the Act fell short of demands that the legislation should cover anyone merely present in the UK, regardless of their residence or immigration status.<sup>39</sup> Commentators have described the amendment as “helpful, although far from perfect.”<sup>40</sup> Indeed, applying the lengthy definition of residence is likely to be no easy task for a Crown Court, where the judge and advocates may be unfamiliar with immigration law. The difficulty with expecting criminal lawyers to have expertise in immigration law has been illustrated by the cases before the Court of Appeal concerning convictions for possession of false identity documents. Convictions have been overturned because it was subsequently discovered that the defendants could have relied upon the defence under s.31 of the Immigration and Asylum Act 1999, introduced in order to ensure compliance with the Convention Relating to the Status of Refugees 1951.<sup>41</sup> It is not difficult to imagine that those dealing with questions of residence under the ICCA will be challenged by the use of immigration law principles in the criminal courts. Yet, correctly applying these principles is

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<sup>35</sup> Coroners and Justice Act 2009 s.70(4). See the criticism of the lack of definition of “residence” before the 2009 Act in Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.352.

<sup>36</sup> ICCA s.67A(1) as amended.

<sup>37</sup> For a discussion of the residence provisions and art.1F(a) of the Refugee Convention 1951, see Cryer and Mora, “Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 812-813.

<sup>38</sup> ICCA s.67A(2) as amended.

<sup>39</sup> Cryer and Mora, “Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 810.

<sup>40</sup> Cryer and Mora, “Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 813.

<sup>41</sup> For example *Mateta* [2013] EWCA Crim 1372; [2014] 1 W.L.R. 1516; *Sadighpour* [2012] EWCA Crim 2669; [2013] 1 W.L.R. 2725; *Jaddi* [2012] EWCA Crim 2565; *Ma'alin* [2011] EWCA Crim 3304; *C* [2011] EWCA Crim 2911. See also the commentary by L. Hoyano [2014] Crim. L.R. 227.

clearly crucial, because the failure of the prosecution to establish that the defendant (who is not a UK national or subject to service jurisdiction) is resident in the UK will deprive the court of jurisdiction.

Interestingly, the jurisdiction established by the ICCA over the offences contained within the Rome Statute appears to be on a wider basis than that under the Statute itself. Jurisdiction over the crimes within the Rome Statute is limited by two factors. First, the ICC may only exercise jurisdiction *ratione temporis* over offences committed after the Statute came into force on July 1, 2002.<sup>42</sup> Secondly, art.12(2) of the Statute provides that

“the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court... (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.”

Thus, the Court only has jurisdiction *ratione personae* over individuals who committed their crimes within the territory, or who hold the nationality, of a state which has acceded to the Court’s jurisdiction.<sup>43</sup>

The ICCA however makes no reference to the jurisdiction *ratione personae* of the ICC. The relevant section of the ICCA simply provides that “[i]t is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.”<sup>44</sup> These offences are subsequently defined by reference to the Statute, with the definitions of the crimes under arts.6 to 8 of the Statute included in Sch.8 of the Act. However, no reference is made here to the limitations imposed on the ICC’s jurisdiction in respect of the personnel who can be prosecuted.<sup>45</sup> Indeed, the ICCA provides that the relevant articles are those listed in Sch.8 and “[n]o account shall be taken for the purposes of this Part of any provision of those articles omitted from the text set out in that Schedule.”<sup>46</sup> It therefore appears that the domestic court is precluded from considering the jurisdictional requirements of art.12. In consequence, the ICCA has potential application to a person who is resident in the UK but whose state of nationality

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<sup>42</sup> Rome Statute art.11(1).

<sup>43</sup> The Court can also exercise jurisdiction in respect of non-State Parties where “a situation” has been referred to the Prosecutor by the UN Security Council: Rome Statute art.13(b).

<sup>44</sup> ICCA s.51(1).

<sup>45</sup> Under s.1(1), the Act defines an “ICC crime” as “a crime ... over which the ICC has jurisdiction in accordance with the ICC Statute”. This definition presumably refers to those offences over which the ICC has jurisdiction *ratione materiae*, *ratione temporis*, and *ratione personae*. However, the term “ICC crime” is only used in Pt 2 of the ICCA which covers the arrest and delivery of suspects to the ICC by the UK and in Pt 3 which covers other forms of assistance which the UK may give the ICC (see also Schs 5 and 6). The term is not used in relation to the creation of specific offences under Pt 5 of the ICCA.

<sup>46</sup> ICCA s.50(6).

has not acceded to the Court's jurisdiction and whose crime was committed in the territory of a state which has also not acceded. For example, hypothetically, a Russian national who commits a war crime on Belarusian territory, and who subsequently resides in London, falls within the jurisdiction of the English courts for that offence. This is despite the fact that neither Belarus nor Russia has ratified the Rome Statute and therefore it would be impossible for the ICC to try that individual. This is an extension of jurisdiction which is unwarranted by the Rome Statute and seems to go beyond the explicit aim of the Act in achieving complementarity.

In addition, the ICCA's temporal jurisdiction is anomalous to that of the Rome Statute. The ICCA as originally enacted came into force on September 1, 2001<sup>47</sup> and therefore applied in the usual manner to conduct committed on or after that date. However, the ICCA was amended by the Coroners and Justice Act 2009 so that it criminalised conduct committed on or after January 1, 1991.<sup>48</sup> These provisions were introduced in response to criticisms that the ICCA had created unjustifiable gaps in the law, given that it had repealed the Genocide Act 1969 which had criminalised genocide in England and Wales until that point.<sup>49</sup> The consequence of the repeal was that there was no longer any legislation under which pre-2001 genocide was criminalised. The subsequent back-dating of the ICCA therefore at least ensured that conduct committed during the conflicts in the former Yugoslavia and Rwanda in the early 1990s was criminalised,<sup>50</sup> although Cryer and Mora argue that it is difficult to see the justification for not extending the ICCA even earlier.<sup>51</sup> Convolutioned provisions were also devised in order to ensure that the back-dating complied with both "the general prohibition on retroactivity in English criminal law"<sup>52</sup> and art.7 of the ECHR. In short, these provisions establish that the substantive offences

"do not apply to a crime against humanity, or a war crime within article 8.2(b) or (e), committed by a person before 1 September 2001 unless, at the time the act constituting that crime was committed, the act amounted in the circumstances to a criminal offence under international law."<sup>53</sup>

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<sup>47</sup> International Criminal Court Act 2001 (Commencement) Order 2001 (SI 2001/2161) art.2.

<sup>48</sup> ICCA s.65A as amended by Coroners and Justice Act 2009 s.70(3).

<sup>49</sup> ICCA Sch.10 para.1. The Aegis Trust, amongst others, launched a campaign to close the "loophole" created by the repeal. See Aegis Trust, "Strengthening UK Prosecution of Suspected Genocidaires" <http://www.aegistrust.org/index.php/Global-Parliamentary-Network/past-policy-achievements.html> [Accessed July 22, 2014].

<sup>50</sup> Cryer and Mora, "The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?" (2010) 59 I.C.L.Q. 803, 803-805; G. Boas, "War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations" (2010) 21 Crim. L.F. 313, 324-325. War crimes which amount to grave breaches of the Geneva Conventions committed prior to January 1, 1991 can still be dealt with under the GCA.

<sup>51</sup> Cryer and Mora, "The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?" (2010) 59 I.C.L.Q. 803, 805.

<sup>52</sup> Richardson et al, *Archbold Criminal Pleading Evidence and Practice* (2014), para.16-98.

<sup>53</sup> ICCA s.65A(2).



The two war crimes singled out for mention are “[o]ther serious violations of the laws and customs applicable in international armed conflict”<sup>54</sup> which do not amount to grave breaches of the Geneva Conventions, and “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character”<sup>55</sup> which do not fall under common article 3 of the Geneva Conventions. These specific offences have been singled out in the legislation because of concerns that they may not have amounted to international crimes on January 1, 1991, unlike genocide, which was criminalised by the Genocide Convention 1948, and war crimes which are grave breaches of the Geneva Conventions 1949. There are similar provisions on the liability of accessories and commanders in relation to conduct committed between January 1, 1991 and September 1, 2001.<sup>56</sup>

Evidently, any domestic court dealing with conduct alleged to have been committed before September 1, 2001 is going to have to grapple with the question of whether that conduct was a crime under international law at the time that it was committed. The courts may need to answer this question by reference to the status of the crime in customary international law.<sup>57</sup> “The Act, in these circumstances, essentially requires the courts to directly apply international law”.<sup>58</sup> By virtue of s.50(5) of the ICCA, the courts may take into consideration “relevant international jurisprudence” when determining whether the conduct was criminalised by custom.<sup>59</sup> Nonetheless, the courts are likely to be seriously challenged by having to establish the existence of historical customary international law,<sup>60</sup> particularly given that custom is notoriously unsettled anyway.

### *Substantive law*

Assuming that the English court can establish jurisdiction over the defendant, the substantive legal provisions of the ICCA are also likely to prove challenging, particularly as the Act in keeping with the Rome Statute requires some departure from the ordinary criminal law of England and Wales. As we have seen, the ICCA creates the offences found within the Statute, namely, genocide, crimes against humanity and war crimes. In applying the relevant law, the Act requires the domestic court to consider the ICC’s Elements of Crimes – a document agreed upon by the State Parties which elaborates on the definitions of crimes found within the Statute

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<sup>54</sup> Rome Statute art.8.2(b).

<sup>55</sup> Rome Statute art.8.2(e).

<sup>56</sup> ICCA s.65A(6) and s.65A(8).

<sup>57</sup> Cryer and Mora, “The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 807.

<sup>58</sup> Cryer and Mora, “The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 808.

<sup>59</sup> See Cryer and Mora, “The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 807.

<sup>60</sup> Cryer and Mora, “The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 808 and 813 but cf. E. De Wet, “The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law” (2004) 15 E.J.I.L. 97, 117-118.

and specifies the elements of each offence.<sup>61</sup> The domestic court is also required to “take into account” the jurisprudence of the ICC and has the discretion to consider case law from other international criminal tribunals.<sup>62</sup> This requires English judges and advocates to draw upon a range of sources with which they are unlikely to be familiar.<sup>63</sup> Furthermore, there is no formal system of precedent in international law.<sup>64</sup> In consequence, judgments from international tribunals are not necessarily written with a view to applying the *ratio decidendi* in future cases, unlike domestic appellate decisions.<sup>65</sup> Decisions of international tribunals also often contain dissenting and/or separate judgments which create difficulties in distilling and applying the legal principles. This stands in contrast to the normally unanimous decisions of the Court of Appeal (Criminal Division).<sup>66</sup> The domestic courts must also construe the ICC articles on genocide, crimes against humanity and war crimes “subject to and in accordance with any relevant reservation or declaration made by the United Kingdom when ratifying any treaty or agreement relevant to the interpretation of those articles.”<sup>67</sup> Cryer and Bekou ask what the courts are supposed to do if the ICC jurisprudence conflicts with a UK reservation or declaration.<sup>68</sup> Presumably, the reservation or declaration would prevail, since the courts are obliged to interpret the articles “in accordance with” the reservation or declaration, whereas they are only obliged to “take into account” the ICC’s jurisprudence. However, evidently “British courts would be in an awkward position if they were asked to adjudicate that issue.”<sup>69</sup>

Despite the requirement for domestic courts to take into account the ICC’s jurisprudence, aspects of the relevant substantive law under the ICCA differ materially from that under the Rome Statute. The Statute contains a part on ‘general principles of criminal law’ which establishes the core aspects of criminal liability, such as participation, inchoate liability, immunity, command responsibility, mens rea, defences etc.<sup>70</sup> As Cryer explains, for

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<sup>61</sup> ICCA s.50(2). The Elements of Crimes are incorporated into English law via a schedule to the International Criminal Court Act 2001 (Elements of Crimes) (No.2) Regulations 2004 (SI 2004/3239). See also Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 444.

<sup>62</sup> For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). ICCA s.50(5).

<sup>63</sup> Although cf. Kreicker, “National Prosecution of Genocide from a Comparative Perspective” (2005) 5 I.C.L.R. 313, 322.

<sup>64</sup> Cf. T. Meron, “Judge Thomas Buergenthal and the Development of International Law by International Courts”, in *The Making of International Criminal Justice – A View from the Bench: Selected Speeches* (Oxford: OUP, 2011), p.241.

<sup>65</sup> Cf. P. Taylor (ed), *Taylor on Criminal Appeals* (Oxford: OUP, 2012), para.5.19 et seq.

<sup>66</sup> Under the Senior Courts Act 1981 s.59, judgments of the Court shall be unanimous unless “the judge presiding over the court states that in his opinion the question is one of law on which it is convenient that separate judgments should be pronounced by the members of the court”.

<sup>67</sup> ICCA s.50(4). Note that no reservations can be made to the Rome Statute itself: art.120.

<sup>68</sup> They give the example of “reprisals against the civilian population outside occupied territories” where the UK view differs from that of the ICTY: Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 445. See also Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law” (2003) 1 J.I.C.J. 86, 102.

<sup>69</sup> Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 445.

<sup>70</sup> Rome Statute Pt 3.

proceedings for ICCA offences, “[t]he UK has decided, with two exceptions, not to adopt this [general part], and rely instead on the corresponding principles of domestic law. The two exceptions are intention ... and command responsibility.”<sup>71</sup> In relation to the former, “the first statutory definition of intent in English law”,<sup>72</sup> the ICCA establishes the concept of oblique intention, although through the use of terminology different to that normally employed in the domestic courts.<sup>73</sup> In relation to command responsibility, this was also the first time that such a concept had been incorporated into English law – even military law did not previously include this basis for liability.<sup>74</sup> Section 65(2) of the ICCA establishes the liability of commanders “for offences committed by forces under his effective command and control” or “authority and control” on the basis of negligence, i.e. that the commander knew or ought to have known about the offences and “failed to take all necessary and reasonable measures within his power” to prevent such conduct or to have the conduct investigated and prosecuted. Under the Rome Statute, command responsibility is regarded “as a *sui generis* form of liability”.<sup>75</sup> The ICCA on the other hand has it as a form of secondary participation: “[a] person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence”.<sup>76</sup> Quite how conduct which could amount to ‘turning a blind eye’ to the commission of a crime can amount to aiding, abetting, counselling or procuring the offence is moot<sup>77</sup> but seems inconsistent with existing English law. There is a further anomaly between the ICCA and the Rome Statute in relation to omissions. The ICCA provides that, for the purposes of the criminal offences created therein, “‘act’, except where the context otherwise requires, includes an omission, and references to conduct have a corresponding meaning.”<sup>78</sup> This is a different approach from that of the Rome Statute which is notably silent on the general issue of omissions liability. The Statute explicitly addresses liability for omissions in relation to command responsibility under art.28 but there is no general principle that omissions are, or are not, included in the conduct criminalised by the Statute.<sup>79</sup>

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<sup>71</sup> R. Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 740. See ICCA s.56 and also Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.350.

<sup>72</sup> “The International Criminal Court Act 2001” [2001] Crim. L.R. 767, 768.

<sup>73</sup> ICCA s.66. The ICCA speaks of what the defendant “means” to do which in ordinary English criminal law seems to equate to purpose, and the defendant’s “awareness” which seems to equate to foresight. See “The International Criminal Court Act 2001” [2001] Crim. L.R. 767, 768.

<sup>74</sup> S. Powles and R. May, “Command Responsibility – A New Basis of Criminal Liability in English Law?” [2002] Crim. L.R. 363, 377.

<sup>75</sup> Zahar and Sluiter, *International Criminal Law* (2008), p.511; Rome Statute art.28.

<sup>76</sup> ICCA s.65(4).

<sup>77</sup> Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 741-742, cf. E. van Sliedregt, “Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?” (2009) 12(3) New Crim. L.R. 420.

<sup>78</sup> ICCA s.69.

<sup>79</sup> The omission(!) from the Statute of provisions on omissions liability generally has been criticised: R. Cryer, “General Principles of Liability in International Criminal Law” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.236 et seq. but cf. F Mantovani, “The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer” (2003) 1 J.I.C.J. 26, 31.

Subject to these two exceptions, and the provision on omissions, the ICCA establishes that “the court shall apply the principles of the law of England and Wales.”<sup>80</sup> This presumably means that the ordinary English criminal law principles of causation, participation, inchoate liability, defences, etc., apply to the ICCA offences. This creates two problems. First, the domestic court is required to take into account the judgments of the ICC, yet those judgments may be applying the ‘general part’ of international criminal law which conflicts with domestic law. This creates difficulties for the domestic court in determining whether the matter in issue is an aspect of the ‘general part’ which is not part of domestic law and, accordingly, the weight to be attached to those ICC judgments. Secondly, it creates anomalies between the law of England and Wales and that under the Rome Statute which may, in some cases, act to the detriment of the defendant. For example, it has been argued that English law on secondary participation by way of aiding and abetting an offence is wider than the corresponding articles of the Statute.<sup>81</sup> Furthermore, some of the defences available before the ICC are more generous than their domestic counterparts. Duress may be a defence to murder under the Statute, unlike in English criminal law.<sup>82</sup> Self-defence to a charge of war crimes also seems to be wider under the Statute than the equivalent domestic defence.<sup>83</sup> The Statute additionally recognises that the defence of superior orders will, in some circumstances, defeat liability for war crimes.<sup>84</sup> Such a defence is not known to English law.<sup>85</sup>

How should the domestic courts approach a case where the defendant argues that they would be tried on more favourable terms before the ICC than before the English court? The difference in treatment between defendants tried domestically and internationally is difficult to justify in light of the fact that a case must meet the threshold of “sufficient gravity” before the ICC will deem it admissible.<sup>86</sup> Those accused of the gravest conduct (and tried at the ICC) may therefore be treated more favourably than those whose culpability may, relatively speaking, be at the lower end of the scale (and who are tried domestically). This is particularly anomalous in relation to the defence of superior orders given that it is more likely that those giving the orders will be tried before the ICC, whilst those receiving them will be tried before the domestic

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<sup>80</sup> ICCA s.56(1).

<sup>81</sup> Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 446.

<sup>82</sup> Cf. *Howe* [1987] AC 417 HL and Rome Statute art.31(1)(d). See Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 447; Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.350; Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 740.

<sup>83</sup> Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 740.

<sup>84</sup> Rome Statute art.33. See Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 740 and Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 447.

<sup>85</sup> On whether it should be generally see I.D. Brownlee, “Superior Orders – Time for a New Realism?” [1989] *Crim. L.R.* 396 and S. Wallerstein, “Why English Law Should Not Incorporate the Defence of Superior Orders” [2010] *Crim. L.R.* 109.

<sup>86</sup> Rome Statute art.17(1)(d).

courts, and yet cannot rely on the defence. In light of this, Cryer and Bekou raise the question of whether the Rome Statute defences could be applied to the ICCA offences on the basis that they are a part of customary international law, which is part of the common law.<sup>87</sup> As they explain, in *Jones*, the House of Lords held that customary international law could not be used to create new criminal offences since it was for “Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence”.<sup>88</sup> However, the Appellate Committee did not determine whether customary international law could form the source of new common law defences. Again, the advocates and judges in the English courts may well find themselves straying into unfamiliar, complex and contested legal waters.<sup>89</sup>

### **The War Crimes Act 1991**

Whilst the ICCA provides an elaborate – if complex – scheme for the trial of international crimes domestically, the (misleadingly titled) WCA is rather more limited in scope. The WCA was enacted in response to revelations by the Simon Wiesenthal Foundation that individuals who had committed war crimes under the Nazi regime were residing in the UK.<sup>90</sup> In consequence, the government established an “Inquiry chaired by the former Director of Public Prosecutions, Sir Thomas Hetherington, and the former [Crown Agent]... Mr William Chalmers”.<sup>91</sup> The Inquiry recommended “that legislation be enacted extending the jurisdiction of the domestic courts to try acts of murder and manslaughter committed as war crimes.”<sup>92</sup> From this, the WCA was born.

#### *Jurisdiction*

The WCA allows “proceedings for murder, manslaughter or culpable homicide” which violate “the laws and customs of war” to be brought before the English courts.<sup>93</sup> However, the scope is particularly narrow: it applies only where the offence “was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time

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<sup>87</sup> Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 448-449 and Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 740. Cryer gives the example of reprisal as a possible defence under customary international law to the war crime of intentionally directing attacks against civilians: at 741-742. Cf. Crawford, *Brownlie’s Principles of Public International Law* (2012), pp.67-68.

<sup>88</sup> *Jones* [2006] UKHL 16; [2007] 1 AC 136 at [60].

<sup>89</sup> Cryer and Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 J.I.C.J. 441, 449.

<sup>90</sup> A.T. Richardson, “War Crimes Act 1991” (1992) 55 M.L.R. 73, 75 and fn.14; A.J. Cunningham, “‘To the Uttermost Ends of the Earth’? The War Crimes Act and International Law” (1991) 11 *Legal Studies* 281, 281.

<sup>91</sup> Richardson, “War Crimes Act 1991” (1992) 55 M.L.R. 73, 75. See also E. Steiner, “Prosecuting War Criminals in England and in France” [1991] *Crim. L.R.* 180, 180.

<sup>92</sup> Richardson, “War Crimes Act 1991” (1992) 55 M.L.R. 73, 75 citing *Report of the War Crimes Inquiry* (1989), Cm.744. See also A.J. Cunningham, “‘To the Uttermost Ends of the Earth’? The War Crimes Act and International Law” (1991) 11 *Legal Studies* 281, 281-282.

<sup>93</sup> WCA, s.1.



was part of Germany or under German occupation”.<sup>94</sup> Furthermore, the jurisdiction *ratione personae* is limited to any person who “was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom”.<sup>95</sup> Unlike the ICCA, there are no provisions under the WCA establishing how the court should determine whether a defendant is resident in the UK. The justification for limiting the jurisdiction to residents was the government’s concern that, without a residence requirement, the courts would become overburdened with prosecutions of those who had no connection to these shores.<sup>96</sup> The legislation generated much controversy when the Bill was passed.<sup>97</sup> In particular, “[t]he exercise of jurisdiction based on the nationality of the accused at the time of prosecution has been criticized in legal doctrine as retroactive application of penal laws”<sup>98</sup> and led “several of the United Kingdom’s most distinguished judges” in the House of Lords to refer to the Bill “as a proposal for retrospective penal legislation.”<sup>99</sup> As a matter of international law, this seems inaccurate. Former International Court of Justice Judge Rosalyn Higgins argued that “all the (narrowly defined) offences were manifestly unlawful as war crimes, throughout 1939-1945” and therefore the legislation was not retrospective.<sup>100</sup> Seen from an international legal perspective, the WCA is perhaps better viewed as extending UK jurisdiction *post hoc* over conduct already criminal, rather than creating retrospective criminal offences.<sup>101</sup> Richardson argues that “international law would allow an extension of jurisdiction on universal grounds – such an extension being merely facilitative – to repair a lacunae in our domestic jurisdiction”.<sup>102</sup> Nonetheless, the controversy was such that the House of Lords voted against the Bill, causing the government to resort to the use of the Parliament Act 1949 to pass the legislation without the Lords’ support.<sup>103</sup>

### *Substantive law and procedure*

The WCA covers only homicides which violate the laws and customs of war. However, the Act provides no explanation of what those laws and customs might be, nor where the English

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<sup>94</sup> WCA s.1(1)(a).

<sup>95</sup> WCA s.1(2).

<sup>96</sup> R. O’Keefe, “Universal Jurisdiction – Clarifying the Basic Concept” (2004) 2 J.I.C.J. 735, 758.

<sup>97</sup> Steiner, “Prosecuting War Criminals in England and in France” [1991] Crim. L.R. 180, 180.

<sup>98</sup> Z. Deen-Racsmány, “The Nationality of the Offender and the Jurisdiction of the International Criminal Court” (2001) 95 A.J.I.L. 606, 614. See also Steiner, “Prosecuting War Criminals in England and in France” [1991] Crim. L.R. 180, 183.

<sup>99</sup> R. Higgins, “Time and the Law: International Perspectives on an Old Problem” (1997) 46(3) I.C.L.Q. 501, 509.

<sup>100</sup> Higgins, “Time and the Law: International Perspectives on an Old Problem” (1997) 46(3) I.C.L.Q. 501, 509.

<sup>101</sup> Richardson, “War Crimes Act 1991” (1992) 55 M.L.R. 73, 76-77; Steiner, “Prosecuting War Criminals in England and in France” [1991] Crim. L.R. 180, 186.

<sup>102</sup> Richardson, “War Crimes Act 1991” (1992) 55 M.L.R. 73, 78.

<sup>103</sup> R. Cottrell, “The War Crimes Act and Procedural Protection” [1992] Crim. L.R. 173, 174; Cunningham, “‘To the Uttermost Ends of the Earth’? The War Crimes Act and International Law” (1991) 11 *Legal Studies* 281, 282. See also T. Tayleur, “A Valid Act?” (1995) 145 N.L.J. 1328; S.N. McMurtrie, “The Constitutionality of the War Crimes Act 1991” (1992) 13 *Statute L.R.* 128; G. Ganz, “The War Crimes Act 1991 – Why No Constitutional Crisis?” (1992) 55 M.L.R. 87.

courts should look in order to find out. Arguably, as a matter of international law, the laws and customs of war applicable between 1939 and 1945 would include the Hague Regulations 1899 and 1907: a series of nascent treaties regulating the means and methods of warfare and the treatment of lawful combatants and certain persons *hors de combat* which gave rise to modern international humanitarian law. It would also include the Convention relative to the Treatment of Prisoners of War 1929 (which has since been superseded by the third Geneva Convention 1949).<sup>104</sup> Cunningham implies that even if the homicide was not explicitly prohibited by these treaties the Martens Clause may apply.<sup>105</sup> This clause, designed as a catch-all for any conduct omitted from the Hague Regulations, provides as follows:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience”.<sup>106</sup>

However, it seems doubtful that conduct could be criminalised on the basis that it violates “the principles of international law ... the laws of humanity and the requirements of the public conscience” and yet still comply with the need for reasonable certainty and predictability under art.7 of the ECHR.<sup>107</sup>

As a matter of international law, there are further limitations on the circumstances in which homicides which violate the laws and customs of war can give rise to liability. First, as the law stood during the Second World War, war crimes could not be committed against a state’s own nationals.<sup>108</sup> In consequence, there could be no liability if the defendant and the victim were of the same nationality. This would therefore preclude the prosecution of conduct committed, for

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<sup>104</sup> Cunningham, “‘To the Uttermost Ends of the Earth’? The War Crimes Act and International Law” (1991) 11 *Legal Studies* 281, 284 and 303; Steiner, “Prosecuting War Criminals in England and in France” [1991] *Crim. L.R.* 180, 186. For the laws and customs of war applicable during WW2 generally see K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: OUP, 2011).

<sup>105</sup> Cunningham, “‘To the Uttermost Ends of the Earth’? The War Crimes Act and International Law” (1991) 11 *Legal Studies* 281, 284.

<sup>106</sup> Preamble, Hague Convention (II) 1899. The clause appears in slightly different form in the preamble to Hague Convention (IV) 1907. In 2000, the ICTY held that the Martens Clause was not a principle in its own right, but a tool for interpretation, i.e. where a rule of international humanitarian law is insufficiently precise, that rule can be defined by reference to the Martens Clause: *Kupreskic*, Case no. IT-95-16, Judgment of January 14, 2000, at [525] et seq. See also A. Cassese in “The Martens Clause: Half a Loaf or Simply Pie in the Sky?” (2000) 11 *E.J.I.L.* 187.

<sup>107</sup> See, for example, *Kokkinakis v Greece* (1994) 17 *E.H.R.R.* 397 (App. No.14307/88) at [52] and *X Ltd and Y v UK* App. No.8710/79 (Commission decision) at [9].

<sup>108</sup> Cunningham, “‘To the Uttermost Ends of the Earth’? The War Crimes Act and International Law” (1991) 11 *Legal Studies* 281, 285-286.

example, by Nazi Germans against German Jews as a war crime.<sup>109</sup> Whilst war crimes could be committed against those in occupied territories, a domestic court considering a defendant's liability under the WCA would still have to establish the different citizenship of the victim in those territories.<sup>110</sup> War crimes could then (and can now) also only be committed in the context of an armed conflict – otherwise, a homicide committed outside of an armed conflict is merely the ordinary crime of murder or manslaughter. International lawyers have agonised for decades over what amounts to an armed conflict.<sup>111</sup> Whilst there are clearly many examples of territory where there existed an armed conflict during the period 1939-1945, the position in respect of 'bloodless invasions' is not so straight-forward. A number of territories were occupied by Nazi Germany during the war but saw little fighting. In light of the stakes for the defendant, any court is likely to feel a sense of unease at having to resolve such contested matters.<sup>112</sup> In summary, it appears that the WCA applies only to deaths caused between 1939 and 1945, where the dead was a foreign national (relative to the defendant), where the territory was part of Germany or under German occupation, where the territory was in a state of armed conflict, and where the death violated the laws and customs of war. In that sense, the WCA is drafted in the "narrowest possible terms" in relation to its substantive offences.<sup>113</sup> It seems unsurprising that there has been only one conviction under the Act.

The WCA was also controversial for an unusual procedural feature. Rather than committing the defendant to the Crown Court from the magistrates' court in the usual manner, the transfer of a case under the WCA was to be effected by a notice issued by the Attorney General or the DPP.<sup>114</sup> Such notice was required to state that in the opinion of the Attorney or the DPP

"the evidence of the offence charged (a) would be sufficient for that person to be committed for trial; but (b) reveals a case of such complexity that it is appropriate that the case should without delay be taken over by the Crown Court".<sup>115</sup>

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<sup>109</sup> See generally the discussion in Heller, *The Nuremburg Military Tribunals and the Origins of International Criminal Law* (2011), pp.233-234.

<sup>110</sup> Cunningham, "To the Uttermost Ends of the Earth"? The War Crimes Act and International Law" (1991) 11 *Legal Studies* 281, 286-7.

<sup>111</sup> See generally Heller, *The Nuremburg Military Tribunals and the Origins of International Criminal Law* (2011), pp.204-205; E. Wilmschurst (ed), *International Law and the Classification of Conflicts* (Oxford: OUP, 2012), Ch.2.

<sup>112</sup> Cunningham, "To the Uttermost Ends of the Earth"? The War Crimes Act and International Law" (1991) 11 *Legal Studies* 281, 300-301.

<sup>113</sup> Higgins, "Time and the Law: International Perspectives on an Old Problem" (1997) 46(3) *I.C.L.Q.* 501, 509.

<sup>114</sup> WCA s.1(4) and Sch.1. See also Cottrell, "The War Crimes Act and Procedural Protection" [1992] *Crim. L.R.* 173, 173.

<sup>115</sup> WCA Sch 1 para.1(1).

The jurisdiction of the magistrates' court was therefore limited to consideration of bail.<sup>116</sup> Why cases under the WCA were deemed more complex than many others which make use of the ordinary committal system is unclear. The decision of the Attorney or the DPP to issue the notice "shall not be subject to appeal or liable to be questioned in any court".<sup>117</sup> However, the defendant was permitted to make an application for dismissal by the Crown court before arraignment.<sup>118</sup> The test to be applied was essentially the same as for ordinary applications for dismissal: "that the evidence against the applicant would not be sufficient for a jury properly to convict him".<sup>119</sup> Curiously, given the effort extended to pass the Act, these procedural provisions were repealed without ever having been brought into force.<sup>120</sup>

Evidently, the manner in which the WCA is drafted gives rise to difficulties. Cunningham went so far as to argue that the Act is so badly drafted that it might "be almost impossible to secure a conviction".<sup>121</sup> But, as we know, one conviction was secured, although in that case, the questions of jurisdiction and substantive law were largely avoided given that the defendant argued that any killings were not performed by him.<sup>122</sup> Nonetheless, this prosecution seems likely to be the last: a defendant who, as an adult, committed an offence criminalised by the WCA would now be at least 93 years old. There would undoubtedly be questions about whether such an individual would be fit to stand trial, and an application that the proceedings were an abuse of the process of the court on account of the passage of time would inevitably be made.<sup>123</sup> In light of its limited jurisdiction and use since its passing, one might wonder whether the parliamentary controversy was worthwhile.<sup>124</sup> Indeed, one commentator suggests that the Act is viewed as no more than "a piece of populist legislation designed to facilitate the prosecution of easy geriatric targets".<sup>125</sup> If it was so designed, it does not seem to have been particularly successful in achieving its aim.<sup>126</sup>

## The Geneva Conventions Act 1957

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<sup>116</sup> WCA Sch 1 para.3.

<sup>117</sup> WCA Sch 1 para.1(4).

<sup>118</sup> WCA Sch 1 para.6(1). Richardson, "War Crimes Act 1991" (1992) 55 M.L.R. 73, 81-2, cf. Cottrell, "The War Crimes Act and Procedural Protection" [1992] Crim. L.R. 173, 173-175.

<sup>119</sup> WCA Sch 1 para.6(1), cf. Crime and Disorder Act 1998 Sch.3 para.2.

<sup>120</sup> Criminal Procedure and Investigations Act 1996 s.46(1).

<sup>121</sup> Cunningham, "'To the Uttermost Ends of the Earth'? The War Crimes Act and International Law" (1991) 11 *Legal Studies* 281, 302.

<sup>122</sup> *Sawoniuk* [2000] 2 Cr. App. R. 220, 223; [2000] Crim. L.R. 506.

<sup>123</sup> Such argument was raised in *Sawoniuk* on account of the 56-year delay but was rejected on appeal: *Sawoniuk* [2000] 2 Cr. App. R. 220 at 230; [2000] Crim. L.R. 506. Concerns about delay were raised in Parliament when the WCA was passed: Steiner, "Prosecuting War Criminals in England and in France" [1991] Crim. L.R. 180, 182.

<sup>124</sup> A. Roberts, Review of H. Fox and M.A. Meyer (eds), *Armed Conflict and the New Law, Vol.2: Effecting Compliance* (London: British Institute of International and Comparative Law, 1993), at (1994) 43 I.C.L.Q. 733, 735-736.

<sup>125</sup> R. English, "War Crimes in the Dock" (2001) 151 N.L.J. 1118, 1118.

<sup>126</sup> Various other cases were referred to the CPS but did not proceed to trial: BBC News, "UK War Crimes Trial Could Be First and Last" (April 1, 1999), <http://news.bbc.co.uk/1/hi/uk/309814.stm> [Accessed July 22, 2014].

As we have seen, the WCA criminalised conduct which occurred during the Second World War. In the aftermath of that war, the treaties which are now regarded as the core of international humanitarian law were agreed: the four Geneva Conventions 1949. They cover the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I); the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II); the Treatment of Prisoners of War (III); and the Protection of Civilian Persons in Time of War (IV). Those treaties have now been almost entirely subsumed into customary international law.<sup>127</sup> In order to give effect to the UK's obligations under the Conventions, the GCA was enacted to criminalise in domestic law grave breaches of those Conventions.<sup>128</sup> The Act was later extended to cover grave breaches of the First Protocol (relating to the Protection of Victims of International Armed Conflicts) and the Third Protocol (relating to the Adoption of an Additional Distinctive Emblem) to the Conventions by virtue of the Geneva Conventions (Amendment) Act 1995 and the Geneva Conventions and United Nations Personnel (Protocols) Act 2009 respectively.<sup>129</sup>

### *Jurisdiction*

The Geneva Conventions establish universal jurisdiction in relation to grave breaches i.e. regardless of the nationality of the defendant or the victim, or the locus of the breach.<sup>130</sup> Each of the Conventions provides that:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”<sup>131</sup>

In consequence, these provisions establish a duty “to exercise criminal jurisdiction over persons alleged to have committed, or to have ordered the commission of, grave breaches of the relevant Convention”<sup>132</sup> regardless of whether there is another “accepted ground of

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<sup>127</sup> J-M. Henckaerts and L. Doswald-Beck (International Committee of the Red Cross), *Customary International Humanitarian Law, Vol. I: Rules* (Cambridge: CUP, 2009), p.xxxvi.

<sup>128</sup> D. Machover and K. Maynard, “Prosecuting Alleged Israeli War Criminals in England and Wales” (2006) 18 Denning L.J. 95, 96.

<sup>129</sup> See M.A. Meyer and P. Rowe, “Legislative Comment: The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach” (1996) 45 I.C.L.Q. 476 and M. Meyer and C. Garraway, “Legislative Comment: The Geneva Conventions and United Nations Personnel (Protocols) Act 2009: A Move Away from the Minimalist Approach” (2010) 59 I.C.L.Q. 171.

<sup>130</sup> See R. O’Keefe, “The Grave Breaches Regime and Universal Jurisdiction” (2009) 7 J.I.C.J. 811, 813-814.

<sup>131</sup> Art.49, Geneva Convention I repeated in Conventions II, III and IV at arts 50, 129 and 146 respectively.

<sup>132</sup> O’Keefe, “The Grave Breaches Regime and Universal Jurisdiction” (2009) 7 J.I.C.J. 811, 814.



jurisdiction".<sup>133</sup> In such circumstances "[t]he exercise of universal jurisdiction is ... mandatory".<sup>134</sup> However, O'Keefe argues that the obligation does not include a requirement to bring suspected persons before the courts regardless of the circumstances of the case or the state of the evidence. In fact, it

"is better viewed as an obligation to submit any such cases to the appropriate authorities for the purpose of prosecution, the decision whether or not actually to prosecute being taken by these authorities independently and on the usual grounds."<sup>135</sup>

The normal English criminal procedure, with the decision to prosecute taken on the basis of the evidential sufficiency and public interest tests, should therefore be adopted.

Section 1(1) of the GCA reflects the universal nature of the jurisdiction required by the Geneva Conventions.<sup>136</sup> It provides as follows:

"[a]ny person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions, the first protocol or the third protocol shall be guilty of an offence."<sup>137</sup>

Subsection 1A then goes on to list those articles of the Conventions and Protocols which set out the grave breaches. The jurisdiction under the Act therefore "extends not only to British subjects who have committed offences against the Conventions outside the United Kingdom, but also to such offences committed by one foreign citizen against another"<sup>138</sup> including in conflicts in which the UK plays no part. It applies to grave breaches committed on or after July 31, 1957, although of course for conduct committed on or after September 1, 2001 there are now co-existing offences under the ICCA.<sup>139</sup> Whilst aiding, abetting or procuring the commission by any other person of a grave breach are explicitly criminalised it is notable that counselling the commission of a grave breach is not. It may be that the point is moot given the

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<sup>133</sup> O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction" (2009) 7 J.I.C.J. 811, 814. See also Brady and Mehigan, "Universal Jurisdiction for International Crimes in Irish Law" (2008) XLIII Irish Jurist 59, 63; Machover and Maynard, "Prosecuting Alleged Israeli War Criminals in England and Wales" (2006) 18 Denning L.J. 95, 103 et seq.

<sup>134</sup> M.T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses" (2001) 23 H.R.Q. 940, 947.

<sup>135</sup> O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction" (2009) 7 J.I.C.J. 811, 816. See also Williams, "Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions" (2012) 75 M.L.R. 368, 382-383.

<sup>136</sup> Cf. the discussion in Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, (2005), p.85 et seq.

<sup>137</sup> See also GCA s.1A(4).

<sup>138</sup> J.D.M. Lew, "The Extra-Territorial Criminal Jurisdiction of English Courts" (1978) 27 I.C.L.Q. 168, 209.

<sup>139</sup> See Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003), pp.242-243.

accepted overlap between abetting and counselling.<sup>140</sup> There is also the question of whether it is an offence to conspire or attempt to commit a grave breach. In *Pinochet*, the House of Lords held that since the substantive offence of torture is an extraterritorial offence under English law, English jurisdiction should also extend to conspiracy to torture.<sup>141</sup> As Hirst explains, following this decision “[i]f ... a substantive offence has extraterritorial effect by virtue of a provision that is intended to implement a Convention, a conspiracy (or presumably an attempt or incitement) to commit that offence must have a similar extraterritorial effect.”<sup>142</sup> Since the GCA intends to implement the Geneva Conventions 1949 it appears that an attempt or conspiracy to commit a grave breach would be an offence in English law.

### *Substantive law*

As we have seen, the GCA criminalises conduct which amounts to a grave breach of one of the Geneva Conventions or the First or Third Protocols. In summary, the grave breaches prohibit: various forms of mistreatment of persons *hors de combat*, including civilians and prisoners of war; certain forms of damage or destruction of property; and the perfidious use of the red cross and related emblems. The entire Conventions and the Protocols are scheduled to the Act, rather than just the grave breach provisions. As Meyer and Rowe explain, “[t]he effect of this procedure was not thereby to make all 429 articles of the four Conventions a part of UK law. What judicial authority there is supports the view that the whole of the 1949 Conventions are not part of English law.”<sup>143</sup> This may be so, but the inclusion of the text of all four Conventions implies that the grave breach provisions must be interpreted in light of the rest of the Conventions, although the Act does not specify this per se. For example, as we have seen, international humanitarian law only applies where there exists an armed conflict. Consequently, unlike the crimes of genocide and crimes against humanity, war crimes require a link to an armed conflict to be classified as such.<sup>144</sup> This would mean that the English courts would have to satisfy themselves that any grave breach occurred during an armed conflict, even though s.1 of the GCA does not explicitly establish this. However, reflecting the state of international law in 1957, the GCA did not criminalise conduct occurring during non-international armed conflicts, only international ones.<sup>145</sup> In relation to the Third Protocol, on

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<sup>140</sup> Ormerod, *Smith and Hogan's Criminal Law* (2011), pp.193-195.

<sup>141</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p. Pinochet Ugarte (No. 3)* [1999] 1 A.C. 147 HL at 236-238. This conclusion was reached on the basis of *Somchai Liangsiriprasert v Government of the U.S.A.* [1991] 1 A.C. 225 PC, although Hirst doubts whether it is the correct interpretation of that case: Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003), pp.280-281.

<sup>142</sup> Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003), p.281. See also Ormerod, *Smith and Hogan's Criminal Law* (2011), pp.422-423.

<sup>143</sup> Meyer and Rowe, “Legislative Comment: The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach” (1996) 45 I.C.L.Q. 476, 477, citing *Cheney v Inland Revenue Commissioners* [1968] 1 W.L.R. 242.

<sup>144</sup> Cassese, Gaeta, Baig, Fan, Gosnell and Whiting, *Cassese's International Criminal Law* (2013), p.77.

<sup>145</sup> Violations of international humanitarian law committed during non-international armed conflicts have since been criminalised: *Tadić*, Case no.IT-94-1, Interlocutory Appeal, Decision of October 2, 1995, at [96]-[137]. In

the prohibition of the perfidious use of emblems related to the red cross, the GCA sets out the circumstances in which the use of the emblems would amount to an offence.<sup>146</sup> This includes provisions on corporate liability for such use.<sup>147</sup> As with the ICCA, if the Protocols are subject to reservation or declaration by the UK government, “the protocol shall for the purposes of this Act be construed subject to and in accordance with any reservation or declaration”.<sup>148</sup> Again, this potentially puts the courts in a difficult position, particularly where the reservation or declaration conflicts with other interpretations of the relevant law.

## The Criminal Justice Act 1988

Finally, we consider the discrete crime of torture, which is criminalised by s.134 of the CJA. This provision was also enacted to give effect to the UK’s treaty obligations, namely the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT). The UNCAT provides that “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law.”<sup>149</sup> Furthermore, where a person alleged to have committed torture is present within a state’s jurisdiction, and is not extradited for trial elsewhere, the state is required to

“submit the case to its competent authorities for the purpose of prosecution.... These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”<sup>150</sup>

Again, this would mean that the usual evidential sufficiency and public interest tests should be applied.

### *Jurisdiction*

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England and Wales, such cases could now be prosecuted under the ICCA. See also J. Rikhof, “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity” (2009) 20 *Crim. L.F.* 1, 48.

<sup>146</sup> GCA s.6.

<sup>147</sup> GCA s.6(5).

<sup>148</sup> GCA s.7(3) and Geneva Conventions (Amendment) Act 1995 s.4(7). See Meyer and Rowe, “Legislative Comment: The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach” (1996) 45 *I.C.L.Q.* 476, 482.

<sup>149</sup> UNCAT art.4(1). See also *Furundžija*, Case no. IT-95-17/1, ICTY Trial Chamber, Judgment of December 10, 1998, at [153] et seq; see generally De Wet, “The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law” (2004) 15 *E.J.I.L.* 97 and C. Nielsen, “Prosecution or Bust: The Obligation to Prosecute under the Convention Against Torture” (2013) 72 *Cambridge L.J.* 240.

<sup>150</sup> UNCAT arts 7(1) and (2). See also Nielsen, “Prosecution or Bust: The Obligation to Prosecute under the Convention Against Torture” (2013) 72 *Cambridge L.J.* 240, 242; Williams, “Arresting Developments? Restricting the Enforcement of the UK’s Universal Jurisdiction Provisions” (2012) 75 *M.L.R.* 368, 382-383.

In order to comply with art.5(2) of the UNCAT, the jurisdiction *ratione personae* of the English courts is universal. The provisions therefore apply to torture committed in the UK or abroad.<sup>151</sup> The jurisdiction *ratione temporis* is limited by the date that s.134 came into force: September 29, 1988.<sup>152</sup> Whilst universal jurisdiction is in many ways controversial as a matter of international and domestic law, it at least has the benefit of being simple for the courts to apply.

### *Substantive law*

The offence of torture can be committed in two different ways under the CJA. First, the offence is committed if “[a] public official or person acting in an official capacity ... intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”<sup>153</sup> In the alternative, the offence is committed if

“[a] person ... intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence – (i) of a public official; or (ii) of a person acting in an official capacity; and ... the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.”<sup>154</sup>

It therefore covers public officials and those acting at their behest. In *Zardad*, it was held at first instance that the phrase “person acting in a public capacity” should be given a wide definition, including those “acting for an entity which has acquired de facto effective control over an area of a country and is exercising governmental or quasi-governmental functions in that area.”<sup>155</sup> The CJA further explains that the pain or suffering may be physical or mental and may be caused by an act or an omission.<sup>156</sup> Although this definition broadly reflects the provisions of the UNCAT, the conduct criminalised is not exactly the same. In some respects, the English definition appears potentially wider than the Convention.<sup>157</sup> For example, the Convention definition includes the phrase “any act” without clarifying whether this includes omissions, although commentators have argued that omissions should be included since that

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<sup>151</sup> CJA s.134(1); Machover and Maynard, “Prosecuting Alleged Israeli War Criminals in England and Wales” (2006) 18 Denning L.J. 95, 105.

<sup>152</sup> CJA s.171(6); C. Montgomery, “Criminal Responsibility in the UK for International Crimes Beyond Pinochet” in M. Lattimer and P. Sands (eds), *Justice for Crimes Against Humanity* (Oxford: Hart, 2003), p.271. Lord Millett, dissenting, took the view in *Pinochet* that the jurisdiction to prosecute torture already existed under English law prior to the enactment of s.134: *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p. Pinochet Ugarte (No. 3)* [1999] 1 A.C. 147 HL at 276.

<sup>153</sup> CJA s.134(1).

<sup>154</sup> CJA s.134(2).

<sup>155</sup> UN Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Fifth periodic report of States parties due in 2008, United Kingdom of Great Britain and Northern Ireland*, May 21, 2012, UN CAT/C/GBR/5, p.46.

<sup>156</sup> CJA s.134(3).

<sup>157</sup> Art.1(2), UNCAT provides that States may legislate on a wider basis than that provided for by the Convention.

would be “consistent with the object and purpose of” the Convention.<sup>158</sup> Article 1(1) also requires that the severe pain or suffering must be inflicted

“for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind”.

There is no such purposive requirement in s.134. However, in other ways, English law seems narrower than its international counterpart. Section 134 requires that the conduct be committed “in the performance or purported performance of ... official duties.” This presumably means that a police officer who, in a private capacity, commits a serious assault on an individual would not be committing torture. No such requirement appears in the Convention. Nonetheless, whilst s.134 appears to narrow the definition of torture, it is consistent with the aim of the UNCAT in criminalising conduct committed by agents of the state, on behalf of the state, rather than seeking to regulate the behaviour of private parties.

Section 134 does not state whether the offence of torture can give rise to inchoate or secondary liability. This is particularly notable given that an offence can be committed “at the instigation or with the consent or acquiescence (i) of a public official; or (ii) of a person acting in an official capacity”. However, in such a case, the public official or person acting in an official capacity must also be liable by virtue of the provisions of s.8 of the Accessories and Abettors Act 1861.<sup>159</sup> This is consistent with art.4 of the UNCAT which requires the criminalisation of complicity in torture. Article 4 also requires the criminalisation of attempts to torture. Again, by virtue of the reasoning in *Pinochet*,<sup>160</sup> it appears that an attempt or conspiracy to commit torture would be an offence in English law even if the conduct occurred abroad. Indeed, the sole prosecution under s.134 was apparently for such conspiracy.<sup>161</sup>

Controversially, various defences are created under the Act, namely, where the defendant “had lawful authority, justification or excuse for that conduct.”<sup>162</sup> The Act explains under s.134(5) that:

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<sup>158</sup> UNCAT art.1(1); N. Rodley and M. Pollard, “Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” [2006] E.H.R.L.R. 115, 120.

<sup>159</sup> A view endorsed by the Divisional Court in *R (Equality and Human Rights Commission) v Prime Minister and others* [2011] EWHC 2401 (Admin); [2012] 1 W.L.R. 1389 at [66] – [70].

<sup>160</sup> See above at XX.

<sup>161</sup> UN Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Fifth periodic report of States parties due in 2008, United Kingdom of Great Britain and Northern Ireland*, May 21, 2012, CAT/C/GBR/5, p.45 but cf. p.44.

<sup>162</sup> CJA s.134(4).



“For the purposes of this section “lawful authority, justification or excuse” means —

- (a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;
- (b) in relation to pain or suffering inflicted outside the United Kingdom —
  - (i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;
  - (ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and
  - (iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.”

By contrast, the UNCAT establishes much more limited exclusions. The Convention explains that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.<sup>163</sup> However, it does not allow “exceptional circumstances” such as war or public emergency to be used to justify torture, and prohibits any defence of superior orders.<sup>164</sup> Various commentators on the prohibition against torture describe it as “absolute” or “unqualified” under public international law.<sup>165</sup> How, then, does the English defence of “lawful authority, justification or excuse” comply with the requirements of the UNCAT? As Rodley and Pollard explain,

“[a]t the time of adoption [of the Convention], Italy, the Netherlands, the United Kingdom and the United States took the position that “lawful” [sanctions] indeed meant lawful under international law. Other states subsequently made similar declarations. Thus, national legislation that precludes criminal liability for lawful sanctions under national law, but which is silent regarding international law, would violate UNCAT.”<sup>166</sup>

Yet, this seems to be precisely what the “lawful authority, justification or excuse” provisions allow, since the focus of the provisions is on the status of the conduct in national law (whether

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<sup>163</sup> UNCAT art.1(1).

<sup>164</sup> UNCAT arts 2(2) and 2(3).

<sup>165</sup> For example, M.D. Evans, “Torture” [2006] E.H.R.L.R. 101, 103; Metcalfe, “Torture and the Boundaries of English Law” (2005) 2(2) *Justice Journal* 79, 80.

<sup>166</sup> Rodley and Pollard, “Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” [2006] E.H.R.L.R. 115, 120-121.

in the UK or abroad) rather than international law.<sup>167</sup> This potentially gives rise to the unpalatable argument that where torture is permitted in the law of a foreign state, anyone inflicting it in that state would have a defence under s.134(5).<sup>168</sup> Furthermore, the provisions presumably also allow reliance on ordinary English common law defences, such as defence of others or necessity, for example, in a 'ticking time-bomb' scenario. Indeed, the UK government acknowledges as much since it argues that without the defence the law would criminalise injuries inflicted by the police in the course of self-defence, defending another or preventing a crime in addition to "[m]ental anguish caused by [lawful] imprisonment".<sup>169</sup> The government insists that these provisions are consistent with its international obligations.<sup>170</sup> The UN Committee Against Torture, unsurprisingly, disagrees.<sup>171</sup> In consequence, a domestic court allowing reliance on such defences risks putting the government in breach of its treaty obligations.<sup>172</sup>

## **Difficulties with domestic proceedings for international crimes**

### *Immunity*

The four pieces of legislation creating these international crimes are clearly not without difficulties in light their jurisdictional, substantive and procedural provisions. However, there are also matters inherent in the prosecution and defence of international crimes which make these cases particularly complex. We now consider some of those challenges. First, assuming that the test for jurisdiction under the relevant legislation is met, some cases before the English

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<sup>167</sup> UN Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session*, June 24, 2013, CAT/C/GBR/CO/5, p.4. Cf. Rodley and Pollard, "Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" [2006] E.H.R.L.R. 115, 121-122.

<sup>168</sup> As discussed in *R (Equality and Human Rights Commission) v Prime Minister and others* [2011] EWHC 2401 (Admin); [2012] 1 W.L.R. 1389 at [35].

<sup>169</sup> UN Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Fourth periodic reports of States parties due in 2002, Addendum, United Kingdom of Great Britain and Northern Ireland*, May 27, 2004, CAT/C/67/Add.2, p.15.

<sup>170</sup> UN Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Fifth periodic report of States parties due in 2008, United Kingdom of Great Britain and Northern Ireland*, May 21, 2012, CAT/C/GBR/5, p.10.

<sup>171</sup> UN Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session*, June 24, 2013, CAT/C/GBR/CO/5, p.4; Rodley and Pollard, "Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" [2006] E.H.R.L.R. 115, 121-122.

<sup>172</sup> The UN Committee Against Torture has "objected to provisions" which permit the use of self-defence: Rodley and Pollard, "Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" [2006] E.H.R.L.R. 115, 125-126; cf. P. Gaeta, "May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?" (2004) 2 J.I.C.J. 785.

courts may raise the question of whether the defendant is entitled to immunity from jurisdiction.<sup>173</sup> As Kamminga explains,

“[b]ecause human rights offenses tend by definition to be committed by persons acting on behalf or with the consent or acquiescence of the state, a question which is likely to arise ... is whether a person accused of such offenses is exempt from criminal responsibility because he has acted in an official capacity.”<sup>174</sup>

This is particularly so in respect of the discrete crime of torture which of course by definition covers conduct by public officials or those acting in an official capacity.<sup>175</sup> Thus, where a prosecution is brought in the courts of England and Wales “against a ... foreign state official or agent, it must be established that the state or its official is not immune from the jurisdiction of the forum.”<sup>176</sup> The same may also apply to a *former* state official or agent.

In brief, under international law there are two forms of immunity which may attach to state officials: immunity *ratione materiae* and immunity *ratione personae*. The former is a functional immunity which provides the office holder with immunity in perpetuity for conduct performed on behalf of the state.<sup>177</sup> The latter is a personal immunity which attaches to a more limited group of individuals (heads of state, for example) and covers the individual’s personal as well as official conduct.<sup>178</sup> However, the immunity ceases to be personal, and becomes functional, once the person leaves office (i.e. a former official can only claim immunity for their official conduct).<sup>179</sup> Under the law of England and Wales, immunity for diplomats, heads of state and their associates is governed by the Diplomatic Privileges Act 1964 and the State Immunity Act 1978.<sup>180</sup> Both functional and personal immunity are controversial in relation to their potential to shield individuals from liability for international crimes. Whether such

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<sup>173</sup> Although the ICCA makes provision for immunity, it does so only in relation to the arrest and delivery of individuals to the ICC (s.23), not for trials held domestically. The other Acts make no mention of immunity.

<sup>174</sup> Kamminga, “Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses” (2001) 23 H.R.Q. 940, 955.

<sup>175</sup> The position is different in respect of the war crime of torture or torture as a crime against humanity. See P. Gaeta, “When is the Involvement of State Officials a Requirement for the Crime of Torture?” (2008) 6 J.I.C.J. 183.

<sup>176</sup> D. Akande and S. Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2010) 21 E.J.I.L. 815, 816.

<sup>177</sup> H. Fox and P. Webb, *The Law of State Immunity* (Oxford: OUP, 2013), pp.564-565.

<sup>178</sup> Fox and Webb, *The Law of State Immunity* (2013), p.550.

<sup>179</sup> Fox and Webb, *The Law of State Immunity* (2013), p.550.

<sup>180</sup> Immunities arising in other circumstances may be dealt with under other specific legislation, for example, the Visiting Forces Act 1952, the Commonwealth Secretariat Act 1966, the Consular Relations Act 1968, and the International Organisations Act 1968. See Richardson, *Archbold Criminal Pleading Evidence and Practice* (2014), para.1-147 et seq.

immunities can survive in the face of allegations of international criminal conduct is currently a contested issue.<sup>181</sup>

Fox and Webb have suggested that “there is some State practice on setting aside immunity for acts constituting international crimes, though the scope of the immunity in such circumstances is still uncertain.”<sup>182</sup> The International Court of Justice held in the *Arrest Warrant Case* that serving heads of state are entitled to full immunity (*ratione personae*) from the criminal process of the domestic courts in other states, regardless of whether the conduct in question is private or official.<sup>183</sup> The same apparently applies to serving foreign ministers and heads of government.<sup>184</sup> However, the position in respect of other state officials is unclear<sup>185</sup> and the English courts have reached varying decisions on the matter.<sup>186</sup> Whether a *former* head of state, foreign minister or head of government continues to be entitled to immunity once they have left office is also contested. In *Pinochet (No 3)* it was held that there could be no immunity *ratione materiae* for a former head of state in respect of conduct falling within the jurisdiction of the UNCAT.<sup>187</sup> The reasoning of the Law Lords differed, but some judgments suggested that it was the *jus cogens* status of the prohibition on torture which had the effect of eclipsing the immunity. However, the correctness of this decision might now be questionable in light of the *Arrest Warrant Case*.<sup>188</sup> Furthermore, not all international crimes have the status of *jus cogens* and therefore it is unclear whether the effect of *Pinochet (No 3)* is to reduce functional immunity for other international crimes.<sup>189</sup> An argument can be made that such immunity should cease. The recent development of international criminal law has arguably superseded the older rules on immunity and “[d]evelopments in international law now mean that the

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<sup>181</sup> Fox and Webb, *The Law of State Immunity* (2013), p.537. See generally J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford: OUP, 2014); Akande and Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2010) 21 E.J.I.L. 815; A. Orakhelashvili, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah” (2011) 22 E.J.I.L. 849; Akande and Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili” (2011) 22 E.J.I.L. 857.

<sup>182</sup> Fox and Webb, *The Law of State Immunity* (2013), p.550. See also p.551 et seq. and Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 737.

<sup>183</sup> *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*, ICJ judgment of February 14, 2002, at [51]-[54].

<sup>184</sup> *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*, ICJ judgment of February 14, 2002, at [54] and [61]; See also Fox and Webb, *The Law of State Immunity* (2013), p.552 et seq.

<sup>185</sup> Fox and Webb, *The Law of State Immunity* (2013), p.558 et seq.

<sup>186</sup> Cf. *Re Mofaz*, February 12, 2004, Bow Street Magistrates Court, (2005) 128 I.L.R. 709; *Re Bo Xilai*, November 8, 2005, Bow Street Magistrates Court, (2005) 128 I.L.R. 713; and *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] EWHC 2029 (Admin), at [55]-[62], cited in Fox and Webb, *The Law of State Immunity* (2013), p.560. See also the judgments cited in C. Warbrick, “Immunity and International Crimes in English Law” (2004) 53 I.C.L.Q. 769, 770-773.

<sup>187</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p. Pinochet Ugarte (No. 3)* [1999] 1 A.C. 147 HL. See also *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* [2006] UKHL 26; [2007] 1 AC 270, 286 and Bindman, “Bringing Tyrants to Book” (2012) 162 N.L.J. 44, 45.

<sup>188</sup> Fox and Webb, *The Law of State Immunity* (2013), pp.552-553.

<sup>189</sup> Fox and Webb, *The Law of State Immunity* (2013), pp.566-567. See also Montgomery, “Criminal Responsibility in the UK for International Crimes Beyond Pinochet” in *Justice for Crimes Against Humanity* (2003), pp.276-277.

reasons for which immunity *ratione materiae* are conferred simply do not apply to prosecutions for international crimes.”<sup>190</sup> The matter, however, is still controversial, and is likely to prove challenging for the domestic courts to resolve.

### *Amnesties*

A related question, albeit not one which technically amounts to a challenge to the court’s jurisdiction, is the position of those individuals who have been granted an amnesty by the state in which the crime occurred. It is not clear whether such an amnesty would have to be respected within the UK jurisdiction.<sup>191</sup> The European Court of Human Rights has held that the grant of amnesty for an offence of torture did not preclude the prosecution of that person under universal jurisdiction in another state. The prohibition on retrospective punishment under art.7 had not been violated when a court in France refused to recognise an amnesty granted in Mauritania.<sup>192</sup> Nonetheless, as a matter of common law, a defendant in England might argue that the pursuit of a prosecution where an amnesty has been granted amounts to an abuse of the process of the court on the basis that it is comparable to a promise not to prosecute.<sup>193</sup> In some cases, particularly where the amnesty has been granted as part of a sham designed to secure impunity for certain individuals, the court may be justified in refusing to uphold it. Such an amnesty is likely to be prohibited by international law anyway.<sup>194</sup> However, genuine amnesties can play a role in conflict resolution and achieving post-conflict stability, as demonstrated by the example of South Africa granting conditional amnesties through its Truth and Reconciliation Commission.<sup>195</sup> To resolve this issue, an English court is likely to require expert evidence about the amnesty under the law of the state in which it was granted. Evidently, this would bring accompanying complexities, including increased cost and court time.

### *Evidence and procedure*

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<sup>190</sup> Akande and Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2010) 21 E.J.I.L. 815, 840; Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 737.

<sup>191</sup> Montgomery, “Criminal Responsibility in the UK for International Crimes Beyond Pinochet” in *Justice for Crimes Against Humanity* (2003), p.281; Kamminga, “Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses” (2001) 23 H.R.Q. 940, 956; Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2004), p.93 et seq.

<sup>192</sup> *Ould Dah v France* (2013) 56 E.H.R.R. SE17 (App. No.13113/03) (admissibility decision).

<sup>193</sup> See Richardson, *Archbold Criminal Pleading Evidence and Practice* (2014), paras 4-93 to 4-94.

<sup>194</sup> Kamminga, “Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses” (2001) 23 H.R.Q. 940, 956 et seq.

<sup>195</sup> See generally A. du Bois-Pedain, “Accountability through Conditional Amnesty: The Case of South Africa” in F. Lessa and L.A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: CUP, 2012), Ch.9. Kamminga suggests that “[a] bona fide amnesty could be taken into account by a prosecutor when exercising his or her discretion whether or not to bring a prosecution”: “Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses” (2001) 23 H.R.Q. 940, 958.



Of course, regardless of the relevant law, proceedings can only be brought for an international crime if the prosecution is able to obtain the necessary evidence to establish a realistic prospect of conviction (and the public interest test is satisfied).<sup>196</sup> The defence must also be able to obtain evidence which supports its case or undermines that of the prosecution in order that the defendant can have a fair trial. The challenge of obtaining evidence in cases where the conduct occurred abroad, and therefore much (or perhaps all) of the documentary evidence and witnesses are overseas, is formidable, and expensive.<sup>197</sup> Furthermore, the evidence collated must be legally admissible, which is rendered more difficult in circumstances where evidence is obtained via third parties in a foreign state where the alleged crime was committed.<sup>198</sup> The authenticity and reliability of such evidence may also be questionable.<sup>199</sup> In *Zardad*, the investigating officer explained the challenge of bringing such proceedings:

“We had to find witnesses in remote parts of Afghanistan and give them the confidence to come forward to give evidence in a British court. ... It was a huge challenge, in the prevailing circumstances in Afghanistan, to investigate and find evidence to the standard demanded by the British courts.”<sup>200</sup>

The existence of mutual legal assistance arrangements may help to obtain evidence in some cases. However, those states that have borne witness to international crimes on their territory may be unwilling and unable to provide evidence in support of a prosecution in England and Wales. This is particularly so where the state is unwilling itself to prosecute because the crimes were “perpetrated by state officials with the acquiescence, tolerance, or support of” those in

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<sup>196</sup> At present, investigation of ICCA offences falls under the Metropolitan Police Counter-Terrorism Command: CPS, “War Crimes/Crimes against Humanity Referral Guidelines”, [https://www.cps.gov.uk/publications/agencies/war\\_crimes.html](https://www.cps.gov.uk/publications/agencies/war_crimes.html) [Accessed July 22, 2014]. There used to be a dedicated War Crimes Unit for such investigations, but this “was disbanded in 1999”: Machover and Maynard, “Prosecuting Alleged Israeli War Criminals in England and Wales” (2006) 18 Denning L.J. 95, fn 5; Cryer and Mora, “The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?” (2010) 59 I.C.L.Q. 803, 813.

<sup>197</sup> Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), pp.24-25; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: OUP, 2008), p.45; H. van der Wilt, “Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court” (2008) 8 I.C.L.R. 229, 231; L. van den Herik, “The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia” (2009) 9 I.C.L.R. 211, 215 et seq.; Bindman, “Bringing Tyrants to Book” (2012) 162 N.L.J. 44, 45; Akande and Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2010) 21 E.J.I.L. 815, 816; Turns, “Aspects of National Implementation of the Rome Statute: the United Kingdom and Selected Other States” in *The Permanent International Criminal Court: Legal and Policy Issues* (2004), p.348. See UN Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention, Fifth periodic report of States parties due in 2008, United Kingdom of Great Britain and Northern Ireland*, May 21, 2012, CAT/C/GBR/5, pp.44-45.

<sup>198</sup> For example, in *Sawoniuk* [2000] 2 Cr. App. R. 220; [2000] Crim. L.R. 506, there was significant dispute at trial about the use of documentary material which could not be authenticated because the maker of the documents could not be traced some fifty years after they had apparently been created, at 242 et seq.

<sup>199</sup> As argued in *Sawoniuk* [2000] 2 Cr. App. R. 220 at 231 et seq; [2000] Crim. L.R. 506.

<sup>200</sup> Quoted in Machover and Maynard, “Prosecuting Alleged Israeli War Criminals in England and Wales” (2006) 18 Denning L.J. 95, 113-114.

power.<sup>201</sup> Even if willing, some states may be less able to prosecute themselves or provide evidence to other states, for example, where the conflict in which the crimes were committed has led to the destruction of the legal infrastructure.<sup>202</sup> Whilst under art.9 of the UNCAT, states have a duty to provide assistance to each other when investigating cases of torture, in relation to other offences cooperation between the state with the evidence and the UK may be hampered by the lack of an international agreement requiring such assistance.<sup>203</sup> Recently, a number of states called for “proposals to address the issue of strengthening and enhancing the international legal framework for mutual legal assistance and extradition in the fight against the crime of genocide, crimes against humanity and war crimes” under the auspices of the UN Commission on Crime Prevention and Criminal Justice.<sup>204</sup> Whether this comes to fruition remains to be seen.

Furthermore, the ability of the defence to obtain evidence may be seriously diminished given their more limited resources for investigating abroad. When the War Crimes Bill was debated in parliament, concerns were raised about the burden imposed on the defence of gathering evidence abroad and whether the costs of this would be covered by legal aid.<sup>205</sup> In *Sawoniuk*, “[p]otential witnesses were always interviewed in the presence of officials of the local state.”<sup>206</sup> In consequence, the defence argued that “potential defence witnesses were intimidated by local officials, who were keen to secure conviction.”<sup>207</sup> As Hirsh explains “[t]his intermeshing of different jurisdictions is likely to be a common source of problems in these cases. The

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<sup>201</sup> Cassese, Gaeta, Baig, Fan, Gosnell and Whiting, *Cassese's International Criminal Law* (2013), p.271; Kamminga, “Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses” (2001) 23 H.R.Q. 940, 959; A. Cassese, “The Role of Internationalized Courts and Tribunals in the Fight against International Criminality” in C.P.R. Romano, A. Nollkaemper and J.K. Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: OUP, 2004), p.4.

<sup>202</sup> A. Cassese, “The Role of Internationalized Courts and Tribunals in the Fight against International Criminality” in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: OUP, 2004), p.5.

<sup>203</sup> Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), p.25. Whilst the Rome Statute makes provision for cooperation with investigations and prosecutions, this applies only to State Parties vis-à-vis their relations with the ICC, not between the State Parties themselves: arts 86 – 102. GA Res 3074 (XXVIII) *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity* (1973) calls on states to assist each other in bringing such persons to trial, but as a UN General Assembly resolution it is non-binding.

<sup>204</sup> UN Economic and Social Council Commission on Crime Prevention and Criminal Justice, twenty-second session, *Draft Resolution by Argentina, Austria, Belgium, Chile, Hungary, Luxembourg, Netherlands and Slovenia on International Cooperation in the Fight against the Crime of Genocide, Crimes against Humanity and War Crimes*, March 28, 2013, E/CN.15/2013/L.5, para.4. See also S. Pfeiffer, “International Cooperation for the Domestic Prosecution of International Crimes” (August 21, 2013), *Opinio Juris* blog, <http://opiniojuris.org/2013/08/21/emerging-voices-international-cooperation-for-the-domestic-prosecution-of-international-crimes/> [Accessed July 22, 2014].

<sup>205</sup> Richardson, “War Crimes Act 1991” (1992) 55 M.L.R. 73, 82.

<sup>206</sup> Hirsh, “The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination” (2001) 10 *Social & Legal Studies* 529, 534.

<sup>207</sup> Hirsh, “The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination” (2001) 10 *Social & Legal Studies* 529, 534.

jurisdiction which is carrying out the investigation does not have state power.”<sup>208</sup> Furthermore, bias may be a problem where prosecution and defence witnesses reflect the opposing sides in any conflict.<sup>209</sup> Indeed, in a context such as the Yugoslav conflict,

“[w]hen it is borne in mind that most (if not all) witness statements tendered by the prosecutor will be made by individuals of a different ethnic group, against whom serious crimes are alleged to have been committed by the defendant, any attempt to assess their credibility in these circumstances will either be very difficult, or impossible.”<sup>210</sup>

Where witnesses for the prosecution or the defence are identified, they may need to give evidence abroad via video-link, which can be problematic in respect of technology and time difference. In addition, it is highly likely that much, perhaps all, of the evidence will be in a foreign language which poses burdens on the parties and the court in respect of translation.<sup>211</sup> Whilst the use of video-links for witnesses abroad and interpreters is obviously well-known territory for the English courts, there are additional evidential challenges when communicating with countries and witnesses emerging from conflict.<sup>212</sup> Witness protection is a serious concern. The ICCA makes the usual provisions for the treatment of witnesses – it establishes the anonymity of complainants and the prohibition on cross-examination by the defendant in sexual offences cases; the application of special measures in court for vulnerable witnesses, and so forth.<sup>213</sup> However, the GCA and CJA make no such provision, and the usual arrangements for sexual offences would not apply to prosecutions under these Acts, even if the alleged conduct were sexual.<sup>214</sup> Yet, in many societies where international crimes have occurred, there are likely to be concerns about repercussions for witnesses based in that community who give evidence before the courts of England and Wales (particularly if the local authorities are unwilling to bring such proceedings themselves). This may be equally applicable to the family members of witnesses. The UK government is clearly not in a position to

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<sup>208</sup> Hirsh, “The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination” (2001) 10 *Social & Legal Studies* 529, 534.

<sup>209</sup> I. Bryan and P. Rowe, “The Role of Evidence in War Crimes Trials: the Common Law and the Yugoslav Tribunal” (1999) 2 *Y.I.H.L.* 307, 318.

<sup>210</sup> Bryan and Rowe, “The Role of Evidence in War Crimes Trials: the Common Law and the Yugoslav Tribunal” (1999) 2 *Y.I.H.L.* 307, 320.

<sup>211</sup> Kamminga, “Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses” (2001) 23 *H.R.Q.* 940, 959. The challenges of translation, particularly where a dialect is involved, are well-illustrated by T.A. Doherty in “Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials” (2013) 26 *Leiden J.I.L.* 937 where the illuminating example is given that “the word ‘mate’ in Australia is a friend, in English a friend or fellow worker, but in Sierra Leonean Krio it is a co-wife of the same husband” at fn 17.

<sup>212</sup> Receiving witness evidence in such circumstances has been equally challenging for the international criminal tribunals: see N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: CUP, 2010).

<sup>213</sup> ICCA s.57.

<sup>214</sup> The provisions of the Youth Justice and Criminal Evidence Act 1999 s.22A apply to the sexual offences listed in s.62 of that Act, which does not mention any offences under the GCA, CJA or ICCA.

guarantee the safety of those outside of its jurisdiction. It is also unclear what legal obligations the government would have in such a situation given that the duty to protect an individual's rights under the ECHR arises by virtue of them falling within UK jurisdiction under art.1. This again makes obtaining evidence for the trial more difficult than usual.

By their nature, many international crimes involve conduct which takes place on a significant scale. Indeed, this is a prerequisite for crimes against humanity since the conduct must be "part of a widespread or systematic attack directed against any civilian population".<sup>215</sup> Whilst genocide may in theory be committed by virtue of a single act,<sup>216</sup> it is unlikely in practice to occur in this manner. War crimes and torture may be more discrete in nature, but it is nonetheless apparent that they often occur in large numbers, particularly during an armed conflict.<sup>217</sup> In practice, this means that the volume of evidence and unused material in any case involving international crimes is likely to be significant – leading to lengthy investigations, preparations, pre-trial arguments and trials, and a considerable burden of disclosure falling on the prosecution and defence.

Beyond the sheer volume of evidence, the parties, judge and jury may also have to understand "a different geographical, social and cultural context"<sup>218</sup> with which hitherto they have been unfamiliar. For example, the judge and jury may need to understand the organisation of a foreign military if the prosecution is seeking a conviction of non-UK service personnel on the basis of command responsibility.<sup>219</sup> It also seems likely that the court would need instruction in the context within which any offences took place, which more often than not will be an armed conflict.<sup>220</sup> This would require the court to obtain at least a basic understanding of the circumstances in which this conflict arose, who was fighting whom, and why. Such matters are, by their very nature, likely to be complicated and disputed and therefore expert evidence may be necessary for "portraying and explaining cultural and social particularities, which can help the domestic judge [and jury] to come to a pertinent evaluation of the foreign evidence."<sup>221</sup> However, even if such expert evidence is available, the court "may have difficulties in properly

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<sup>215</sup> Rome Statute art.7(1) and ICCA Sch.8 art.7(1).

<sup>216</sup> See W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: CUP, 2009), p.276.

<sup>217</sup> To be admissible before the ICC, a case would need to meet the gravity threshold, and it is unlikely that a single war crime would do so. See Rome Statute art.17(1)(d).

<sup>218</sup> van den Herik, "The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia" (2009) 9 I.C.L.R. 211, 215; Doherty, "Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials" (2013) 26 Leiden J.I.L. 937, 938-939.

<sup>219</sup> Obviously, if the trial is of UK service personnel then the Judge Advocate and board are likely to have knowledge of matters related to military hierarchy and the conflict in which the force was participating.

<sup>220</sup> *Sawoniuk* [2000] 2 Cr. App. R. 220 at 234-235; [2000] Crim. L.R. 506. See also Bryan and Rowe, "The Role of Evidence in War Crimes Trials: the Common Law and the Yugoslav Tribunal" (1999) 2 Y.I.H.L. 307, 313-314.

<sup>221</sup> van den Herik, "The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia" (2009) 9 I.C.L.R. 211, 221.

assessing culturally influenced patterns of conduct which are foreign to them.”<sup>222</sup> The court may benefit from a visit to the locus of the crime, which of course will be more complex than usual where this is abroad. In *Sawoniuk*, the case concerned conduct committed in Belorussia during the Nazi occupation and the jury undertook a site visit.<sup>223</sup> Such visits impose significant burdens on the jury in respect of travelling abroad. There is also of course the additional expense for the legal system of transport and accommodation which is unlikely to be granted in light of current budget constraints. Indeed, such visits may be impossible where the security situation in the country in question is unstable – not an unlikely occurrence if widespread international crimes have occurred there in recent times. In any event, there is a risk that the judge and jury will be insufficiently culturally attuned so as to correctly understand and analyse the evidence.

An additional complication in relation to obtaining evidence, particular to the ICCA, is the Act’s provision in relation to the interview of suspects. Under s.28, where the UK government has received “a request from the ICC for assistance in questioning a person”, that person may only be questioned if they consent and are informed of their rights under the Rome Statute.<sup>224</sup> Those rights reflect many of the provisions of the PACE Codes of Practice, including the right to legal advice, to an interpreter and to an explanation of the reasons for which the person is under suspicion. However, there is one notable anomaly.<sup>225</sup> The Rome Statute provides that the person must be informed that they have the right “[t]o remain silent, without such silence being a consideration in the determination of guilt or innocence”.<sup>226</sup> This absolute right to silence contrasts with the adverse inference which may be drawn in domestic proceedings for an ICCA offence because of a failure to answer questions in interview.<sup>227</sup> Section 28 again invokes a double-standard to the disadvantage of the accused facing trial in England and Wales. Furthermore, when the suspect is interviewed it may not be clear whether they are likely to face proceedings before the English courts or the ICC. The fact that they are being questioned on behalf of the ICC does not preclude domestic prosecution instead.

## Conclusion

As we have seen, the complexity of the relevant legislation in relation to residence or nationality, the issue of immunity and amnesties, the applicable law and the nature of the

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<sup>222</sup> van der Wilt, “Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court” (2008) 8 I.C.L.R. 229, 231. Similar challenges have arisen before the international criminal tribunals: see N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: CUP, 2010).

<sup>223</sup> *Sawoniuk* [2000] 2 Cr. App. R. 220; [2000] Crim. L.R. 506. See D. Ormerod, “A Prejudicial View?” [2000] Crim. L.R. 452.

<sup>224</sup> ICCA s.28. The relevant rights are found in art.55 of the Statute, which is contained in ICCA Sch.3.

<sup>225</sup> Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 735.

<sup>226</sup> Rome Statute art.55(2)(b).

<sup>227</sup> Pursuant to Criminal Justice and Public Order Act 1994 s.34, s.36 and s.37. Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 I.C.L.Q. 733, 735.



evidence, makes cases involving international crimes potentially time-consuming and burdensome for courts and the parties. Such cases may require extensive preparatory hearings for contested matters of law to be addressed and directions given,<sup>228</sup> lengthy trials, and appeals against rulings and convictions. All of these matters pose obvious challenges not only to the parties and courts, but to the “quality” of justice which may be obtained in cases involving charges of international crimes.<sup>229</sup> As Williams explains, “[a]t the very least, this makes such trials more complicated, lengthy and expensive than ‘ordinary’ criminal trials and may raise novel and difficult questions of law for the national court.”<sup>230</sup> This is even more problematic given the vanishing criminal justice budget.<sup>231</sup> Lengthy proceedings also have obvious detrimental consequences for defendants, particularly those in custody or subject to bail conditions. England and Wales’ “impressive array of legislation” may have “considerable symbolic importance in so far as it demonstrates the United Kingdom’s abhorrence of such crimes, and [its] ... discharge [of] its obligations under public international law; but it has seen minimal use in practice.”<sup>232</sup> As this article has demonstrated, aside from practical considerations, the manner in which these international crimes have been incorporated into domestic law has not made that use any easier. As the ICC now picks up speed from its slow start a decade or so ago, domestic courts, parties, and legal commentators may increasingly have to wrestle with these legal and evidential difficulties.

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<sup>228</sup> Under Criminal Procedure and Investigations Act 1996 Pt 3. See also Williams, *Hybrid and Internationalised Criminal Tribunals* (2012), p.24.

<sup>229</sup> van der Wilt, “Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court” (2008) 8 I.C.L.R. 229, 231.

<sup>230</sup> Williams, *Hybrid and Internationalised Criminal Tribunals* (2012), p.25. Although the domestic trial of international crimes may still be cheaper than cases brought before an international tribunal. See C. Ryngaert, “Universal Jurisdiction in an ICC Era” (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 46, 79.

<sup>231</sup> See, for example, the statistics on the cost of investigating and bringing proceedings under the WCA in the 1990s in Machover and Maynard, “Prosecuting Alleged Israeli War Criminals in England and Wales” (2006) 18 *Denning L.J.* 95, 113.

<sup>232</sup> Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003), p.237.