SCOTLAND[1]

I. INTRODUCTION

Scotland, like the rest of the United Kingdom, does not have a written Constitution and is based on the common law. However, the Scottish legal system is entirely distinct from the rest of the United Kingdom, though similar principles apply throughout. The 1707 Act of Union created a customs union similar in purpose to that of the European Union. Consequently, in a number of fields, the laws of countries forming the United Kingdom are harmonised, whereas in other fields, Scottish law is distinct from the rest of the UK.

The separation between the Scottish legal system from other countries of the United Kingdom has been further enhanced by the devolution process, implemented through the Scotland Act 1998. This Act established a new parliament in Scotland that was given the power to legislate on certain matters. Essentially, the Scottish government (usually called the Scottish Executive) now has the power to introduce new legislation to the Scottish Parliament on any matter except those reserved in the Scotland Act 1998 for the Westminster Parliament. Principally these matters are any kind of foreign affairs and laws that affect international obligations and relations with foreign states. This body of law is still within the domain of the Westminster Parliament and do not usually require the enactment of separate Scottish laws. Even though Westminster has retained overall sovereignty, the Scottish Executive is responsible for ensuring that it complies with the UK's international obligations in all areas devolved to them. As a result of the devolved arrangements, the internal procedures are not the same *per se* as in England and Wales or other countries of the United Kingdom. For example Scotland's criminal and civil procedures are different along with certain elements of the substantive law. Furthermore, historical Scottish writers such as *Hume* are recognised sources of law in court and although English law is persuasive in Scottish courts, it is not absolutely binding on them.

1. Incorporation and status of international law in domestic law

The United Kingdom has ratified:

- European Convention on Human Rights, 1950 (ratified 8 March 1951)
- Geneva Conventions I to IV (ratified on 23 September 1957) and Additional Protocols I and II (ratified on 28 January 1998)
- International Covenant on Civil and Political Rights, 1966 (ratified 20 May 1976)
- International Convention on the Elimination of all Forms of Racial Discrimination, 1966 (ratified 7 March 1969)
- European Convention for the Prevention of Torture (ratified 24 June 1988)

[1] REDRESS undertook a study on the right to reparation for torture in England and Wales in 2000 entitled: ***Challenging Impunity for Torture : A manual for bringing criminal and civil proceedings in England and Wales for torture committed abroad***. The Report is available on REDRESS' website: http://www.redress.org/publications/CHA.PDF.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (ratified 8 December 1988)
  Convention on the Rights of the Child, 1989 (ratified 16 December 1991)
- Rome Statute of the International Criminal Court, 1998 (ratified 4 October 2001)

Generally, the United Kingdom requires implementing legislation for international conventions to be incorporated into domestic law. This applies to Scotland as well. The International Committee of the Red Cross Advisory Service has summed up this system in its General Comment on the United Kingdom of Great Britain and Northern Ireland:

> "Any treaty ratified by the United Kingdom government must be implemented by means of domestic legislation where any change to the law is required or where the rights and obligations of individuals are concerned. For this reason, it is frequently the case that the enactment of domestic legislation by Parliament is a prerequisite for ratification of a treaty by the government. The most common practice is the adoption of primary legislation to specifically set out those parts of the treaty to be implemented through domestic law. Alternatively, a reference may be made to particular articles of the treaty, which are then added as a schedule to the legislation. In some cases the whole of the treaty may be added as a schedule...Where there is no direct implementation of a treaty (or part of a treaty) through domestic legislation, the courts follow the principle of construing national law, in so far as they are able to do so, in the light of the United Kingdom's international obligations". [2]

The International Committee of the Red Cross specifically commented in relation to Scotland that: "Since 1998, legislation to give effect to treaties in domestic law (called "implementing legislation") may also be passed by the Scottish Parliament. The first example is the International Criminal Court (Scotland) Act 2001, which must be considered jointly with the United Kingdom's International Criminal Court Act 2001". [3]

Specific legislation has been passed to incorporate the following treaties in relation to torture into domestic law;

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 was incorporated into UK domestic law by the Criminal Justice Act 1988, s.134
- European Convention on Human Rights, 1950 was incorporated into UK domestic law by the Human Rights Act 1998
- Rome Statute of the International Criminal Court, 1998 was incorporated into UK domestic law by the International Criminal Court Act 2001 and the International Criminal Court (Scotland) Act 2001
- Certain provisions of the Geneva Conventions I to IV and Additional Protocols I and II were incorporated into UK domestic law by Geneva Conventions Act 1957 (as amended by the Geneva Conventions (Amendment) Act 1995 which added each of the 1977 Additional Protocols as schedules).

[2] ICRC Advisory service: database providing documentation concerning implementation of international humanitarian law at the national level (available at www.icrc.org).

[3] Ibid.

However, not all of the above domestic legislation directly incorporates the whole of the international convention. For example, section 134 of the Criminal Justice Act only reflects some of the provisions set out in the UN Convention against Torture.

Some treaties relating to torture have no specific implementing legislation such as the International Covenant on Civil and Political Rights, 1966 and the European Convention for the Prevention of Torture 1987. Even though the findings of the treaty enforcement mechanisms are not directly enforceable by the Courts, they can be used as evidence in court and are of persuasive value.[4] For example; the findings of the European Committee for the Prevention of Torture were accepted by the Court in the *Napier* case.[5]

Even though the UK's international treaty obligations require an act of specific implementation before being legally enforceable at the domestic level, customary international law (once identified) may, however, be raised before domestic courts in the UK without any further action being required by the legislative hence:

> "the application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from rules of customary international law will be recognized and given effect by English courts without the need for any specific act adopting those rules into English law".[6]

The automatic intrusion of customary international law into Scots Law was explicitly recognised by the Appeal Court of the High Court of Justiciary (the highest court for criminal cases in Scotland) in the Greenock case which held that "[a] rule of customary international law is a rule of Scots law".[7] The parties in the case agreed that the customary law position in Scotland does, or at least should, replicate that of the English courts as laid down in the *Trendtex* case.[8] In that case, the Court of Appeal acknowledged that international law changes and as a consequence, the English Courts have a responsibility to apply such changes without being constrained by English Law precedent:

> "the rules of international law, as existing from time to time, do form part of our English law. . . If this court today is satisfied that the rule of international law on a subject has changed . . .it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it".[9]

[4] Public Law, Autumn 2002.

[5] Napier v. The Scottish Ministers (26 June 2001, unreported). This case concerned an inmate in 'C' Hall at Barlinnie prison and found that the conditions were indeed inhuman and degrading.

[6] Oppenheim's International Law, 9 th edition.

[7] Lord Advocate's Reference No. 1 of 2001, 2001 SLT at 512. See commentary by Stephen C. Neff in "International Law and Nuclear Weapons in Scottish Courts" ICLQ vol 51 [2002] pp 171-176.

[8] Trendtex Trading Corporation v. Central Bank of Nigeria [1977] QB 529; [1977] 2 WLR 356.

[9] *Ibid,* per Lord Denning.

Although the prohibition against Torture has now been recognized as having customary international law status,[10] the impact of this appears to be in dispute by the English courts. For example, the House of Lords in the first Pinochet case held (by a 3 to 2 majority) that Senator Pinochet was unable to claim immunity from prosecution because of the status of the prohibition against Torture as binding customary international law.[11] Whereas in the subsequent rehearing, the House of Lords held that the loss of immunity was triggered by the coming into force of the Convention against Torture (via the Criminal Justice Act) and not by the customary international law status of the crime.[12] The latter decision of the House of Lords has cast doubt on whether it is possible to pursue a prosecution for torture, in the English courts, on a customary law basis, prior to the coming into force of the Convention against Torture in 1988.[13] It remains to be seen, however, whether the Scottish courts would follow the English courts approach in Pinochet (No.3).

2. Practice of Torture: Context, Occurrence, Responses

2.1. The practice of torture

The practice of torture or ill-treatment in Scotland can be characterised as rare, even though Scottish history shows that it has experienced periods of torture and ill-treatment in its past.[14] Even though there are reports of police brutality in England and in Wales, no similar allegations have been made against the Scottish police forces.[15]

2.2. Domestic Responses

In October 2000, the Human Rights Act 1998 came into force in the UK, incorporating some of the provisions of the European Convention of Human Rights. For the individual, the direct consequences of the Human Rights Act are of major importance; for the first time, an individual can rely on the rights set out in the Act before any domestic court or tribunal. In the Government's White paper, "Rights brought Home: The Human Rights Bill", it stated:

> "We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to

[10] For examples of scholarly opinion and UN General Assembly Resolutions see R. Garnett, "The Defence of State Immunity for Acts of Torture" [1997] Australian YBIL, pp 101-2.

[11] R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 1) 1998 3 W.L.R.1456. The House of Lords held that Torture had been designated a crime by customary international law and the commission of a crime could not be within the official functions of a head of state.

[12] R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3) 1999 2 W.L.R. 827.

[13] There has been some disagreement with the House of Lords reasoning in Pinochet No.3 . For example the Federal Court of Australia in Nulyarimma v. Thompson expressed surprise that Pinochet No.3 was not pursued on a customary law basis. [1999] FCA 1192.

[14] The last time there was endemic torture in Scotland could be said to be at the time of the 'highland clearances' in the 18th Century, where the English forces reportedly tortured the Scots.

[15] See also United Kingdom: Police brutality must be addressed, January 2000, http://library.amnesty.it/isdocs/aidoc_everything.nsf/Index/EUR450072000.

> the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights".[16]

The White Paper viewed the Act's role as providing "the European Court with a useful source of information and reasoning for its own decisions" and to "lead to closer scrutiny of the human rights implications of new legislation and new policies".[17] Undoubtedly, the Human Rights Act has had much impact in the UK and potentially could lead to the UK Courts interpreting substantive and procedural rights wider than the European Court of Human Rights, itself.

The provisions of the Human Rights Act include all substantive rights except for article 13 of the Convention, the right to an enforceable and effective remedy. However, section 2 of the Act directs that UK courts, in determining an individual's right under the Human Rights Act, must take into account the jurisprudence of the European Court of Human Rights. This has been viewed by some as incorporating article 13 "in an interpretative context at least by requiring a court considering any question arising "in connection with" a Convention right to take into account Convention jurisprudence, in which Article 13 has a significant place".[18] Notwithstanding the absence of article 13, the Act includes specific powers for the Court to "grant such relief or remedy, or make such order, within its powers as it considers just and appropriate" under section 8 (1) in relation to any act or proposed act of a public authority which the Court finds unlawful".

The legal machinery for protecting individual rights is slightly different from England. Even though Scotland has the same public law remedies as England and the Human Rights Act 1998 also applies to Scotland, the Scottish Courts have the power to strike down acts of the Scottish Parliament, giving the Scottish judiciary an added weapon where the state violates an individual's rights. Whereas, in England and Wales the Courts can only issue a declaration for incompatibility under the Human Rights Act against legislation which does not comply with its obligations under the European Convention on Human Rights.

Additionally, the Scottish Executive is currently considering setting up a Scottish Human Rights Commission and has published a second consultation paper on 4 February 2003.[19] There are plans for primary legislation, however, this will be subject to election results in May 2003.

If established under the current proposal, the Commission will have the remit to examine the full range of international human rights instruments including, UN Conventions, the European Convention on Human Rights and the EU Charter of Fundamental Rights. The Commission will be empowered to hold Scottish Ministers to account by monitoring compliance with international human rights instruments and publishing reports and recommendations. The Commission will also be able to issue guidance to public authorities in light of human rights case law, and advise the Scottish Parliament on legislation during their passage through Parliament. The

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[16] The UK Government's White Paper: Rights Brought Home: The Human Rights Bill presented to Parliament by the Secretary of state for the Home Department by command of her Majesty. HMSO October 1997 (Cm 3782).

[17] Ibid.

[18] Blackstone's guide to the Human Rights Act 1998, John Wadham & Helen Mountfield, 2nd ed. Blackstone Press Limited, p.51.

[19] The Scottish Human Rights Commission, 2nd Consultation Paper HMSO (Edinburgh) February 2003.

Commission will be independent from the Scottish Executive and Parliament; it will decide its own workload and it will not be obliged to monitor issues at the request of the Parliament. Importantly, the Commission will have powers to access information, including right to enter and search premises of public authorities.

2.3. International Responses

The United Kingdom has only agreed to the individual right of petition under the European Convention of Human Rights and to the jurisdiction of the International Criminal Court. It has yet to sign up to the optional protocol of the ICCPR or to make a declaration pursuant to article 22 of Convention against Torture giving the individual right of petition to the Human Rights Committee and the Committee against Torture respectively. However, the United Kingdom has informed the Human Rights Committee and the Committee against Torture that it will review its position on this matter.[20]

The UK has submitted periodic reports regularly to both the Committee against Torture and the Human Rights Committee. Following the submission of the UK's last report to the Committee against Torture, the Committee recognised the UK's efforts to improve prison conditions, including overcrowding and the conditions of detention in parts of Scotland,[21] however it was concerned by "the number of deaths in police custody and the apparent failure of the State party to provide an effective investigative mechanism to deal with allegations of police and prison authorities' abuse, as required by article 12 of the Convention, and to report publicly in a timely manner".[22]

At a regional level, the individual right of petition to the European Court of Human Rights as well as periodic delegations from the European Committee for the Prevention of Torture provide close scrutiny of the UK's compliance with its obligations under the respective treaties. To date, the European Court of Human Rights has yet to find police or prison authorities in breach of article 3 of the Convention in Scotland.[23] However, the European Committee for the Prevention of Torture has labelled conditions in 'C' Hall in Glasgow's Barlinnie Prison 'inhuman and degrading':

> "*Conditions in 'C' Hall were quite unsatisfactory. The vices of overcrowding, inadequate lavatory facilities and poor regime activities were all found there;*

[20] In the UK's fifth periodic report to the Human Rights Committee (CCPR/C/UK/99/5 dated 11 April 2000), the UK reported that: "In July 1997, the Government announced a comprehensive review of its policy on various international human rights instruments, with particular reference to those it had not ratified, or to which it had derogations or reservations. The review was made public in March 1999 ... Reforming legislation had enabled the UK to accede to some of these measures, for example Protocol 6 of the ECHR and the Second Optional Protocol to the Covenant, both of which abolish the death penalty". The review concluded that it would be wrong to divert the considerable resources needed for commencement of the Human Rights Act, in order to prepare for the right of individual petition under the Covenant (or, indeed, under the conventions against torture or racial discrimination). It undertook, however, to reconsider this question when the Human Rights Act had been fully implemented and was operating satisfactorily" (paras 6 and 7). See also para 10(g), Third periodic report of the United Kingdom to the Committee against Torture, CAT/C/44/Add.1, 20 July 1998.

[21] Para 44 of the summary record of the first part of the public meeting to consider the UK's third periodic report to CAT, CAT/C/SR.354, 23 November 1998.

[22] See the Committee Against Torture's conclusions and recommendations on the third periodic report of the United Kingdom of Great Britain, UN Doc. A/54/44, paras.72-77, 17 November 1998, para.76 (a).

[23] The only case to come before the European Court of Human Rights is the case of E and others v United Kingdom, *(Application no. 33218/96),* (judgment dated 26 November 2002) relating to social services.

in addition many of the cells were in a poor state of repair. As the CPT had occasion to make clear in the past, to subject prisoners to such a combination of negative elements amounts, in its view to inhuman and degrading treatment".[24]

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Torture/ill-treatment is specifically prohibited under section 134 of the Criminal Justice Act 1988 (CJA).[25] The prohibition of torture is also found in the Human Rights Act 1998,[26] the International Criminal Court (Scotland) Act 2001 (ICC (Scotland) Act), and the Geneva Conventions Act 1957 as amended by the Geneva Conventions (Amendment Act 1995).

In addition to these statutory provisions, the House of Lords in the Pinochet (3) decision recognised the prohibition of torture as a general principle of international law with *jus cogens* status.[27] Even though this case was decided in accordance with the laws of England and Wales, the jurisprudence is likely to be followed by Scottish Courts given that the *jus cogens* status of torture has also been recognised by the International Court of Justice in the Yerodia case[28] and by the European Court of Human Rights in the Al-Adsani case.[29]

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1.1. The Substantive Law: Criminal offences and punishment

Torture is a statutory offence under section 134 of the CJA and is defined as:

(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—
(a) in the United Kingdom or elsewhere he 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
(b) 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.
(3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

[24] United Kingdom Report CPT/Inf (96) 11, para 343.

[25] Criminal Justice Act 1988, s172(2) specifically extends this offence to Scotland.

[26] Section 1(1)(a) and Schedule 1 of the Human Rights Act 1998.

[27] R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3) supra 11.

[28] Congo v Belgium (Case concerning the Arrest Warrant of 11 April 2000) ICJ reports (2000) provision measures.

[29] Al-Adsani v UK, ECHR Application 35753/97, judgment dated 21 November 2001.

This definition does not mirror the wording of the definition found in the Convention against Torture but more or less complies with it. However, the provisions for a defence to torture in section 134 is wider than those in the Convention in that an alleged perpetrator of torture may avoid criminal accountability for acts of torture under section 134(4) on the basis of "lawful authority, justification or excuse for that conduct".[30] Section 134(5) gives a fuller meaning of "lawful authority, justification or excuse for that conduct":

> "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.

This defence is clearly incompatible with the Convention against Torture which only allows for the defence of "lawful sanctions". The Committee has found these provisions to be "in direct conflict" with article 2 of the Convention and has recommend that the UK brings the articles into conformity with the Convention.[31] To date, the UK has not yet reformed these provisions.

The CJA does not provide for any specific provisions on ancillary offences unlike the ICC (Scotland) Act[32] and the Geneva Conventions Act 1957.[33] However the general rules on the criminal liability for third party involvement also apply to torture (such as complicity, conspiracy, or incitement of the act of torture or for attempt).

The maximum penalty for committing torture under the CJA is life imprisonment[34] whereas grave breaches of the Geneva Convention carry a maximum sentence of 14

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[30] "It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct."

[31] Supra 21, para 5(e) under section D "Subjects of Concern" and para (c) under Section E "Recommendations".

[32] Section 2 of the act includes ancillary offences as defined by section 7 of the ICC (Scotland) Act: "being art and part in the commission of an offence; inciting a person to commit an offence; attempting or conspiring to commit an offence perverting, or attempting to pervert, the course of justice in connection with an offence; or defeating, or attempting to defeat, the ends of justice in connection with an offence".

[33] Section 1 of the Geneva Conventions Act 1957 includes the same liability within its provisions for persons who "aids, abets or procures the commission by any other person of a grave breach" as the person who actually commits the offence.

[34] Article 134 CJA.

years.[35] Under the ICC (Scotland) Act, the maximum penalty is imprisonment not exceeding 30 years.[36]

1.2. The procedural law: Investigations into Torture

There are no amnesty laws or other laws granting immunity to state officials that have been enacted in Scotland and no limitation period applies to any of the offences of torture. [37]

In Scotland, the system of investigation of complaints against the police differs significantly from other countries in the United Kingdom because Scotland has no police complaints authority.[38] Complaints of a criminal nature, such as torture or ill-treatment are addressed to the Procurator Fiscal Service (equivalent to the Crown Prosecution Service) in the area where the police officer serves and it is open to them to request that the investigation into the complaint is carried out by another force.[39] The investigation is however conducted under the supervision of the Procurator Fiscal Services. It is for the prosecutor and not the police to decide whether or not the results of the investigation justify a prosecution, and the police must put the result of their investigations fairly before the prosecutor so that he/she has a proper basis on which to decide whether or not to prosecute.[40]

In practice prosecutors rely heavily on the reports submitted by the police, and in the vast majority of cases the prosecutor's decision is based entirely on these reports without further or additional investigation. Before action on a report from the police, the prosecutor must first be satisfied that the circumstances disclose a crime known to the law of Scotland. He/she must then consider whether the evidence is sufficient, admissible and reliable. If not, the Procurator Fiscal will take no further action.[41]

The Regional Procurators Fiscal's investigation of complaints against the police in their region goes through various stages. First, senior police officers appointed for the purpose investigate and report the results of this preliminary inquiry through the Deputy Chief Constable to the Regional Procurator Fiscal (RPF). Sometimes (where, for example, the complaint has been made direct to the RPF) this part of the investigation will be conducted under his close supervision. If the RPF is satisfied that the complaint is one of criminal conduct by a police officer he will then start his own, independent inquiry. In most cases that will mean that the complainant and the main witnesses to the complaint will be interviewed. In the minority of cases the complainant may be written to and asked to confirm the earlier statement but he/she is also given the opportunity to an interview if he/she wishes one. The Procurator Fiscal (PF) may investigate the complaint personally or instruct a member of his staff or a PF from another office within his region to assist in the investigation and report

[35] The Geneva Conventions Act.

[36] Article 3(5) ICC (Scotland) Act.

[37] Jones and Christie, *Criminal Law* (2nd edition), W. Green/Sweet & Maxwell, Edinburgh, 1996 at 2-43 – 2-44.

[38] A discussion how investigations are completed in England and Wales see *Core Document forming part of the reports of State Parties: United Kingdom of Great Britain and Northern Ireland,* 23/06/97, HRI/CORE1/Add.5/Rev.2.(Core document).

[39] Research Note RN 00/105 December 2000 THE POLICE SERVICE IN SCOTLAND http://www.scottish.parliament.uk/whats_happening/research/pdf_res_notes/rn00-105.pdf

[40] Smith v. H.M. Advocate, 1952 J.C. 66.

[41] Crown Office Scotland, *The Prosecution of Crime in Scotland*, Edinburgh.

to him. When the investigation is complete, the RPF must first decide whether there is any substance to the complaint. If not, he will inform both the complainant and the police officer that he intends to take no further proceedings. If he considers that there may be substance to it, the RPF reports to the Crown Office with his recommendations. The papers will be placed before Crown Counsel who may order further enquiries. They will then make a recommendation to the Law Officers. Finally, either the Lord Advocate or Solicitor General will decide whether proceedings are to be taken against the officer concerned. If it is in the interests of both the complainant and the police officer that the complaint should be investigated, a decision will be reached as quickly as possible.

The decision of whether to prosecute a police officer will be based on the same considerations as in any other criminal case; there must be sufficient evidence in law to support the allegation and it must be regarded as being in the public interest that criminal proceedings should be taken.

Minor complaints are dealt with either at the appropriate police station or by the Deputy Chief Constable. If the complaint is against a higher ranking officer – superintendent or above, police authorities with investigate the complaint. Section 61 of the Police and Magistrates' Court Act 1994 gives the HMIC the power to review the way in which the complaint was investigated (but not the outcome) and have the power to make a recommendation to reconsider the complaint or taken into account new evidence. HMIC has no power to change the investigating body's decision. HMIC will also send a copy of its findings to the complainant and to the police officer against whom the complaint was made.

Before a prosecution for torture can proceed, the consent of the Advocate-General is required in accordance with the statutory requirements of section 135 of CJA and the Geneva Conventions Act. However, unlike section 53(3) of the UK ICC Act "Proceedings for an offence shall not be instituted except by or with the consent of the Attorney General", the International Criminal Court (Scotland) Act 2001 contains no such statutory requirement. Dr Iain Scobbie in his written submission to Justice 2 Committee of the Scottish Parliament was of the view that: "it appears that Scots law on title to prosecute would - at least potentially - be more liberal than that obtaining elsewhere in the UK."[42]

In every case where a prosecution is instituted, the Procurator Fiscal has to decide at the outset whether the proceedings are to be by summary or solemn procedure. Unlike in England, there is no right to trial by jury. The practical test is the gravity of the offence and the criminal record of the accused. It is anticipated that investigations into torture would be by solemn procedure in the High Court of Judiciary given the grave nature of the offence.

In the Solemn procedure, the first step is the presentation of a petition by the Procurator Fiscal to the Sheriff setting out the name, age and address of the accused person and the charge against him. The Petition seeks a warrant to arrest the accused and bring him before the court (although in the most serious cases the accused will have been arrested by the police without warrant) and further warrant to search his person and premises and to summon witnesses for precognition and authorise the seizure of productions and article required as evidence in the case.

[42] Dr Iain Scobbie, written submission of 24 April 2001, available at www.scottish.parliament.uk

When the accused is brought before the Court under this procedure, to admit or deny the charge against him, the Procurator Fiscal will ask the Sheriff to commit him either for further examination or, if satisfied that sufficient evidence is already available to prove the charge until "liberated in due course of law" (i.e. until trial) This stage is known as full committal.

If the Procurator Fiscal decides not to prosecute, it is possible to bring a private prosecution in Scotland, however such cases are extremely rare.[43] Before a private prosecution under CJA can proceed the statutory consent of the Advocate-General is required as referred to above. However, it is unclear whether this requirement applies to private prosecutions for crimes under the ICC (Scotland) Act given the absence of the requirement of the Advocate-General's consent. [44]

2. Criminal Accountability in practice

Between October 1999 and February 2000, the Her Majesty Inspectorate of the Constabulary carried out a comprehensive review of the complaints system in the Scottish police force. It found that "the overwhelming majority of complaints against police officers are investigated with thoroughness, impartiality and integrity" but that there was a lack of general understanding about the complaints system itself.[45] The report made a number of recommendations that will hopefully be implemented as soon as possible.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Civil Law

Generally, civil claims in Scotland for torture or inhumane and degrading treatment can be made under the law of delicts (torts). The claimant who uses this method to bring such a claim has the option of pursuing his/her claim as an intentional or unintentional delict.

The type of unintentional delict which is likely to be most applicable is vicarious liability. Under the umbrella of vicarious liability a victim of torture would pursue his claim for damages against the police or prison authority, for example the chief constable, and not the perpetrator of the act. In order to establish vicarious liability,

[43] The mechanisms of private prosecution are outlined in Jones and Christie, *Criminal Law*, supra 37 at 2-58 – 2-59. See also: Dr Iain Scobbie evidence given to the Justice 2 Committee of the Scottish Parliament regarding the general principles of the International Criminal Court (Scotland) Bill at Stage 1, 11th Meeting, 2001 (Session 1) Wednesday 9 May 2001 (written evidence dated 24 April 2001), minutes available at www.scottish.parliament.uk

[44] "The Committee had drawn to its attention by Dr Scobbie a difference in the treatment of private prosecutions between the UK Act and the Scottish Bill. The UK Act specifically precludes private prosecutions under section 53(3), "Proceedings for an offence shall not be instituted except by or with the consent of the Attorney General." The Bill before the Committee has no parallel provisions. The Minister confirmed that the position in Scotland is that a private prosecution may be made under the Bill, but only with the concurrence of the Lord Advocate (col 212). While concurrence may be marginally different from consent it appears that this is not a significant difference in effect'.

Justice 2 Committee, 7th Report, 2001, Stage 1 Report on the International Criminal Court (Scotland) Bill, http://www.scottish.parliament.uk/official_report/cttee/just2-01/j2r01-07-02.htm

[45] HM Inspectorate of Constabulary report, "A Fair Cop" presented to the Scottish Executive.

the survivor must show that the authority had breached the duty of care owed – that is the perpetrator committed such acts in connection with the performance of his duties.

Alternatively a victim of torture can pursue his/her claim under the intentional delict of assault against the perpetrator of the acts of torture or ill treatment. However this claim can only be used against a public official where he has acted within his authority under malice or without want of probable cause, which has to be proved.[46] If the official exceeds the authority given to him no malice needs to be proved as the "wrongful interference by a constable of a person's liberty by way of ...the unwarranted use of force are sufficient grounds for establishing civil liability."[47]

Anyone who seeks a claim in damages under the laws of delicts must do so within a period of three years after the delict is complete. However Section 19A of the Prescription and Limitation (Scotland) Act 1973 gives the court discretion to extend/ignore this limitation period in the interest of equity.[48]

The only statutory provision which expressly provide for a civil remedy for torture is article 8 of the Human Rights Act.[49] Article 8 (1) provides that:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate".

Article 8(2) and (3) allows the public authority including the Court to award damages where it already has the power to do so and that when making an award, the same principles used by European Court of Human Rights must be applied including the principle of "just satisfaction".[50] It is viewed by some that this provision may result in the amount of damages being quite low.[51] Even if this is correct, article 11 provides that a claim based on article 8 does not affect or restrict "(a) any other right of freedom conferred on him by or under any law having effect in any part of the United Kingdom; or (b) his right to make any claim or bring any proceedings which he could make or bring". Those seeking to use the Human Rights Act are restricted by the fact that proceedings have to be brought within a year after the breach occurred.[52] This limitation period can only be extended in circumstances where the courts feel it would be inequitable not to do so.[53]

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[46] Stair Memorial Encyclopaedia, *The Laws of Scotland,* Vol. 16 page 292 at para 1766.

[47] Ibid.

[48] (Stubbings v UK).

[49] Section 7 of the Human Rights Acts permits individuals to bring proceedings for breaches of the relevant sections of the European Convention on Human Rights that have been adopted into domestic law against public authorities. Section 6(3)(b) of the Human Rights Act 1998: Police or prison authorities and the officers themselves fall within the definition of a "public authority" whose functions are of a public nature The Human Rights Act does not include article 13 of the ECHR, the right to an effective remedy, however John Wadham & Helen Mountfield have commented that even in the absence of Article 13 in the Human Rights Act, "section 2 may incorporate article 13 in an interpretative context at least, by requiring a court considering any question arising "in connection with" a Convention right to take into account Convention jurisprudence, in which Article 13 has a significant place", supra 18, p.51.

[50] Ibid, p.52.

[51] Ibid.

[52] Section 7(5)(a) of the Human Rights Act 1998.

[53] Section 7(5)(b) of the Human Rights Act 1998.

1.2. Criminal Law

The Scottish system does not allow a claimant to attach a civil claim for reparation to criminal proceedings as in other European/civil law countries.

V. NATIONAL SCHEMES FOR COMPENSATION

Torture survivors may be awarded compensation under the Criminal Injuries Compensation Scheme[54]. This scheme, which was set up by the government in 1964 as an expression of public sympathy for victims of crime, does not depend upon the conviction of the perpetrator in order for compensation to be awarded. However, there must be evidence that a crime has taken place, though it is not necessary to prove who committed the crime. In order to benefit from the Criminal Injuries Compensation Scheme it is necessary to make a claim within a period of two years after the act occurred, but this may be disregarded in the interest of justice. In addition to this, the act that caused the injury must have occurred in England, Scotland and Wales.

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of Acts of torture committed in a third country

Statutory provisions under section 134 of the Criminal Justice Act gives the Courts universal jurisdiction over acts of torture, however, the alleged perpetrator can only be prosecuted if they are physically present within the jurisdiction of the United Kingdom.[55] Similar provisions are found in the Geneva Conventions Act 1957 for grave breaches.[56] The ICC (Scotland) Act however, does not provide for universal jurisdiction within its statutory provisions but only provides for Scottish Court jurisdiction over Scottish nationals or persons resident in Scotland for acts which were committed after 1 July 2001.[57] Given that Westminster has retained power over matters of foreign affairs, the ICC (UK) Act provisions to try acts committed by armed forces abroad is likely to apply in Scottish Courts. Even though the ICC (Scotland) Act provides for jurisdiction over war crimes, and crimes against humanity, this does not curtail/affect the jurisdiction of the Court under section 134 of the Criminal Justice Act or the Geneva Conventions Act.

Immunity may be a jurisdiction bar preventing a case from proceeding under section 134 of the Criminal Justice Act and the Geneva Conventions Act. As established by the Pinochet case, an acting head of state may be shielded by sovereign immunity but will lose that immunity once he/she no longer holds office.[58] It is likely that Scottish Courts will extend this immunity to acting Ministers of Foreign Affairs as a

[54] Criminal Injuries Compensation Act 1995.

[55] Section 134(1) CJA.

[56] Section 1 of the Geneva Conventions Act 1957.

[57] Section 6 defines the term of UK resident" to include a person who has become resident in the UK since they committed the act. Section 28 defines a UK national as "a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen; a person who under the British Nationality Act 1981 (c.61) is a British subject; or a British protected person within the meaning of that Act."

[58] Pinochet (3) supra 11.

result of ICJ findings in the Yerodia case.[59] The position in relation to immunity is different for crimes committed under the ICC (UK)/(Scotland) Act, in that: "Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person".[60] However, section 23(4) gives the power to the Secretary of State to direct that proceeding should either not be taken or be halted "after consultation with the ICC and the State concerned". [61]

As extradition is a matter reserved to Westminster under the Scotland Act 1988, the extradition of any alleged perpetrator of torture will be governed by the general laws relating to extradition, namely the 1989 Extradition Act and will be subject to the executive discretion of the Uk government.[62] The obligation of "try or extradite" which is contained in the Convention against Torture is not specifically provided for within the statutory provisions of the Criminal Justice Act 1988. However, the House of Lords in the Pinochet judgment confirmed that only acts committed after the date they were criminalised in both the UK and Spain could be considered as extradition crimes within the meaning of the Act under the double criminality principle.[63] Under section 7 of the Extradition Act 1989, the Secretary of State is required to give his "authority to proceed" before extradition can take place and such authority may be refused if extradition "could not lawfully be made, or would not in fact be made, in accordance with the provisions of this [Extradition] Act".[64] In relation to the Geneva Conventions, the UK did not enact any specific provisions, however the universal jurisdiction principle has been incorporated through the adoption of the grave breaches provisions of the Geneva Conventions in the schedule to the Act.[65] Specific provisions are included in the ICC (UK) Act for the surrender of alleged perpetrators to the International Criminal Court.[66]

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[59] Yerodia supra 28.

[60] Section 23(1) ICC(UK)Act. No provisions on immunity are found in the ICC(Scotland) Act. Article 23(6) defines "state or diplomatic immunity as meaning: any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state, under the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968 (c.18), the International Organisations Act 1968 (c.48) or the State Immunity Act 1978 (c.33), any other legislative provision made for the purpose of implementing an international obligation, or any rule of law derived from customary international law".

[61] Section 23(4) states "The Secretary of State may in any particular case, after consultation with the ICC and the state concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by state or diplomatic immunity attaching to a person shall not be taken against that person" This provision has been described by Tim Hancock, Head of Amnesty International UK as "extremely worrying" in his Oral evidence to Scottish Parliament Justice 2 Committee, Tuesday 15 May 2001; available at www.scottish.parliament.uk

[62] Schedule 5 Part II Head B11.

[63] Pinochet (3), supra 11. Lord Browne-Wilkinson, also see Lord Hope and his analysis of the charges raised by Spain and the double criminality rule. The other lord lords adopted Lord Hope's reasoning.

[64] Section 7(4) of the Extradition Act 1989.

[65]Despite its reserved status, extradition has been discussed in the Scottish Parliament's Justice 2 committee. Dr Scobbie noted that currently, in the United Kingdom there is Executive discretion in deciding whether to extradite. He said that he believed that the extradition law will be changed to remove that discretion. Member of the Scottish Parliament Mary Mulligan asked Dr Scobbie if a country agrees to universal jurisdiction, is it also agreeing to agree to extradition requests, or is there still a way in which to refuse to extradite? Dr Scobbie replied that as was the case with General Pinochet, the country could refuse to extradite. In effect, he was being extradited because of allegations that he had committed torture or been involved in torture, and universal jurisdiction exists for torture. Although the House of Lords said finally that he could be extradited to Spain, the Home Secretary used his executive discretion to prevent the extradition on the medical grounds. (Oral submission to Scottish Parliament Justice 2 Committee, 11th Meeting, 2001 (Session 1), Wednesday 9 May 2001; available at www.scottish.parliament.uk).

[66] Part 2 of the ICC(UK) Act.

To date there is only one known case in Scotland where an alleged perpetrator was arrested and charged for torture under section 134 of the CJA. Unfortunately, after two trial dates had been set (in August 1988 and in January 1999) and postponed, the Scottish Crown Office decided to discontinue proceedings. Even though the case had reached an advanced stage of proceedings, no reasons were given for this decision other than "on reviewing the case, they had concluded that the available evidence was not sufficient to prove in criminal proceedings that Dr Mahgoub was party to conduct which amounted to an offence under section 134 of the CJA 1988."[67]

2. Claiming reparation for torture committed in third countries against an individual and against a foreign state.

Immunity continues to be a bar to torture survivors bringing civil claim against a foreign State in the UK. The ECHR ruling in Al-Adsani v UK held by a slim majority that immunity could be a legitimate bar for bringing a civil action against a State.[68]

It is possible for an individual to bring a case against an individual perpetrator regardless of their nationality for acts which are committed abroad. However, the individual will need to overcome a number of procedural hurdles such as the *forum non conveniens* doctrine, the relevant limitation periods and comply with the rules for service abroad.

3. Government Reparation Schemes

The trust fund for victims referred to in article 79 of the Rome Statute is not provided for in the ICC Act or the ICC (Sc) Act. However, ICC (Sc) Act, section 26 confers powers on Scottish Ministers to make subordinate legislation for the enforcement of fines, forfeitures and reparation awards for victims, which are ordered by the ICC.

At the 12th meeting of the Scottish Parliament Justice 2 Committee, Deputy Minister for Justice, Iain Grey, assured the Committee that the ICC Fund would be created by virtue of Article 79 of the Rome Statute and that no legislation was needed to achieve this:

> "There is no mention of a trust fund in the bill because it is not necessary. The creation of the trust fund is covered in article 79 of the Rome statute. The ICC trust fund will therefore be created. Although we sympathise with the sentiments behind the suggestion that a new and separate trust fund should be created, it is difficult to see the necessity for it. Anyone in Scotland will be free to make contributions to the main ICC trust fund. It is not clear to me what the purpose would be of setting up a separate fund. I know that a

[67] The alleged perpetrator was a Sudanese national, Dr Mahgoub who was residing in Scotland and was charged in relation to acts of torture at a secret detention centre in the Sudan during 1989 to 1990 by Sudanese refugees in the UK. Reasons were given to REDRESS in a letter from the Scottish Crown Office dated 28th May 1999. See "Universal Jurisdiction in Europe *Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*" Redress Trust, 30th June 1999.

[68] Al-Adsani v UK , supra 29. The Court found that while "the prohibition of torture has achieved the status of a peremptory norm in international law" the judges were divided as to whether this status applied to a civil action for damages for torture where state immunity could be invoked and a slim majority (8 votes to 9) considered that a distinction could be made between criminal proceedings (where immunity does not apply to former heads of state) and civil claims.

separate fund has been created in Canada. Clearly I cannot speak for Canada, but that seems to me to be an unnecessary stage in the transfer of funds to the international fund. It is certainly the case that the regulations to be made under section 25 will ensure that the proceeds of fines and forfeitures that are enforced in Scotland will go to the ICC trust fund. There should be no concern that that will not happen. I would not say that putting in an additional step would make that less likely, but I do not see how it would help".[69]

[69] Oral submission of MSP Iain Gray, Deputy Minister for Justice Scottish Parliament Justice 2 Committee, 12th Meeting, 2001 (Session 1), Tuesday 15 May 2001 (cols 210-11); available at www.scottish.parliament.uk