



Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law

**The urgent need to strengthen universal jurisdiction legislation and to
enforce it vigorously**

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Foreword

A series of cases over the past decade in which persons in the United Kingdom suspected of the worst crimes have escaped investigation and prosecution, as well as civil accountability, has demonstrated the urgent need for the United Kingdom to strengthen its universal jurisdiction legislation and then to enforce it vigorously.

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I. Introduction

International law permits, and at times requires, states to investigate and, if there is sufficient admissible evidence, to prosecute certain crimes under international law based on universal jurisdiction, regardless of where those crimes were committed, regardless of the nationality or location of the suspect or the victims and irrespective of any specific connection to the prosecuting state. One of the justifications for this rule of international law is that the crimes are crimes against the international community as a whole and, as such, each member of the international community has an inherent interest and responsibility to ensure that perpetrators of such crimes do not evade justice or fail to provide reparations to the victims and their families.

The principle is not a new or novel concept in the United Kingdom or elsewhere. For more than two centuries, states have provided for universal jurisdiction over ordinary crimes in their penal codes without objections from other states.¹ In addition, it has long been recognised by customary international law that states may exercise universal jurisdiction over piracy, slavery, slave trading, war crimes, crimes against humanity, genocide, torture, enforced disappearances and extrajudicial executions. Furthermore, in the last half-century, a steadily increasing number of treaties have required parties to exercise universal jurisdiction (i.e. when states must try or extradite for trial those suspects found in territory subject to their jurisdiction) over such serious international crimes as grave breaches of the 1949 Geneva Conventions, torture, enforced disappearances and “terrorist” offences, including hijacking aircraft.

In addition, international law permits and, in some cases, requires, states to exercise universal *civil* jurisdiction over conduct that is criminal or tortuous under international law. As discussed below in Section VII, states have exercised such jurisdiction both in civil litigation and in civil claims filed as part of criminal proceedings, whether those proceedings were instituted by the state or by victims.

The application of universal jurisdiction by all countries is vital to ending impunity for the most serious crimes under international law – to ensure that no perpetrator escapes justice or fails to provide reparations to victims and their families, and that the international community registers its contempt for such crimes, crimes which affect all.

The application of universal jurisdiction in the United Kingdom is most associated with the landmark hearings concerning the requests by Spain, Belgium, France and Switzerland for extradition of former Chilean President, Augusto Pinochet, with respect to charges of torture. There were prosecutions immediately after the Second World War under the Royal Warrant of 1945 for war crimes.² Accordingly, British military courts operating as part of the allied military tribunals under Control Council Law (CCL) N°10, of 20 December 1945, applied the principle of universal jurisdiction.³ There were also investigations involving war crimes committed during the

¹ Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 435, 636 (1935).

² A Royal Warrant, issued on 14 June 1945 at the end of the Second World War in Europe, authorized British military courts to exercise jurisdiction over violations of the laws and customs of war. The 1958 British *Manual of Military Law* expressly states that "British Military Courts have jurisdiction outside the United Kingdom over war crimes committed . . . by . . . persons of any nationality . . . It is not necessary that the victim of the war crime should be a British subject." *Manual of Military Law*, III (1958), para. 637. The *Manual* adds that "The courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. This jurisdiction is independent of any agreement made between neutral and belligerent States. War Crimes are crimes *ex jure gentium* [under international law] and are thus triable by the courts of all States." *Ibid*.

³ In the *Almelo* case, a British military court sitting in the Netherlands based its jurisdiction over German defendants accused of killing a Dutch civilian in part on universal jurisdiction. According to the law report of the case, the military court explained that "under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was

Second World War under the 1991 War Crimes Act and prosecutions of two persons.⁴ The first successful non-WWII prosecution in England and Wales was brought against Faryadi Zardad Sarwar, a mujahadeen military commander in Afghanistan, who was convicted of acts of torture and hostage-taking that had taken place in Afghanistan in the 1990s and sentenced to twenty years imprisonment.⁵ Other attempts have been made in the United Kingdom to arrest individuals accused of these crimes in recent years,⁶ and allegations have been leveled against a range of additional suspects.

Section II describes how United Kingdom legislation fails to provide universal jurisdiction over all crimes under international law and provides a broad defence which is impermissible under international law for torture committed abroad. Section III discusses how the United Kingdom has seriously restricted the temporal scope of jurisdiction over these crimes. Section IV analyzes the weaknesses in the practical arrangements for investigating and prosecuting these crimes. Section V identifies the political limitations on investigations, prosecutions, extraditions and mutual legal assistance with respect to crimes under international law. Section VI discusses the alternatives of deportation and other immigration measures. Finally, Section VII discusses the inadequacies of current legislation regarding civil universal jurisdiction. In each section, the paper provides a series of recommendations on how the implementation of obligations may be better assured.

committed". *Sandrock and three others (The Almelo Trial)*, Judgment, Case No. 3, Brit. Mil. Ct. - Almelo 24-26 November 1945, 1 *Law Reports of Trials of War Criminals*, 35, 42 (1949). In the *Zyklon B* case, another British military court, sitting in Hamburg, exercised jurisdiction over German industrialists on charges that they knowingly supplied poison gas to kill Allied nationals who were not nationals of Great Britain. The law report of the case explained that the military court could exercise universal jurisdiction on the facts of this case. *Tesch and two others (The Zyklon B Case)*, Judgment, Case No. 9, Brit. Mil. Ct. - Hamburg 1946, 1 *Law Reports of Trials of War Criminals*, 93, 103 (1949). A British military court at Maymyo in 1947, without expressly citing universal jurisdiction, convicted two Japanese of offences committed against Chinese and Indian inhabitants of areas occupied by Japan. *Introduction*, 10 *Law Reports of Trials of War Criminals*, 43.

⁴ A War Crimes Inquiry Group reviewed over 400 cases pursuant to the War Crimes Act 1991 of alleged war crimes committed during that war in Europe with a view to possible prosecution and a special unit of the Metropolitan Police was established to investigate these cases with a view to prosecution. On 15 April 1996, a resident, Szymon Serafinowicz, was charged under this legislation with murder in violation of the laws of war and of the common law of three persons in 1941-1942 at a concentration camp in the Byelorussian S.S.R. (now Belarus) where he was serving as a guard. On 17 January 1997, after a week of hearings on his medical condition, the accused was found by a jury at the Central Criminal Court to be unfit to stand trial. See Jane L. Garwood, *The British Experience*, in M. Cherif Bassiouni, 3 *International Criminal Law* 325-326 (Ardsley, New York: Transnational Publishers, Inc. 2d ed. 1999); Helen Smith, *Britain's first war crimes trial collapses*, Reuter, 17 January 1997; John Mason, *War crime prosecution collapses*, *Financial Times*, 18 January 1997. The Attorney General then entered a *nolle prosequi* on the ground of the accused's medical condition. Hansard, House of Lords, Vol. 596, 11 January 1999, Written Answers (obtainable from <http://www.parliament.uk/hophome.htm>). On 1 April 1999, Anthony (Andrzej) Sawoniuk was sentenced under the War Crimes Act 1991 to life imprisonment for the murder of two civilians. For a discussion of this case, see Ian Bryan and Peter Rowe, *The Role of Evidence in War Crimes Trials: The Common Law and the Yugoslav Tribunal*, 2 Y.B. Hum. L. 307 (1999). See also Tim Jones & Alan Hamilton, *War criminal weeps for an old age in jail*, *The Times*, 2 April 1999; Tim Jones, *The only trial out of 393 suspects*, *The Times*, 2 April 1999; *Spelling error nearly led to killer's escape*, *The Times*, 2 April 1999; *The outsider driven by a hatred of Jews*, *The Times*, 2 April 1999. The Court of Appeal upheld his conviction on 10 February 2000. *R. v. Sawoniuk*, Court of Appeal (Criminal Division), [2000] Crim. L. R. 506. The House of Lords denied leave to appeal on 20 June 2000. *War Criminal Refused New Hearing*, *Financial Times*, 20 June 2000.

⁵ *R v. Zardad*, High Court judgment of 19 July 2005, see <http://www.redress.org/news/zardad%207%20apr%202004.pdf>; appeal denied 17th February 2007.

⁶ For example, on 10 September 2005, an arrest warrant was issued against Israeli General Almog for allegations relating to the commission of war crimes. The warrant was withdrawn on 15th September 2005 after General Almog left the country. In 2003, an application was filed for an arrest warrant for Mr. Narendra Modi, the Chief Minister of State of Gujarat, India, while he was visiting the United Kingdom on personal business. The application, filed on behalf of three victims, accused Modi of responsibility for acts of torture under section 134 of the Criminal Justice Act 1988. Mohammed Ahmed Mahgoub Ahmed Al Feel, a Sudanese doctor working as a general practitioner in Dundee, Scotland, was charged with torture under Section 134 of the Criminal Justice Act in September 1997. In May 1999, the charges were dropped, apparently for insufficient evidence.

Unless otherwise indicated in this paper, references to the law and to legislation relate to that of England and Wales.⁷

II. Inclusion of crimes under international law, principles of criminal responsibility and defences in national law

United Kingdom law expressly provides for universal jurisdiction over the crimes of torture,⁸ hostage taking,⁹ participating in the slave trade,¹⁰ offences against United Nations personnel,¹¹ piracy¹² and certain war crimes, including grave breaches of the 1949 Geneva Conventions and its first additional Protocol.¹³ It also provides for active personality and a very restricted form of universal jurisdiction over three of the crimes under the Rome Statute of the International Criminal Court 1998 ('the Rome Statute') – war crimes, crimes against humanity and genocide. To exercise extraterritorial jurisdiction under the International Criminal Court Act 2001 ('ICCA'), the crimes must have been committed by a United Kingdom citizen or resident (not defined in the Act) at the time of either the commission of the act or the institution of proceedings¹⁴ or, in England and Wales only, a person subject to United Kingdom service jurisdiction.¹⁵ Likewise, the UK War Crimes Act 1991 provides for only limited universal jurisdiction over certain crimes committed during the Second World War.¹⁶

United Kingdom legislation criminalising acts which give rise to universal jurisdiction does not consistently comply with the strictest definitions of the crimes, principles of criminal responsibility and defences in international law.¹⁷ This poses the danger that persons responsible for the worst crimes in the world could travel to or even reside in the United Kingdom with complete impunity.¹⁸

⁷ It should be noted that UK legislation in the form of the International Criminal Court Act 2001 has separate provisions relating to the UK as a whole, and others relating specifically to England and Wales, Scotland or Northern Ireland.

⁸ Criminal Justice Act 1988, Section 134(1).

⁹ Taking of Hostages Act 1982, Section 1.

¹⁰ An Act for consolidating with Amendments the Acts for carrying into effect Treaties for the more effectual Suppression of the Slave Trade, and for other purposes connected with the Slave Trade (Slave Trade Act, 1873), Section 26, as amended by the Statute Law (Repeals) Act 1998.

¹¹ United Nations Personnel Act 1997, Sections 1, 2, 3 and 5(3).

¹² R v. Keyn (1876) 2 Ex D 63, 2 bilc 701, CCR; R v. Anderson (1868).

¹³ Geneva Conventions Act 1957 ('GCA'), Section 1(1); and the Geneva Conventions (Amendment) Act 1995, Section 1.

¹⁴ However, in the latter circumstances, the act would need to have constituted an offence in the particular part of the United Kingdom that is exercising jurisdiction. International Criminal Court Act 2001, Section 68; International Criminal Court (Scotland) Act 2001, Section 6.

¹⁵ ICCA, Sections 51, 52, 58 and 59; International Criminal Court (Scotland) Act 2001, Sections 1 and 2.

¹⁶ War Crimes Act 1991, Section 1 – with respect to war crimes committed in Germany or German-occupied territory between 1939 and 1945. Jurisdiction under the Act is limited to offences of homicide constituting a violation of the laws and customs of war, committed by a person who is now a British citizen or resident in the United Kingdom, or who had such status on or after 8 March 1990.

¹⁷ For example, the definition of torture set out in the Criminal Justice Act does not incorporate the definition in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Further, there are problems regarding criminal liability of commanders and superiors under the concept of command and superior responsibility.

¹⁸ For example, the United Kingdom's failure to provide for retrospective application of the ICCA has meant that certain individuals present in the United Kingdom suspected of participation in the Rwandan genocide cannot under the current legislation be prosecuted for genocide by UK courts, even where they are UK nationals or UK residents.

A. Universal jurisdiction over crimes against humanity and war crimes in a non-international conflict

War crimes committed in non-international armed conflicts

The 1949 Geneva Conventions require that universal jurisdiction be exercised only for offences committed in international armed conflict and *not* internal armed conflict; accordingly, they do not expressly require prosecution or extradition of persons suspected of violating common Article 3, which applies solely to situations of “armed conflict not of an international character”. However, under common Article 49/50/129/146, each state party is required to “take measures necessary for the suppression of all acts contrary to the provisions of the . . . Geneva Convention[s] other than . . . grave breaches”. The Geneva Conventions (Amendment) Act 1995 extended universal jurisdiction to grave breaches of the first Additional Protocol 1977, which concerns international armed conflict,¹⁹ and this is consistent with the evolving jurisprudence of international criminal tribunals. However, the GCA does not apply to serious violations of the second Additional Protocol, relating to the protection of victims of *non-international* armed conflicts, as that treaty did not criminalise such conduct. Further, universal jurisdiction does not exist in UK law in respect of some serious crimes against humanity, such as enforced disappearances and apartheid.

The Statute of the ICTR, being concerned with war crimes arising out of internal armed conflict, includes a specific provision giving the Tribunal jurisdiction over such violations.²⁰ The Appeals Chamber of the ICTY held that customary international law does impose criminal liability for violations of common Article 3.²¹

Crimes against humanity

The term ‘crimes against humanity’ was first used in something close to its modern meaning in a statement issued jointly by Britain, France and Russia in May 1915 in response to systematic Turkish attacks on the Armenian population of the Ottoman Empire.²² Offences of ‘crimes against humanity’ were set out in Article 6(c)²³ of the 1945 Nuremberg Charter (i.e. pursuant to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (IMT) which sat at Nuremberg). Thereafter, other bodies such as the International Military Tribunal for the Far East (Tokyo) and the CCL (referred to in the Introduction to this document) followed suit.

Presently, there are eleven international texts defining crimes against humanity. Although definitions vary, they do share the following:

1. They refer to specific acts of violence against persons irrespective of whether the person is a national or non-national and irrespective of whether these acts are committed in time of war or time of peace.

¹⁹ Section 1(1A)(b).

²⁰ Statute of the Rwanda Tribunal, Article 4.

²¹ *Prosecutor v. Tadic*, Case No. IT-94-1-T 7/5/97, 2 October 1995, 35 ILM (1996) 32, para. 137.

²² ‘In view of these new crimes of Turkey against humanity and civilization, the Allied Governments announce publicly to the Sublime Porte that they will hold personally responsible for these crimes all members of the Ottoman Government, as well as those of their agents who are implicated in such massacres’

²³ “Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

2. These acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution. Such a policy can also be manifested by the “widespread or systematic” conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition.²⁴

The more recent statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) expanded the crimes to include rape and torture. Article 7 of the Rome Statute added the crimes of enforced disappearance of persons and apartheid, whilst clarifying the definitions of crimes of extermination, enslavement, deportation or forcible transfer of population, torture, and forced pregnancy.

Crimes against humanity overlap with crimes of genocide and war crimes. However, while article 2 of the 1948 Genocide Convention includes a requirement of **intent** to “destroy in whole or in part” a national, ethnic, religious or racial group, there is no such requirement in cases of crimes against humanity. Further, unlike genocide, crimes against humanity apply to a broad range of victims, going beyond the above-mentioned four groups listed in the Genocide Convention. As defined in the Rome Statute, a crime against humanity is committed where any of the atrocities included in the definition are committed as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”.²⁵ Finally, unlike war crimes, crimes against humanity apply in times of both war and peace.’

Consequences of absence of criminal offences in UK law

Article 8(2)(c) and (e) of the Rome Statute include as ‘war crimes’ violations of (a) article 3 of the Geneva Conventions of 1949; and (b) article 4 of the second Protocol Additional to the Geneva Conventions, while (as mentioned above) article 7 of the Rome Statute defines crimes against humanity. All of these are now domestic criminal offences by virtue of the ICCA, but *only* (a) when committed in England and Wales by anyone or (b) when committed outside the UK by UK nationals or residents or persons subject to UK service jurisdiction. (See also below in relation to the problems of universal jurisdiction in respect of the crime of genocide.) Other countries, such as Finland, have provided for universal jurisdiction over all war crimes, whether committed in international or non-international armed conflict.

Since most present day conflicts are of an internal rather than an international character and often involve serious human rights violations by state agents, in some cases amounting to crimes against humanity, the absence of universal jurisdiction over these two categories of international crime significantly diminishes the effectiveness of existing UK universal jurisdiction legislation.

Ideally, section 51 of the ICCA should be amended (with retrospective effect) to achieve universal jurisdiction in respect of the offences of crimes against humanity, genocide (as to which see further below) and war crimes as defined in the Rome Statute (i.e. so that all persons suspected of such offences, wherever committed and of whatever nationality, can be brought to justice in England and Wales)²⁶

²⁴ Bassiouni, Cherif, *Crimes Against Humanity* in ‘Crimes of War 2.0: What the Public Should Know, Revised and Expanded Edition’ by Roy Gutman (Editor), David Rieff (Editor), Anthony Dworkin (Editor), W. W. Norton; Rev Upd edition, 2007). Available online: <http://www.crimesofwar.org/thebook/crimes-against-humanity.html>

²⁵ Rome Statute of the International Criminal Court, 17 July 1998, Part 2. Jurisdiction, Admissibility and Applicable Law, Article 7 available at: <http://www.icrc.org/ihl.nsf/WebART/585-07?OpenDocument>

²⁶ Similar amendments would be required to legislation in respect of Scotland and Northern Ireland.

The United Kingdom should amend its law to define all war crimes and crimes against humanity, whether committed in international or non-international armed conflict, as crimes under national law in accordance with the strictest definitions in customary and conventional international law and to provide universal jurisdiction over all such crimes.

B. Universal jurisdiction over genocide

The Genocide Act 1969 was repealed by the ICCA. It had provided that a person would be guilty of the offence of genocide if they commit any of the acts set out in Article II of the Genocide Convention for the Prevention and Punishment of the Crime of Genocide of 1948 with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.²⁷ Such acts include “causing serious bodily injury or mental harm to members of the group”.²⁸ Article VI of the Genocide Convention provides that a person may be tried by: “a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction”.

The silence of the Genocide Convention on the question of the exercise of universal jurisdiction by national courts has not been taken as an indication that as a matter of international law states may not exercise universal jurisdiction over persons suspected of involvement in genocide.²⁹ Some states have already recognised genocide as imposing an obligation *erga omnes* on states to exercise jurisdiction. This position was put in the *Third Restatement of the Foreign Relations Law of the United States*.³⁰ Indeed, the federal criminal law of the USA has recently been amended to provide for universal jurisdiction over the crime of genocide.³¹ Meanwhile, courts in Austria, Germany and Spain have exercised jurisdiction over cases of genocide committed abroad even in the absence of an explicit provision in the Genocide Convention, while Belgium and Senegal recently added genocide to the list of international crimes over which its courts may exercise universal jurisdiction.

When passing the ICCA and consequently repealing the Genocide Act 1969 the UK Parliament failed to take the opportunity of remedying the absence of universal jurisdiction over genocide.

²⁷ Genocide Convention Article II.

²⁸ Genocide Convention Article II(b).

²⁹ The drafters did not intend to prevent states parties to the Genocide Convention from exercising universal jurisdiction over genocide. See Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation – Chapter Seven: Genocide: The legal basis for universal jurisdiction*, AI Index: IOR 53/010/2001, September 2001. As of September 2001, the following states had expressly provided for universal jurisdiction over genocide in their legislation, according to Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation - Chapter Eight: Genocide - State practice at the national level*, AI Index: IOR 53/011/2001, September 2001: Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Czech Republic, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Ghana, Honduras, Hungary, Israel, Kazakhstan, Latvia, Lithuania, Luxemburg, Macedonia, Montenegro, New Zealand, Panama, Paraguay, Poland, Portugal, Romania, Slovakia, Slovenia, Serbia, South Africa, Spain, South Africa, Spain, Sweden, Switzerland, Tadjikistan, Turkmenistan, United States, Uzbekistan and Venezuela. Since then, a number of other states, such as Australia, have provided for universal jurisdiction over genocide, usually in implementing legislation for the Rome Statute of the International Criminal Court.

³⁰ Restatement (Third) of the Foreign Relations Law of the United States (1987).

³¹ Genocide Accountability Act of 2007 Pub. L. 110-151 (December 21, 2007). The Act amends Title 18 section 1091 of the U.S. Code by deleting the current subsection (d) and adding a new subsection. The new language in the Act would permit the prosecution of genocide if the alleged offender is an alien who was lawfully admitted for permanent residence in the U.S.; or a stateless person whose habitual residence is in the U.S., or, after the conduct for the offense transpires, the alleged offender is brought into, or found in the U.S., even if the conduct occurred outside of the U.S.

Instead, it limited those subject to UK criminal law in respect of genocide to the same group as other ICCA offences (i.e. crimes against humanity and war crimes, as to which see above).

The United Kingdom should provide that its courts can exercise universal jurisdiction over genocide, either by amending the ICCA or passing a new Genocide Act.

C. The problem of command and superior responsibility for international crimes under international law

The doctrine of command and superior responsibility, i.e. the responsibility of a commander or superior for the actions of his subordinates, has been developed through customary international law, particularly in cases decided after World War II. It has also been considered in various domestic jurisdictions.³²

Additional Protocol I to the Geneva Conventions, adopted in 1977, provides for the criminal and disciplinary responsibility of commanders and superiors for the conduct of their subordinates. The provisions of Additional Protocol I reflect customary international law.³³

1. Article 87 provides that parties to a conflict should require military commanders to prevent, supervise and report breaches of the Geneva Conventions and Protocol by troops and others under their command and, where appropriate, initiate disciplinary action. Article 86(2) provides that the fact that a breach of the convention or of the Protocol is committed by a subordinate does not absolve his or her superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he or she was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
2. The ICRC Commentary on the Protocol³⁴ identifies three conditions which must be fulfilled for a superior to be held responsible for an offence committed or about to be committed by a subordinate:

³² This section considers the criminal liability for a commander's failure to either prevent or punish the crimes of his subordinates (indirect command responsibility) under English criminal law, but there is no doubt that a commander **can** incur criminal liability for his **direct** command responsibility under English criminal law.

The responsibility of a superior for the acts of his subordinate is not a new concept in English law. The liability of a superior for planning, instigating, or ordering the crimes of his subordinates in English law is well established. For instance, the organiser of a criminal enterprise is responsible for all the actions of his subordinates in carrying it out. Thus, the prosecution of a superior, either military or civilian, on the basis of his **direct** command responsibility is clearly possible since the principle of direct responsibility is broadly akin to existing forms of criminal liability. Commanders can be held responsible for crimes under the Geneva Conventions Act 1957 committed by his subordinates where there is evidence that the commander planned, instigated, or ordered the crimes of his subordinates pursuant to the ordinary principles of English criminal law. Moreover, a superior can also be prosecuted as an accomplice **if** his failure to prevent or punish the crimes committed by his subordinates could be demonstrated to have aided and abetted or encouraged them to commit further crimes.

What is in question is whether a commander or superior can otherwise be held liable under existing English criminal law for his failure to prevent or punish the crimes of his subordinates where the crimes in question were not committed in the UK or where the commander is neither a UK citizen or subject to UK service jurisdiction.

³³ W. J. Fenrick "Some International Law Problems Related to Prosecution Before the International Criminal Tribunal for the Former Yugoslavia", (1995) 6

³⁴ ICRC Commentary par. 3543.

- (i) the person to be held responsible must be the superior of the person or persons committing the breach of the convention³⁵;
- (ii) the superior must have known or had information which should have enabled him to conclude that a breach was being committed or was going to be committed³⁶; and
- (iii) the superior did not take all feasible measures within his powers to prevent the breach.³⁷

Indeed, similar wording of the customary international law principle of command and superior responsibility can be found in the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (Article 6)³⁸, the ICTY Statute (Article 7 (3))³⁹, the ICTR Statute (Article 6 (3))⁴⁰, the Statute of the Special Court for Sierra Leone (Article 6 (1))⁴¹ and the Law Establishing the Extraordinary Chambers for Cambodia (Article 29).⁴²

Further, there is now important jurisprudence concerning the scope of command and superior responsibility as defined in the statutes that established the ad hoc tribunals into Rwanda and the former Yugoslavia (ICTR and ICTY), but that is not addressed here.

Rome Statute

Article 28 of the Rome Statute⁴³ imposes similar liability on commanders as the statutes of the ad hoc tribunals and liability on both military and civilian commanders and superiors for crimes within the jurisdiction of the ICC. Criminal responsibility can be imposed upon both military and civilian commanders or superiors.

Contrary to customary and conventional international humanitarian law, which imposes the same criminal responsibility on commanders and superiors, Article 28 of the Rome Statute, which applies only to cases in the International Criminal Court provides for a weaker standard of criminal responsibility for superiors. However, differing states of knowledge are required: a military commander or person effectively acting as a military commander is liable for crimes which he "should have known" about, whereas a civilian superior is liable only if he "consciously disregarded information which clearly indicated, that subordinates were committing or about to commit such crimes".

³⁵ Article 87(3) refers to "commanders" while Article 86(2) refers to "superiors". The ICRC Commentary (para. 3544) states that the term superiors encompasses military commanders and extends to a further category of persons with similar powers of control over subordinates. In the Commentary on Article 87 (par. 3556) the duty to prevent crimes extends to all persons in the armed forces who exercise command "from the highest to the lowest level of the hierarchy". The duty extends to all persons under the commander's control, not just members of armed forces. The Commentary on Article 86 (para. 3544) makes clear that the provision is concerned only with "the superior who has personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control."

³⁶ The ICRC Commentary (para. 3545) states that a superior cannot be absolved from responsibility by pleading ignorance of reports addressed to him or by citing temporary absence as an excuse. In certain cases, knowledge of breaches committed by subordinates could be presumed. The Commentary makes clear (para. 3541) that responsibility pursuant to Article 86 may be incurred by negligence. However, the negligence must be so serious as to amount to malicious intent.

³⁷ The ICRC Commentary (para. 3548) states that as a matter of common sense a superior is only under an obligation to take measures that are "within his power".

³⁸ Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf

³⁹ Available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf>

⁴⁰ Available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>

⁴¹ Available at <http://www.sc-sl.org/Documents/scsl-statute.html>

⁴² Available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf

⁴³ Article 25 of the Rome Statute imposes criminal liability on individuals who commit, order, solicit or induce a crime, aids and abets the commission of a crime, and those who contribute to the commission of a crime by a group of persons acting with a common purpose.

The criminal responsibility of commanders or superiors under English law

A commander or superior can incur liability for the crimes of his subordinates pursuant to the ICCA. In addition, as customary international law, the doctrine of command and superior responsibility has been incorporated into English law. The relevant parts of section 65 of the ICCA follow Article 28 of the Rome Statute and are as follows:

(2) A military commander, or person acting as a military commander, is responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where--

(a) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences, and

(b) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) With respect to superior and subordinate relationships not described in subsection (2), a superior is responsible for offences committed by subordinates under his effective authority and control, as a result of his failure to exercise control properly over such subordinates where:

(a) he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offences,

(b) the offences concerned activities that were within his effective responsibility and control, and

(c) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation or prosecution.

Liability pursuant to section 65 is limited to the offences in the ICCA: genocide, crimes against humanity, and war crimes. As already mentioned, domestic courts only have jurisdiction over such offences committed in England and Wales or overseas by United Kingdom nationals, residents or persons subject to United Kingdom service jurisdiction.⁴⁴ It is therefore impossible for this form of command responsibility to apply under the ICCA to any offences not committed in England or Wales or those committed abroad, other than by UK nationals or persons subject to UK service jurisdiction.

The Geneva Conventions Act 1957 (as amended) makes grave breaches of the four Geneva Conventions and their Additional Protocols offences under English law.. However, although the First Additional Protocol forms a schedule to the Act, Articles 86 and 87 that provide for the command responsibility of superiors are not explicitly referred to in the main body of the Act. There is therefore an issue as to whether this form of liability is properly recognised by English domestic law.

⁴⁴ Section 51 of the ICCA. Section 52 criminalises conduct ancillary to an act which would constitute an offence under section 51.

The problem is compounded by the fact that if it is not properly recognised by statute, English domestic law is uncertain as to whether customary international law can impose domestic criminal liability. The House of Lords, in *R v Jones and Others* [2006] UKHL 16 in relation to the international law crime of aggression, indicated an unwillingness to recognise domestic criminal liability for the customary international law offence of aggression in the absence of explicit statutory authority. Similarly, in *Pinochet No 3*,⁴⁵ in the context of extradition, the House of Lords held that the international law crime against humanity of torture was not a domestic offence contrary to the law of England and Wales until after the time of its enactment by a domestic statute.

For these reasons, it is important that any uncertainty is removed and the Geneva Conventions Act 1957 is amended to make clear that the command responsibility of superiors as provided for by Articles 86 and 87 of Additional Protocol I is clearly and explicitly recognised by domestic law.

D. Universal jurisdiction over torture – impermissible defences

The legislation giving the United Kingdom universal jurisdiction over torture seriously undermines it by providing that it is a complete defence if the conduct was lawful in the state where the torture occurred. It could even be interpreted to apply where the country concerned has not defined torture as a crime or where the executive has given an authoritative legal opinion that a particular method of torture, such as waterboarding, was not torture.

Sections 134(4) and 5(b)(iii) of the Criminal Justice Act provide that:

(4) “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”

(5) For the purpose of this section “lawful authority, justification or excuse” means - ... (b) in relation to pain and suffering inflicted outside the United Kingdom . . . (iii) in any other case, lawful authority, justification, or excuse under the law of the place where it was inflicted.”

These defences are a violation of the United Kingdom’s obligations under the Torture Convention, which simply states that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”, which means that they must be lawful under international law, not just under national law, and specifies that superior orders may not be invoked as a justification for torture.⁴⁶ The wording of these statutory provisions is clear and unambiguous. Parliament may pass a law that mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the incorporation may be misleading. It is not the treaty but the statute, which forms part of English law. In addition, English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so, or to an authoritative interpretation by a treaty body.

In light of the above, it would be open to a Court to interpret these provisions without having to assess its compliance with the Torture Convention, because of the lack of interface between the statute and the Convention and the unambiguous wording. As a result, the UK courts are unable to interpret statutory provisions in accordance with international law, even if this results in a breach of the UK’s international obligations.

⁴⁵ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147.

⁴⁶ Torture Convention Articles 1(1) and 2(3) respectively.

Section 134 should be amended to incorporate Article 2(3) of the Convention; “An order from a superior officer or a public authority may not be invoked as a justification of torture”.

III. The failure of the United Kingdom to define crimes under international law as crimes from the moment they were recognised as such

The failure of the UK to define crimes under international law as crimes under national law from the moment they were recognised as such under international law seriously undermines its ability to play an effective role in ending impunity either by investigating and prosecuting such crimes in its courts or by extraditing suspects to face trial abroad, as demonstrated in the Augusto Pinochet case.

The general prohibition of retroactive criminal legislation has been misinterpreted by Parliament to prohibit retrospective application of national law defining crimes under international law as crimes under national law from the moment they were so recognized under international law.⁴⁷ The general rule under international law with respect to retrospective laws is that, in the absence of express words to the contrary, no person may be held guilty of any criminal offence which did not constitute such an offence under national or international law at the time when it was committed.⁴⁸ Therefore, international law makes clear that, if the acts of an individual were contrary to international law at the time they occurred, the principle of non-retrospectivity should *not* prevent them from being prosecuted under national law enacted after the conduct became criminal under international law. Indeed, this is given effect to in Article 7(2) of the European Convention, which qualifies Article 7(1) with respect to retrospectivity. It states that: “This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.” Similarly, Article 15(2) of the International Covenant on Civil and Political Rights, states that non-retrospectivity is subject to a proviso that it should not prejudice the trial and punishment of any person for an act which was recognised as criminal according to international law at the time it was committed.

In *Pinochet (No. 3)* the House of Lords disregarded this fundamental rule of international law and decided that the rule of non-retroactivity meant that Augusto Pinochet could not be extradited to Spain for acts of torture committed before the UK had incorporated the Torture Convention in 1988. Lord Millett, who put forward the only dissenting judgment on this point, challenged the rule of non-retrospectivity on the basis that it was outweighed by the need for universal jurisdiction because of the nature of the crimes.⁴⁹ What emerges from this case is the need for the legislature to include a provision on retrospectivity on each occasion that an international crime is introduced into domestic law.

The fact is that the ‘retrospective’ changes required to English law that are set out in this paper are not genuinely retroactive, as they all relate to matters which have long been recognized as

⁴⁷ i.e. limiting criminal liability to offences committed after the legislation entered into force.

⁴⁸ *Waddington v. Miah* [1974] 1 WLR 683.

⁴⁹ *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (24 March 1999) [1999] 2 WLR 827, at p. 912.

criminal under international criminal law.⁵⁰ Indeed several common law countries such as Canada and New Zealand have implemented the Rome Statute 'retrospectively' in this sense.⁵¹

IV. The flawed system for conducting investigations

A. The need for an effective specialised investigation and prosecution unit

The UK is one of a handful of countries, including Canada, Denmark, Germany, Netherlands, Norway and Sweden, that have established specialised units or other structures to deal with investigations and prosecutions of serious human rights crimes. Recent research in Europe's states where prosecutors and investigating judges have successfully investigated and prosecuted cases based on universal jurisdiction has demonstrated that specialised units are usually a key 'ingredient for success' in the investigation and prosecution of these crimes.⁵² With the exception of two cases where private parties played a leading role, all convictions since 2001 in universal jurisdiction cases in eight leading countries have been handled by these specialised units.

The War Crimes Act 1991 is notable for statutory provisions which saw the setting up of special units by the police and the CPS for investigating those suspected of World War II war crimes. In the early 1990s, a specialised Metropolitan Police War Crimes Unit was established to investigate cases under the War Crimes Act. It spent more than £11m investigating 376 cases.⁵³ On the 10th March 2006, the Home Office released documents relating to why the War Crimes Unit was disbanded in 1999.⁵⁴ Documents suggest that 'the decision to disband the Unit was an operational decision' made by the Metropolitan Police who stated in a 'Policing of London Debate 1999' briefing that 'there were no more leads for the police to investigate' and that 'if new evidence were to come up this would be investigated by the police, but not through a specific War Crimes Unit.'⁵⁵

Currently, the Metropolitan Police are charged with the investigation of allegations and cases have been allocated to either SO 7(1) Kidnap and Specialist Investigations Unit of the Serious crime group or the Crimes against Humanity Unit of the Metropolitan Police (SO15). Although allegations have been raised against numerous individuals who have been physically present in the UK, the number of investigations and arrests has been distinctly low. The current institutional set up should be strengthened to enable proactive investigations and the swift detention of perpetrators.⁵⁶

⁵⁰ Parliament should ensure that national law covers crimes, principles of criminal responsibility and defences from the moment they were part of customary or conventional international law, which will vary.

⁵¹ See sections 4(4), 6(4) and (5) and 7 of Canada's Crimes Against Humanity and War Crimes Act 2000,

⁵² Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, 2006; REDRESS and FIDH, Fostering a European Approach to Accountability for Genocide, Crimes against Humanity, War Crimes and Torture, March 2007.

⁵³ Muir, Hugh, 'Plan for new Met War crimes unit falls foul of funding problems,' The Guardian, January 5 2004: <http://www.guardian.co.uk/politics/2004/jan/05/ukcrime.immigrationpolicy>

⁵⁴ Reasons for the disbanding of the Metropolitan Police War Crimes Unit, FOI 2867, March 10 2006, available at: <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/foi-archive-crime/2867-war-crime-unit?version=1>

⁵⁵ *ibid.*, p. 4

⁵⁶ The Dutch War Crimes Unit since 2002 provides an excellent example of an effective war crimes unit. It is integrated into the Dutch prosecution services with staff ranging from administrative staff, criminal intelligence officers and investigators who work on international crimes. Experts from criminal scientists to weapons experts, historians and anthropologists are recruited depending on when they are needed and the unit actively cooperates with other institutions such as immigration authorities and government ministries. The team has since been positively evaluated, as recently as February 2006. More information can be found at: http://www.hrw.org/reports/2006/ij0606/10.htm#_ftn334

It is recommended that a designated unit is established to proactively investigate all crimes under international law committed abroad, including torture, war crimes, genocide and crimes against humanity, and associated crimes of international concern.

It is important that steps are taken to maintain and develop the expertise of investigators working on the investigation of these specialised crimes, which involve challenging foreign investigations and require sensitivity in interviewing victims and witnesses and an appreciation of cultural differences. Developing a core group of investigators who work specifically on these crimes would improve the efficacy of these investigations. It would also facilitate fruitful sharing of experiences among investigative teams from other countries. This is consistent with the recent recommendation from the EU Network of Contact Points on Genocide, War Crimes and Crimes against Humanity. If this were done, the Metropolitan Police would be able to increase the number of investigations as well as develop the expertise of its officers responsible for existing investigations. Officers working within this unit should be provided with specialist training.

There is some concern that as the investigators within the relevant MPS unit and the Crown Prosecutors within the relevant CPS unit also have responsibility for anti-terrorism cases, that even these specialised individuals are facing competing demands and their essential work on international crimes needs to be better 'ring-fenced'.

- Notification of potential cases

Members of the public, be it the media, victims, or NGOs, have been key to notifying the Metropolitan Police and courts about the presence or anticipated presence of alleged perpetrators of international crimes. The general public should be made aware of the Metropolitan Police's remit to investigate such crimes. This would improve victims' participation in the investigation of such crimes, and may act as a deterrent to alleged perpetrators wishing to visit the UK.

Immigrants and asylum-seekers are a key link in the initiation of investigations, both as suspects and as victims and witnesses. The UK is one of a few leading states in Europe which screen immigration and asylum applicants for suspicion of involvement in war crimes and transfers some cases for further investigation. But the UK could be doing more to publicise the existence of its special team working on universal jurisdiction cases to immigration and asylum applicants. Through information campaigns, leaflets, posters, and the internet, the UK could ensure that victims and witnesses who have arrived in the country and learn about the presence of a potential perpetrator know that they can turn to the police. Denmark, for example, has demonstrated its strong commitment to these types of investigations by distributing posters and leaflets in immigrant communities and in immigration offices.

- Carrying out arrests

The police will usually decide whether to investigate a complaint and issue an arrest warrant. In addition to any action taken by the police, it is possible for third parties to file a complaint and, where the police refuse to investigate, to initiate a private investigation and prosecution⁵⁷ and to apply for an arrest warrant to be issued.

⁵⁷ Prosecution of Offences Act 1985, section 6 (1).

In the case concerning former Israeli General Doron Almog, an application was made to a judge to issue an arrest warrant and a warrant was subsequently issued on the basis of the substantial evidence relating to war crimes that was provided in support of the application. Mr. Almog arrived at Heathrow airport on 11 September 2005 where the police were waiting to execute the arrest warrant. It appears that a senior government official informed the Israeli government of the arrest warrant, but no prompt, independent, impartial and thorough investigation has been made of this conduct, which may have involved contempt of court. General Almog was advised by the military attaché of the Israeli embassy not to leave the plane and to return directly to Israel and he heeded this advice.⁵⁸ Following this incident, Israeli officials have met with Home Office representatives to discuss possible changes to the Prosecution of Offences Act, ostensibly to take away the power of district judges to issue arrest warrants in such cases.

The ability of a district judge to issue an arrest warrant is crucial to the effective exercise of universal jurisdiction as it enables a judicial authority to respond swiftly to the presence or expected impending arrival of a suspect. Time is very much of the essence especially where an alleged perpetrator is not resident but just visiting the UK.

The Government should resist any and all pressure to amend the power of district judges to issue arrest warrants supported by clear and cogent evidence. In addition, it should make disclosure of sealed arrest warrants before the suspect has been arrested a criminal offence regardless who has made the disclosure.

In May 2007, the Counter Terrorism Division of the Crown Prosecution Service (CTD) agreed a protocol with the Crimes against Humanity Unit of SO15.⁵⁹ The protocol (and its publication) is a welcome step in demonstrating the commitment of both the police and CPS to adequately resource prosecutions of serious international criminals. However, it is unclear why the protocol does not mention allegations of torture, nor the role the CPS or police would adopt vis a vis the Court in urgent cases where an application is made for an arrest warrant. Further, there is mention made of writing to a complainant to indicate a decision not to investigate an allegation, but in the interests of the fair administration of justice it would be helpful if any such letters set out reasons for the decision.

The existing National Protocol between the police and CPS should be amended to include torture cases and to reflect the duty to provide reasons for decisions not to investigate allegations.

⁵⁸ <http://www.hickmanandrose.co.uk/news05.html>.

⁵⁹ http://www.cps.gov.uk/publications/agencies/war_crimes.html

V. Political interference with prosecuting, extraditing and providing mutual legal assistance

A. Political official's consent required to prosecute

Before any prosecution can proceed, the consent of the Attorney General, a political official, is required.⁶⁰ The (previous) Attorney General confirmed to Parliament that the applicable criteria “are the same as for any other criminal offence. First, there must be sufficient admissible and reliable evidence to afford a realistic prospect of conviction; secondly, the circumstances must be such that it would be in the public interest for there to be a prosecution”.⁶¹ The test requires that the evidence be admissible in a UK court of law, reliable and “more likely than not” to lead to a conviction.

The relevant Acts do not stipulate at what stage in an investigation the consent of the Attorney General should be sought. However, in practice, the Crown Prosecution Service (CPS), following the contact from the police will usually seek the Attorney General's consent once the CPS considers that a person can be prosecuted, i.e.: the case fulfils its guidelines on decisions to prosecute. In this context, we note that the role of the Attorney General in giving consent to prosecutions is currently under review and the Draft Constitutional Renewal Bill provides an important opportunity to amend the current arrangements.⁶²

The need for Attorney General consent must be questioned, given that the Attorney General bases her decision on exactly the same guidelines as those taken by the CPS when deciding to pursue a regular prosecution.

The recent Ministry of Justice White Paper *The Governance of Britain – Constitutional Renewal*, proposes a number of significant changes to the role of the Attorney General including her functions in relation to prosecutions.⁶³ The Paper initially states that “the Government proposes to legislate to provide that the Attorney General's function of superintending the prosecuting authorities does not entail an ability to give a direction in relation to a particular case. *Thus it will not be open to the Attorney, as superintending Minister, to direct a prosecuting authority to prosecute a particular case or not to prosecute a particular case.*”⁶⁴ Unfortunately, this bold premise is contradicted further into the White Paper. The Paper proposes to maintain the power of the Attorney General to give a direction to stop a prosecution in “exceptional cases” which give rise to issues of national security.⁶⁵ It also goes on to state that “in relation to a very small range of offences which are particularly likely to give rise to consideration of public policy or public interest (such as most Official Secrets Act offences *and war crimes*), the obligation to obtain the consent of the Attorney General should be retained...”⁶⁶

⁶⁰ Criminal Justice Act 1988, section 135; Geneva Conventions Act 1957, section 1A (3) (a); International Criminal Court Act 2001, section 53 (3).

⁶¹ Written answer by the Attorney General to Mr Boateng, Parliamentary question 19/07/93 published in Hansard.

⁶² See e.g. the report of the House of Commons Justice Committee, *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* (HC 698: 24 June 2008).

⁶³ *The Governance of Britain – Constitutional Renewal*, presented to Parliament March 2008, HMSO (<http://www.justice.gov.uk/docs/constitutional-renewal-white-paper.pdf>), paragraphs 32 – 98

⁶⁴ Paragraph 79 (my italics)

⁶⁵ Paragraphs 85 – 89

⁶⁶ Paragraph 91 (my italics)

A small amount of hope may be found in the fact that the paper admits that further work is needed to determine which of the Attorney's current consent functions fall into the category of cases described above. However, it is obviously unfortunate that the Ministry of Justice has chosen to single out war crimes as an example where the requirement for the consent of the Attorney General should be retained.

With regard to the international crimes which are the subject of this paper, it can never be appropriate for a political figure to be able to revoke the power of an independent body to investigate and prosecute suspects. There is something perverse to a claim that it may sometimes be in the public interest to prevent the prosecution of some of the gravest crimes known to man. Most members of the public would be repulsed by the idea that they might be made complicit in the impunity of those responsible for these most serious crimes by a Government which states that their hands are tied by "the public interest".

As seen in the dropping of the Serious Fraud Office's investigation into BAE, there is a more than just a theoretical risk of political interference in high profile prosecutions with an international element. The fact that there is an explicit and legally sanctioned power residing in a politician to interfere with the prosecutorial process, is crying out for manipulation by interested international actors who are associated with the UK Government, whether through trade, security or other forms of international relations.

The High Court has pointed out that "the United Kingdom's system of democracy forbids pressure being exerted on an *independent prosecutor* whether by the domestic executive or by anyone else."⁶⁷ Given that this is the case where the decision to prosecute lies with an independent prosecutor, the High Court has pointed out that there should be no "temptation for those who wish to halt an investigation" to try and exert political or diplomatic pressure.⁶⁸ In other words the decision is simply out of the hands of those who are susceptible to such pressure. However, where the decision to prosecute lies with a politician, this will only encourage external attempts to influence individual decisions.⁶⁹

B. Home Secretary's consent to extradite

Some of the typical grounds in extradition agreements and other legislation to refuse extradition⁷⁰ will not be applicable in the universal jurisdiction context in which the requesting state is seeking to prosecute on behalf of the international community. Other grounds for refusing extradition such as fitness to stand trial, are typically factors which should normally be left to the courts (as opposed to the executive authorities) in the requesting - rather than the requested - state. Although the Extradition Act 2003 now leaves little discretion to refuse extradition requests, the circumstances of the Pinochet case must be avoided at all costs. When decisions are left to political officials in the requested state to decide on the basis of discretion, rather than a fair and open process on the basis of legal criteria, the public perception of the fairness and integrity of the proceedings is undermined.

⁶⁷ *R (on the application of Corner House Research and Campaign Against Arms Trade) v The Director of the Serious Fraud Office and BAE Systems PLC* [2008] EWHC 714 (Admin), paragraph 90

⁶⁸ Paragraph 79

⁶⁹ The High Court stated in the BAE case that this is also the unfortunate outcome where an *independent* prosecutor's decision is unlawfully interfered with.

⁷⁰ E.g., the prohibition of the extradition of nationals, double criminality requirements, the political offence exception, *ne bis in idem*, statutes of limitation and general discretion.

The UK must refuse to extradite a person to a state if there is a real risk that upon return the suspect would face torture, inhuman or degrading treatment or punishment (including the death penalty), would not receive a fair trial, or if the extradition would otherwise result in a flagrant breach of the suspect's rights.

In accordance with the UK's obligation to extradite or prosecute, the competent UK officials should be well prepared to prosecute in the event of a refusal to extradite. Without adequate foresight, a refusal to extradite might otherwise lead to impunity.

C. Ineffective mutual assistance

In one instance, the UK received a request for legal assistance from the Australian Federal Police in relation to the investigation of an individual who allegedly perpetrated acts of torture in Bahrain and who was located for a short period in Australia.⁷¹ At the same time the UK requested legal assistance from the Australian authorities in relation to the same perpetrator. Unfortunately, neither request was responded to in time, even though the UK indicated to Australia that there was an ongoing investigation and that the UK authorities had amassed a considerable amount of evidence. Apparently, there was some discussion about which country had “primary jurisdiction” over the case in the absence of any extradition request. This may have hindered the UK's response for mutual legal assistance.

The UK should provide evidence expeditiously to the authorities of requesting states, unless provision of mutual legal assistance would lead to an unfair trial, the death penalty or torture or other ill-treatment, in the absence of any request from the UK for the individual's extradition, rather than make its own request for assistance. An alleged perpetrator should not be given the opportunity to leave a co-operative third state before any arrest can be made (i.e. as a result of evidence remaining under the control of the UK authorities).

VI. The need for deportations and other Immigration ‘remedies’ to support, not supplant, investigations and prosecutions

The power of the Home Secretary to deport or otherwise effect the removal of non-nationals on immigration grounds should not be used without the UK authorities first fulfilling their obligations under the Convention to carry out an effective investigation with a view to prosecution in the absence of any bone fide extradition request. This is a particular risk in the recent example of the discovery of the presence of several Rwandans accused of participating in the 1994 genocide. Given the lacunae in the genocide legislation referred to earlier, Home Office officials may be

⁷¹ See “Alleged torturer questioned in Bahrain on “Fraud and other Abuses” dated 27th November 2003 http://www.redress.org/news/bahrain_27_11_2002.html.

inclined to deport the suspects or put them at risk of torture or cruel, inhuman or degrading treatment or punishment if extradition to Rwanda is allowed.

The Government must fulfil in all cases its obligations to extradite or prosecute suspects of the most serious crimes under international law. Deportation is a complement, not a substitute. Countries selected must be willing to investigate and, if there is sufficient admissible evidence, prosecute in fair trials without the death penalty or torture or other ill-treatment.

VII. Provide access to a civil remedy

The same circumstances that give rise to international crimes also give rise to a civil obligation under international law. For example, Article 14 of the UN Convention against Torture sets out the obligation of state parties to ensure in their legal systems that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.⁷² This means that victims must be provided with effective procedural remedies (the ability to have access to justice) as well as substantive reparation, including as appropriate restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Extraterritorial civil claims for torture are more made in civil law countries by attaching civil claims to ongoing criminal proceedings through the constitution de partie civile system. In contrast, only one common law country has expressly authorized and used civil suits for crimes under international law committed abroad - the United States - where there are specific laws that allow for such claims, but cases have also been lodged in the United Kingdom, Canada and Switzerland. This jurisprudence has developed separately from the criminal jurisprudence, and in some instances different standards have been applied to questions of immunities as well as forum or nexus considerations.

In the UK, there is no specific legislative basis on which to bring an extraterritorial civil claim for torture or other crimes under international law. Civil claims are brought on the base of common law tort actions. There is no requirement under English law for a person launching a claim for a civil wrong committed abroad to be resident in the UK or to be a British national. However in claims where the injury occurred outside of the UK the claimant needs to overcome a series of procedural hurdles. In particular:

- Limitation periods: The time limit to bring a case for intentional trespass of the person is 6 years. However, there is a discretion not to apply the limitation period when it is judged to be equitable to do so.
- Service rules: Jurisdiction will only be effective if the defendant is served in the appropriate form.⁷³

⁷² Article 14 continues: "... including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

⁷³ See REDRESS. Challenging Impunity for Torture: A Manual for Bringing Criminal and Civil Proceedings in England and Wales for Torture Committed Abroad, 2000, at Part III, pp. 125 – 163. See also Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 Eur. J. Int'l Law 903 (2007); Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 Eur. J. Int'l Law 955 (2007); Noah Benjamin Novogrodsky, *Immunity for Torture: Lessons*

- Forum non conveniens: The court has the inherent ability to stay the proceedings when it is satisfied that there is some other available forum having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
- Immunities: As will be discussed below, courts have taken a more expansive view of applicable immunities in extraterritorial civil proceedings than has been taken in criminal proceedings.

The Government contended that the scope of article 14 is limited by the distinction between universal criminal and universal civil jurisdiction in relation to article 5, claiming that international law only recognises the former jurisdictional base. It has argued in its State party report to the Committee against Torture that:

“the solutions to such state-orientated wrongdoing may be multilateral co-operation or bilateral diplomatic action, rather than a national judicial process. In contrast, where individual malefactors are involved the international community generally treats egregious human rights violations as crimes to be punished by domestic or international tribunals ... rather than torts to be remedied primarily by damage awards in civil proceedings.” And “It is not even necessary that all remedies for tort-like wrongs be judicial in nature. A responsible sovereign may prefer to have a political resolution that looks to the future rather than a backward-looking resolution based on litigation damages.”

Here, the Government appears to ignore the position in international law that remedies for serious violations of human rights, such as torture must be judicial in nature.⁷⁴

Lord Archer of Sandwell, QC has put forward a Private Members’ Bill, the Torture (Damages) Bill, which sets out such an exception. The Bill has passed its Second Reading in May 2008

Following the decision of the House of Lords in Jones et al. v. Saudi Arabia, the Government should implement its obligation under Article 14 of the Convention against Torture and legislate an exception to state immunity for torture and other serious crimes under international law giving rise to universal jurisdiction. The Torture (Damages) Bill should be supported by Government⁷⁵

from Bouzari v. Iran, 18 Eur. J. Int'l Law 939 (2007); and Christopher Keith Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 Eur. J. Int'l Law 921 (2007).

⁷⁴ See Human Rights Committee Decision of admissibility of 13 October 2000, Communication No 778/1997, Case Coronel et al(Colombia), United Nations document CCPR/C/70/D/778/1997, para 6(4).

⁷⁵ See: <http://services.parliament.uk/bills/2007-08/torturedamages.html>, last accessed June 2008.