

Chapter 10

Ben Brandon

The United Kingdom

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

1.1 Introduction

On 1 April 1999, 79-year-old Antony Sawoniuk was convicted at the Old Bailey in London of murdering two Jews in September 1942 in Domachevo, Belorussia, a town under German occupation, in “violation of the laws and customs of war”. He received a sentence of life imprisonment.

Despite the leading role played by Great Britain at the International Military Tribunal (IMT) in Nuremberg, and in the prosecution of Nazi war criminals in occupied Germany between 1945 and 1950 in its own Military Courts and under Control Council Order Number 10, Sawoniuk was the first person to be tried in England for war crimes committed during World War II. He will probably be the last.

There are a host of legal, historical and political reasons for the absence of substantive prosecutions for international crimes in the United Kingdom for 50 years – but it really comes to this: Until the late 1980s it was not thought that any war criminals lived in the UK. The few thousand German prisoners of war in the UK at the end of the War were rapidly repatriated. It was confidently assumed that the ‘displaced persons’ and other migrants from the Eastern Front (where many of the worst atrocities of the War occurred) had been adequately screened before their arrival in the UK to help with the post-War reconstruction effort, and any potential war criminals identified and arrested.

Three factors influenced the UK Government to re-examine the question of war crimes prosecutions in the late 1980s. Firstly, the thawing in relations between the former Soviet Union and the West led to greater information sharing between NGOs, police and foreign ministries about suspected war criminals who had escaped justice after 1945 – a process that had been almost completely absent in the immediate aftermath of the War. Secondly, the relentless investigations of pressure groups such as the Simon Wiesenthal Center in Los Angeles disclosed the presence of suspected war criminals in the UK population. Finally, although not explicitly referred to in contemporary debates, the rise of ethnic violence and gross human rights violations in the former Yugoslavia from 1991 onwards caused many law-makers in Europe to look again at their own record of failure in prosecuting war criminals after the terrible conflict of 1939-1945.

1.2 Domestic implementation and international crimes in the UK

The UK Government, and in particular the Foreign Secretary, can enter into treaty relations that confer rights and create binding obligations on the executive, without the prior

consent of Parliament. However, such rights and obligations have no effect in domestic law “unless domestic law is in force to give effect to them”.¹ Parliament can incorporate such rights and obligations into domestic law through legislation. This constitutional arrangement is known as ‘dualism’. Under the dualist approach treaty provisions that have been incorporated into domestic law “have only the status of domestic law”,² and can be amended or repealed by subsequent legislation, regardless of the impact on the UK’s international obligations to other States Parties to the relevant treaty.

Treaties are incorporated into UK law in one of three ways: (1) where the whole or part a treaty is annexed to the relevant Act as a Schedule and expressed “to have the force of law of the United Kingdom”;³ (2) where Parliament confers a power on the executive to conclude future treaties of a particular type; and (3) where an Act of Parliament authorises the Crown to create secondary or delegated legislation in the form of Orders in Council making the treaties part of domestic law.⁴

There is nothing in English constitutional law that *per se* prevents English courts from recognising customary international law norms as part of the English common law. At the same time, whether or not a rule of customary international law forms part of English law is governed by the principle of certainty. In *Jones & Others v. Gloucestershire Crown Prosecution Service*,⁵ the Court of Appeal was called upon to determine the legality of the invasion of Iraq by UK and US forces in March 2003. In considering whether the international crime of aggression was a crime in English law, the Court noted that:

“The mere fact that an act can clearly be established as proscribed by international law and is described as ‘a crime’ does not necessarily of itself determine its character in domestic law unless its characteristics are such that it can be translated into domestic law in a way which would entitle domestic courts to impose punishment.”

The Court of Appeal found that there was insufficient consensus in the international community as to the constituent elements of the crime of aggression for it to meet the certainty test. By contrast, in *Pinochet No. 3*⁶ their Lordships appeared to accept the possibility that torture existed as a crime in English law before it was defined in the Criminal Law Act 1988.⁷

1 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge (2000).

2 Ibid.

3 See, for example the Geneva Conventions Act 1957 (which had annexed to it all four Geneva Conventions, and as amended, the First Additional Protocol), discussed below. Also, for a commentary on the same, Rowe and Meyer, ‘The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach’, *ICLQ* (1996). Also see Schedule 8 to the ICC Act, which incorporates the three ICC core crimes of genocide, crimes against humanity and war crimes into UK domestic law.

4 See for example, the ICC Elements of Crimes incorporated into UK domestic law by the International Criminal Court Act (Elements of Crimes) Regulations 2001 [SI 2001/2505].

5 *Jones and Others v. Gloucestershire Crown Prosecution Service* [2004] EWCA Crim 1981.

6 *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte* [200] 1 AC 61.

7 But held, nonetheless, that the dual criminality provisions of the extradition arrangements between the UK and Spain were not satisfied until the extra-territorial effect of the torture offence was made certain in English law by the passage of the Act.

As a matter of practice, experience has shown that it is unlikely that prosecutions will be brought to a successful conclusion in UK courts unless there is relevant domestic legislation in existence implementing customary international law norms or international conventions to which the UK is a party.

Two pieces of legislation were passed in the UK prior to the International Criminal Court Act 2001 that allow for the prosecution of two of the three core international crimes in domestic courts – the Geneva Conventions Act of 1957 and the Genocide Act of 1969. No one has been prosecuted in the UK for grave breaches of the Geneva Conventions or genocide, and both Acts lie on the statute books unused. Other non-core international crimes, such as hostage taking and torture, are also the subject of domestic legislation, and have been used in a small number of prosecutions in the UK courts.

Therefore the history of domestic prosecutions in the UK of international crimes prior to the implementation of the International Criminal Court Statute can be understood through the prism of the *Sawoniuk* case alone.

1.2.1 Moscow Declaration 1943 to the War Crimes Act 1991

Although Great Britain was a party to the Hague Conventions of 1907 and incorporated many of its provisions into the 1914 British Manual of Military Law, the long road that led to Sawoniuk's conviction began a year after his dreadful crimes were committed, in Moscow on 30 October 1943.

On that day, Churchill, Roosevelt and Stalin signed the Moscow Declaration. Two important features of that treaty determined what would follow: first, upon Germany's surrender, those responsible for war crimes were to be sent back to the place where the crimes were committed to be judged and punished; second, the major war criminals whose offences "had no particular location" would be punished by joint agreement of the Allies.⁸ The agreement reached after the Moscow Declaration was that the major war criminals should be tried at the IMT in Nuremberg.

Although there was tremendous political will to ensure that war criminals did not escape justice both during and in the immediate aftermath of the War, it soon dissipated as the huge scale of the reconstruction effort in Europe increasingly took precedence over thoughts of 'retribution', and the overwhelming practical difficulties involved in apprehending and trying suspects became apparent.

Eight million men under arms were captured and imprisoned by the Allies in 1945. Many combatants in the German armed forces were not German nationals, but from the Baltic States in the East, much of which was occupied by the Soviets. At Yalta, Churchill and Roosevelt had agreed to surrender all Soviet citizens under the control of Commonwealth forces in Europe and facilitate their return to the USSR. Between May and September 1945, some two million Soviet 'citizens' had been repatriated. The repatriations continued until 1949. It is not known how many Balts who had fought with the Germans against the Russians were returned. Britain was also under an obligation to return alleged war

8 See Joint Four Nation Declaration Order 1943 at <http://www.yale.edu/lawweb/avalon/wwii/moscow.htm>

criminals regardless of their nationality to the Baltic States, where many of the worst crimes had been committed.

Nevertheless, huge numbers of men remained in the camps. Quite apart from the obligations imposed on belligerent occupiers by the Hague Conventions to release prisoners of war after a conflict had ended, there was a tremendous shortage of labour after the war across Europe, and many of those captured in 1945 were educated, skilled and willing workers. Thousands were released from the camps and made their way to Britain as European Volunteer Workers.

The job of screening camp internees for possible prosecution fell to two organisations that were established to investigate and identify war crimes suspects – the Allied Central Registry of War Criminals and Security Suspects (CROWCRASS) and the United Nations War Crimes Commission (UNWCC). Their already difficult task was rendered virtually insurmountable by resource constraints and intelligence failures. The Soviet authorities had declined to actively participate in or provide evidence to either CROWCASS or the UNWCC, after the US and the UK had refused to allow the Baltic nations to sit on the UNWCC as independent States. Such information as was provided was often of limited value, as investigators were frequently overwhelmed by the logistical hurdles put in their path by the chaos of post-War Europe.

War crimes trials did take place in the British-controlled sectors of occupied Germany, either under the authority of a Royal Warrant of 1945 that created Military Courts, or Control Council Order Number 10. Although Hartley Shawcross, the then Attorney General said in October 1945 that “we must set ourselves an absolute minimum of prosecuting at least 10% of those criminals in the British zone...I am setting as an irreducible minimum that we try 500 by 30 April 1946”, it is unlikely that even that number were tried. Staff numbers for both investigations and prosecutions continued to decline, and Shawcross was forced to concede in May 1946 that “[i]n these circumstances I can only suggest that the trials should continue to the end of the year and that we should then review the situation with a view to bringing them to an end except in the most serious of cases.”⁹

By 1946, even Churchill was growing weary of war crimes trials. In a speech he gave in Zurich in September that year, he said “there must be an end to retribution. We must turn our backs upon the horrors of the past, and we must look to the future”. A number of factors contributed to this change of heart.

When the idea of war crimes trials was first mooted by the British in 1942, one of the original aims was swift trials to reduce the length of time suspects were kept in custody without charge, and to permit the rapid return of a peaceful atmosphere to Europe. These factors continued to influence thinking after the War had ended, and combined with concerns that the German population would perceive war crimes trials as an extended punishment of a defeated people, led to a reappraisal of the value of such trials. In addition, there was increasing concern at the treatment meted out to those extradited to the Soviet Union to face what appeared to be increasingly politically motivated war crimes

9 See Sir Thomas Hetherington KCB CBE TD QC and William Chalmers Esq. CB MC, *War Crimes - Report of the War Crimes Inquiry*, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty July 1989. Cmd. 744 at p 25 (the Hetherington-Chalmers Report).

trials under Stalin. The huge number of those said to have been involved in the crimes also presented tremendous practical problems, and with it came an increasing realisation that the numbers who could be traced, identified and punished for such widespread atrocities would be small in relation to the total number of war criminals. Finally, the British economy was in a parlous state, and it became increasingly difficult to justify further expenditure on war crimes trials in occupied Europe when the problems were so acute at home.

As a consequence, by 1950 Britain had largely abandoned its plans to prosecute large numbers of war criminals. It was considered that CROWCROSS and UNWCC screening of displaced persons coming to the UK from 1945 onwards had been largely effective. Very few, if any, German citizens were allowed to enter the UK after the war. A few extradition requests were received from the Soviets after the war, but hardly any were acted upon.¹⁰

However, Antony Sawoniuk, and others like him, did manage to enter the UK undetected between 1939 and 1950. Sawoniuk had fled the Russian advance in 1943 to 1944 with the German army, and joined the Waffen SS, fighting the Allies in France. Realising that the tide of the war was turning against the Axis, he abandoned his unit, and joined the Polish Corps, who at that point in the war were fighting their way up Italy. After the War it is unlikely that Sawoniuk faced any sustained interrogation about his background, and he assimilated into English life as many others had done.

1.2.2 The War Crimes Act 1991

Sir Thomas Hetherington (a former Director of Public Prosecutions in England) and William Chalmers (a former Crown Agent for Scotland) conducted a detailed investigation into alleged Nazi war criminals said to be in the UK in 1989, and assessed the need for further legislation. The Hetherington-Chalmers Report concluded that there was reliable evidence to support prosecutions of a number of (unnamed) suspects. They also concluded that existing UK law was inadequate, in that it did not permit the prosecution of Nazi war criminals who had committed crimes abroad. Although the Offences against the Person Act 1861 gave the UK courts extra-territorial jurisdiction to try British citizens for murder wherever the crime was committed, it did not allow for the prosecution of persons who had committed murder or manslaughter abroad if the accused was not a British subject at the time.

The Royal Warrant of 1945, which led to the trial of many war crimes suspects in occupied Europe and the Far East after the war, was over 40 years old, and it was felt that it could not be relied upon so long after the event, and in peacetime. Neither the Geneva Conventions Act 1957 nor the Genocide Act 1969 could be applied retrospectively. There were, at the time, no extradition arrangements between the UK and the Soviet Union, and it was difficult to return suspects to the USSR for trial. The Hetherington-Chalmers Report therefore concluded that further legislation was necessary.

Having considered war crimes legislation in other countries, including Canada and Australia, the authors of the Report recommended that:

¹⁰ Ibid, p 31. Also see David Cesarani, *Justice Delayed - How Britain became a refuge for Nazi war Criminals*, 2nd edition, London (2000).

“British courts [should] be given extra-territorial jurisdiction over murder and manslaughter allegedly committed during the Second World War by persons who are now British citizens or resident in the United Kingdom....In our view, to enact legislation in this country to give British courts jurisdiction over murder and manslaughter committed as violations of the laws and customs of war would not be to create an offence retrospectively. It would be making an offence triable in British courts to an extent which international law has recognised and permitted at a time before the alleged offences in question had been committed.”¹¹

In the Summary of their findings, they concluded that:

“there is sufficient evidence to support criminal proceedings for murder against some persons living in the United Kingdom and further investigations may disclose the necessary evidence against other such persons. The cases we have investigated disclose horrific instances of mass-murders, and we do not consider that the lapse of time since the offences were committed, or the age of the offenders provide sufficient reason for taking no action in such cases. We therefore recommend that some action should be taken in each case in which the evidence is adequate.”¹²

Following a long and difficult passage through both the House of Commons and House of Lords, the War Crimes Act finally became law on 10 May 1991. Its only offence-creating provision is as follows:

- (1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –
 - (a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and
 - (b) constituted a violation of the laws and customs of war.
- (2) No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.
- (3) No proceedings shall by virtue of this section be brought in England and Wales or in Northern Ireland except by or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

Parliament ultimately followed the recommendations of the Hetherington-Chalmers Report, in that only the offences of murder and manslaughter were proscribed in the Act. The Report's authors concluded that the evidence that they had considered disclosed the commission of many crimes in the course of the war, but that murder was both the most serious and most prevalent crime. Concerns about the retroactive nature of the legislation were allayed by the fact that any person committing murder in violation of the laws and

11 See the Hetherington-Chalmers Report, note 8 above, p 96.

12 Ibid, p 103.

customs of war would have been well aware that such acts were in violation of international law at the time of their commission. Finally, although their Canadian and Australian counterparts had introduced retroactive legislation for other less serious crimes committed during wartime, both countries also had similar extra-territorial offence provisions for 'ordinary' crimes on their statute books. The only similar 'ordinary' offence in UK law with extra-territorial effect was murder. Hence it was considered that "any extraterritorial jurisdiction that is taken should be only in respect of the acts of murder and manslaughter".¹³

1.2.3 *Regina v. Antony Sawoniuk*

Sawoniuk was not the only person against whom proceedings were brought under the 1991 Act. Szymon Serafinowicz was also charged with the murder of two Jews in Mir in Belarus between 1941 and 1942. His trial was aborted after a specially convened jury determined that he was not fit to plead in January 1997. He died seven months later. Neither Serafinowicz nor Sawoniuk appeared in the original list of 37 suspects sent to the British Government by the Simon Wiesenthal Centre in 1986, although it has been suggested that the nature of the allegations both men faced and the fact of their presence in the UK was known, or should have been known, by the British authorities from as early as 1946.¹⁴

When interviewed by the British authorities, Sawoniuk admitted that he had served in local police units under the command of the German occupiers at the time of the killings. This admission, combined with compelling eyewitness testimony of the terrible events that had occurred in a forest in Belarus 47 years earlier, persuaded Crown counsel to proceed against him. The relevant offence under section 1 of the War Crimes Act 1991 requires the Crown to prove that the murders constituted a violation of the laws and customs of war. After careful consideration, the Crown concluded that as a matter of evidence, charging Sawoniuk with murdering Jews rather than civilians would be less likely to give rise to complex legal arguments about the legality of reprisals against partisans during the German occupation of Domachevo.

Sawoniuk denied responsibility for the murders. However, he made a number of bizarre claims in his police interview, and subsequently at his trial – including the assertion that no Jews were killed by the local police or *Einsatzgruppen* in Domachevo, which conflicted with records kept by the Germans themselves confirming the extent of the massacres. At the insistence of his counsel, the Judge and Jury paid a macabre visit to the scene of Sawoniuk's crimes and considered the harrowing testimony of two eye-witnesses who were children at the time of the offences, before convicting him of two murders.¹⁵

The Sawoniuk case brought an end to almost 10 years of debate about the morality and practicality of trying suspected war criminals who had led blameless lives since arriving

¹³ Ibid, p 96.

¹⁴ See John Silverman, 'War Crimes Inquiries - England accused of dragging its feet in prosecuting war criminals', *History Today*, November 2000.

¹⁵ I am indebted to Sir John Nutting QC Bt., who prosecuted Sawoniuk at trial, for his assistance in the preparation of this section of this chapter.

in the UK and who, in many instances, were old and infirm. Nonetheless, the public, the Appeal Courts and many of those intimately involved with the Sawoniuk case were convinced that he had received a fair trial – and that the prosecution that led to his conviction was far from the merciless victimisation of a defenceless old man as it had been characterised by sections of the media and amongst prominent opponents of the Act.¹⁶ Instead, in the measured words of the authors of the Hetherington-Chalmers Report, the prosecution demonstrated that “the crimes are so monstrous that they cannot be condoned.... To take no action would taint the United Kingdom with the slur of being a haven for war criminals.”¹⁷

The support for the Rome Statute by the UK delegation at the Rome Conference, and the timely implementation of the International Criminal Court Act 2001 (ICC Act) shortly after the Rome Statute came into force, suggests that the UK is unlikely to be a haven for those that commit the gravest of international crimes in future conflicts.

2 Implementing Legislation

2.1 Title

The full title of the UK implementing legislation is the International Criminal Court Act 2001 Chapter 17 (hereafter ICC Act). A full copy of the text of the ICC Act is available at <http://www.legislation.hms.gov.uk/acts/acts2001/20010017.htm>.

2.2 When in force

The International Criminal Court Act 2001 (Commencement) Order 2001 [SI 2001/2161] brought the ICC Act into force on 1 September 2001, save that to the extent necessary for the purposes of making any Order in Council, order, rules or regulations under sections 7(3), 13(3), 49, 50(3) or (4) 79(3) or 80(3), the ICC Act came into force on 13 June 2001.

There are a number of pieces of subordinate legislation that give effect to, *inter alia*, the Elements of Crimes contained in the Report of the Preparatory Commission for the ICC adopted on 30 June 2000. The relevant regulations are set out in the International Criminal Court Act (Elements of Crimes) Regulations 2001 [SI 2001/2505]. In addition, the UK's reservations to the Rome Statute appear in another Statutory Instrument, entitled the International Criminal Court Act 2001 (Reservations and Declarations) Order 2001 [SI 2001/2559]. There are also Orders in Council relating to the enforcement of fines and forfeitures in the UK ordered by the ICC that appear in the International Criminal Court Act 2001 (Enforcement of Fines Forfeiture and Reparation Orders) Regulations 2001 [SI 2001/2376], as amended by the International Criminal Court Act 2001 (Enforcement of Fines Forfeiture and Reparation Orders) (Amendment) Regulations 2002 [SI 2002/822].

¹⁶ See Cesarani, note 5 above.

¹⁷ Hetherington-Chalmers Report, note 8 above, p 94.

2.3 Government departments

All prosecutions in England and Wales under the ICC Act will be conducted by the Crown Prosecution Service London Branch 1, at 50 Ludgate Hill, London EC4M 7EX. It is likely that any referrals it receives from either the Foreign and Commonwealth Office (who may receive requests via diplomatic or political channels) or the Home Office would be passed on to the Metropolitan Police SO13 Crimes Against Humanity Unit, c/o New Scotland Yard, the Broadway, London SW1.

2.4 Amendments to existing domestic legislation

There are a number of minor amendments to existing domestic legislation that relate to procedural issues. The changes to the extradition and mutual assistance provisions are dealt with in the next section. The principal substantive amendments are to the Geneva Conventions Act 1957 and the Genocide Act 1969, the latter having been repealed in its entirety. The relevant changes to pre-Act legislation appear as set out in Schedule 10 to the ICC Act.

As the ICC Act is not retroactive in effect, international crimes committed before its coming into force would have to be prosecuted under the Geneva Conventions Act 1957 or the War Crimes Act 1991.

3 Co-operation with the ICC

3.1 Arrest and surrender

The arrest and surrender provisions of the ICC Act are faithful to the corresponding Articles of the Rome Statute, which create a new and innovative regime of global judicial co-operation between States that are parties to the Statute and the ICC.

Arrest is effected using an endorsed ICC warrant or domestic warrant issued by a District Judge sitting at Bow Street Magistrates Court upon receipt of a request for the same issued by the Home Secretary. Provided that the District Judge is satisfied that the ICC has issued a warrant for the arrest of a person suspected of having committed an ICC core crime, or that a person has been convicted at the ICC, he is obliged to endorse the ICC warrant or issue a domestic warrant for the arrest of that person. A warrant so issued or endorsed is called a 'section 2 warrant' throughout the ICC Act. That person will be delivered up to the ICC provided that the District Judge is satisfied that the section 2 warrant has been properly endorsed or issued, and that "the person brought before the court is the person named or described in the warrant" (section 5(2)(a) and (b)).

There is no 'sufficiency of evidence' requirement, and even where it is established that "the person's [to be delivered up] rights have not been respected" under section 5(8) of the ICC Act, that person will in all likelihood be surrendered to the ICC. There are none of the usual bars to extradition available to defendants under the Extradition Act 2003, such as passage of time or double jeopardy. Similarly, a breach of the European Convention on Human Rights, which would be fatal to any extradition under the Extradition Act 2003, would appear to result in a declaration "that a person's rights have not been respected", rather than discharge. The common law right of habeas corpus remains, and there are

provisions in the ICC Act to permit the adjournment of surrender proceedings pending the outcome of such an application.

In short, a 'delivery order' will only be refused where there is some defect in the original warrant or notice of conviction and sentence issued by the ICC, or where the person arrested is not the person described in the warrant. There are provisions for adjourning proceedings whilst questions of admissibility and jurisdiction are determined by the ICC, although it is likely that the defendant will be remanded in custody pending the outcome of any such determination. There are strict time limits that apply at various stages of the arrest and surrender process, and the District Judge may discharge if the timetable is not followed. It is the High Court that has jurisdiction to discharge surrender proceedings upon hearing a successful habeas corpus application, not the Magistrates Court.

3.1.1 The procedure involved in the arrest process

As described above, it is the Secretary of State who initially receives a request from the ICC for the arrest and surrender of a person present (even temporarily) in UK territory. There are four types of request contemplated in the ICC Act: (1) a request in the form of a fully executed warrant from the ICC for the arrest of a person alleged to have committed an ICC crime (section 2(3)); (2) a request that a person be delivered up to the ICC who has already been convicted by the ICC (section 2(4)); (3) a request for the provisional arrest of a person alleged to have committed an ICC crime or alleged to have been convicted by the ICC (section 3); and (4) a separate procedure where a person who is being surrendered by another State to the ICC makes an unscheduled landing in the UK (section 22).

■ ICC arrest warrant cases

Where the Secretary of State (the Home Secretary in ICC cases) receives an ICC warrant for the arrest of a person suspected of having committed an ICC crime who is present in the UK, he is obliged to transmit that warrant to an appropriate judicial officer (section 2(1)). An appropriate judicial officer is a Senior District Judge or a District Judge sitting at a Magistrates Court (section 26). Virtually all extradition cases are dealt with by Bow Street Magistrates Court in central London, and it is anticipated that any ICC arrest and surrender cases will be heard there.

The Home Secretary is obliged to transmit any other documentation that accompanies the warrant received from the ICC to the District Judge. Given that there is no evidential sufficiency requirement, there is unlikely to be much in the way of supporting documentation in ICC arrest warrant cases, other than material relating to identity.

Provided that the District Judge is satisfied that the warrant has been issued by the ICC, he endorses the warrant for execution in the UK. Provided that is done, the warrant "shall be treated as if it were a warrant for the arrest of a person for an offence committed in that part of the United Kingdom" (section 14). The warrant does not need to be executed by a police constable, although in reality it is likely that a police officer will accompany the person executing the warrant at the very least. Any person arrested under such a warrant will be kept in custody before being brought before the District Judge at Bow Street "as soon as is practicable" (section 5(1)).

■ *ICC conviction cases*

The procedure is much the same in cases where the Home Secretary receives a request for the arrest of a person convicted by the ICC. Again, the Home Secretary is obliged to transmit the request to a District Judge. The ICC Act contemplates that the request may be in one of two forms. When it is in the form of an ICC warrant for the arrest of a convicted person, the procedure is identical to that described in the section dealing with ICC arrest warrant cases. Where the request is not accompanied by, or is not in the form of an ICC warrant, it must be accompanied by: "(a) a copy of the judgment of conviction, (b) information to demonstrate that the person sought is the one referred to in the judgment of conviction, and (c) where the person sought has been sentenced, a copy of the sentence imposed and a statement of any time already served and the time remaining to be served" (section 2(4)). Both warrants are termed 'section 2 Warrants' under the ICC Act.

■ *Provisional arrest warrant cases*

A provisional arrest warrant procedure is a familiar feature of UK extradition treaties and related domestic legislation. In relation to the ICC, it is designed to provide an immediate response where an urgent request for arrest has been received by the Home Secretary and there has been insufficient time to prepare an ICC arrest warrant. Provisional arrest warrant cases are likely to arise where a person alleged to have committed or been convicted of ICC crimes is on their way to the UK, or has just arrived in the UK from another State. When the Home Office receives a request from the ICC for the arrest of such a person, the Home Secretary passes on the request to a police constable, who then appears before the District Judge at Bow Street and makes an application for a warrant on oath in the normal manner. The police officer is required to give evidence to the effect that s/he has reason to believe "that a request has been made on grounds of urgency by the ICC for the arrest of a person, and that the person is in, or on his way to, the United Kingdom" (section 3(2)(b)). It would appear that the District Judge is obliged to issue a warrant if such an application is made.

The person arrested under a provisional warrant must be brought before the District Judge as soon as is practicable (section 4(1)). If upon that person's first appearance at the Magistrates Court a section 2 warrant is produced, then the matter proceeds as if he had been arrested under that warrant. If no ICC warrant is forthcoming, the defendant is remanded, either in custody or on bail, pending the production of such a warrant. The relevant Order in Council specifying the maximum period a person may be remanded pending production of a section 2 warrant in a provisional arrest case has not yet come into force. As soon as a section 2 warrant is produced, the period of remand is terminated, and the matter proceeds as if the person was arrested under the section 2 warrant (section 4(5)).

■ *Unscheduled landing cases*

Where a person is in the process of being surrendered to the ICC by another State, and that person lands in the UK by sea or air without warning, he may be arrested by any police officer, without a judicially authorised or executed warrant. If arrested under an unscheduled landing warrant, the defendant must be brought to a competent court as soon as is practicable. He is then remanded in custody, pending receipt from the ICC by the Home Secretary of a request for his transit. Such a request must be received within 96 hours of that person's arrest under the unscheduled landing warrant (section 22(3)). If no

ICC transit request is received in that period, the Magistrates Court must be notified and the person discharged. The Home Secretary retains discretion in unscheduled landing cases not to accede to the request of the ICC to surrender (section 22(1)(b)).

3.1.2 *The procedure involved in the surrender process*

As we have seen, the person arrested under a section 2 warrant or a provisional warrant is brought before the District Judge at Bow Street Magistrates Court as soon as is practicable. The Court then considers whether it is appropriate for the person to be delivered up to the ICC in The Hague, or the custody of a State enforcing a sentence of imprisonment on behalf of the ICC.

Provided that the ICC warrant has been properly endorsed by the District Judge under section 2(3), or has been properly issued under section 2(4), and the person in custody is the person on the warrant, the Court “shall make a delivery order”. The Magistrates Court is expressly not permitted to enquire whether the warrant issued by the ICC was duly issued, or “in the case of a person alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed” (section 5(5)(b)). In other words, the delivery order proceedings are simply not concerned with evidence at all.

In the arrest and surrender provisions of the ICC Act there are none of the recognised human rights protections now routinely built into UK legislation. Consistent with Article 59 of the ICC Statute, the District Judge only has the power to declare that a person’s rights have not been respected during the arrest and surrender process. The Court is unable to make any other order or grant any other remedy (section 5(7)). However, any such declaration must be passed on to the ICC by the Home Secretary. It is not clear how this particular provision is consistent with the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR) into domestic law. Procedurally, the surrender process is susceptible to review and to appeal, and persons brought before the courts pursuant to ICC surrender requests are entitled to legal representation. It should be noted that the extradition process in the UK does not attract the full panoply of rights under the European Convention on Human Rights in any event.

Indeed, it is only recently that the courts in England have recognised that any form of challenge to a person’s detention under an extradition warrant can be made before a court of law, as opposed to the Secretary of State. In a long line of authorities from *Atkinson*¹⁸ (1971) to *Schmidt*¹⁹ (1995), the House of Lords held that the Magistrates Court did not have the power to stay extradition proceedings as an abuse of process, as the Home Secretary could always refuse to surrender a fugitive where there was evidence that the requesting State had acted in bad faith. However, following the incorporation of the ECHR into UK law under the Human Rights Act 1998, the Administrative Court has decided that the power to stay extradition proceedings where there has been a breach of the detained person’s rights under Article 5 of the ECHR should be exercised by the courts, not the executive.²⁰

18 *Atkinson v. U.S.A. Government* [1971] A.C. 197.

19 *In re Schmidt*, 1 A.C. 339 (1995) (HL).

20 *R (Kashamu) v Governor of Brixton Prison*, 2 *Weekly Law Reports* (WLR) 907 (2002).

Whether similar arguments will be raised by the defence in surrender proceedings remains to be seen. However, it is clear from Part 9 of the ICC Statute and the UK ICC Act that successful challenges to surrender are likely to be a rare occurrence.

Arrest and surrender proceedings under the ICC Act differ from extradition proceedings in another important way. Under the Extradition Act 2003 and its predecessors, it was the Secretary of State who made the final decision as to whether the person whose extradition was sought in the request was sent to the requesting State. Hence even where extradition proceedings were successful, in the sense that the Magistrate ordered a person's extradition, the Home Secretary could still refuse to extradite. Under the arrest and surrender scheme in the ICC Act, however, the Home Secretary has no power to refuse to send an arrested person to the ICC once a delivery order has been made by the District Judge.

The delivery order proceedings may be avoided if the person arrested consents to his delivery up to the ICC. Where the District Judge refuses to make a delivery order, the matter cannot automatically be discharged. The District Judge must remand the defendant in custody or on bail, and immediately notify the Secretary of State of his decision. If the Magistrates Court is notified "without delay" by the Home Office that the Home Secretary intends to appeal against the District Judge's decision to refuse the order for delivery up, the Court must continue to remand the defendant. The Secretary of State has the right to appeal to the High Court without permission.

Where the Home Secretary appeals, the High Court considers it by way of rehearing. If the High Court allows the appeal, it may make the delivery order or refer the matter to the competent court to make a delivery order. If the High Court dismisses the appeal, the Secretary of State may appeal to the House of Lords with the permission of the High Court or the House of Lords. The person whose arrest and surrender is sought also has a right of appeal prescribed in the ICC Act.

Where the Magistrates Court makes a delivery order, the Home Secretary cannot make directions for the execution of the order until 15 days have passed, so as to allow adequate time for a habeas corpus application to be made on behalf of the defendant if appropriate. It may be that habeas corpus proceedings prove to be the principal route of challenge to the surrender process generally, and orders to deliver up in particular.²¹

Once the order is made, the delivery order is sufficient authority for any person acting in accordance with the instructions of the Home Secretary to keep the person in custody and deliver him up to the ICC or the State of enforcement.

In some instances, it may be that the person sought by the ICC is either already the subject of domestic criminal proceedings in the UK, or is wanted by another international tribunal, such as the ICTY. In such cases, the Home Secretary can consult with the domestic court where the proceedings are ongoing, and if necessary direct that the proceedings be discontinued (Schedule 2 of the ICC Act).

21 See the procedure on habeas corpus applications in Clive Nicholls QC, Clare Montgomery QC, Julian P Knowles, *The Law of Extradition and Mutual Assistance – International Criminal Law: Practice and Procedure* (2002), pp 199-228.

■ *Bail*

Persons arrested provisionally or otherwise may apply for bail. In cases in England and Wales the general bail legislation applies as if the person were a fugitive offender.

To comply with Article 59 of the ICC Statute, the court must notify the Secretary of State that a bail application is to be made, so that he may consult with the ICC. Bail may not be granted without full consideration of the views of the ICC. Further, the court needs to consider at the hearing the test set out in Article 59(4) of the ICC Statute, namely whether, given the gravity of the offence or offences alleged to have been committed or for which the person has been convicted, there are urgent and exceptional circumstances justifying release on bail. The court must further consider whether any necessary measures have been or will be taken to ensure that the person will surrender in accordance with the terms of the bail. It is clear from these provisions that the Bail Act does not apply in arrest and surrender proceedings to the same extent that it does in extradition hearings.

■ *Failure to deliver up within 40 days*

The legislation also contemplates circumstances where the person is not delivered up within 40 days or where the ICC advises that the person is no longer required to be surrendered. In the former case the person may make an application for discharge, which should be granted unless reasonable cause is shown for the delay. In the latter case the appropriate executive officer will notify the judicial authorities, who shall order the discharge of the person.

■ *Transit*

As in extradition regimes, the legislation also makes provision for transit through the UK of a person being surrendered to the ICC and for holding a person in custody for 96 hours in the case of an unscheduled landing, pending receipt of a request for transit from the ICC.

3.1.3 *Extradition and international crimes*

A detailed consideration of UK and EU extradition law is beyond the scope of this work. However, there are two features of the Extradition Act 2003 that are worthy of review. First, “crimes within the jurisdiction of the International Criminal Court” are ‘European Framework List offences’ for the purposes of the new European Arrest Warrant (EAW) procedure under Part 1 of the 2003 Act.²² As such, relevant member States²³ (not confined to the EU) who issue or receive requests for extradition in ICC core crimes cases do not have to meet formal dual criminality requirements, are obliged to surrender within strict time limits and do not have to satisfy any evidential sufficiency requirement. There are also no political offence exception provisions under the new EAW procedure.

22 Article 2 of the Council Framework Decision of 13 June 2002 “on the European Arrest Warrant and the surrender procedures between member States”, *Official Journal of the European Communities* L 190/1.

23 At the time of writing: Austria, Belgium, Cyprus, Denmark, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovenia, Spain and Sweden. See The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 [SI 2003/3333] and the Extradition Act 2003 (Amendment to Designations) Order 2004 [SI 2004/1898].

In addition, a person whose extradition is sought from the UK to another State for an ICC crime, or for grave breaches of the Geneva Conventions under the 1957 Geneva Conventions Act, cannot rely on a *nullem crimen sine lege* bar to his surrender. Section 196 of the Extradition Act 2003 provides that “it is not an objection to extradition under this Act that the person could not have been punished for the offence under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he has been convicted”.

3.2 Other forms of assistance to the Court

Part 3 of the ICC Act implements the UK's obligations under Article 93 to provide investigative and prosecutorial assistance to the ICC. Article 93 of the ICC Statute obliges State Parties to comply with the requests of the ICC and offer a myriad of different forms of legal assistance when required to do so. The ICC Act makes extensive provision for legal assistance in Part 3 of the Act, and at Schedules 3 to 6.

In general terms, UK criminal justice procedures have been ‘cut and pasted’ to fit the demands of Article 93, and procedures for the taking and production of evidence (section 29) entry, search and seizure (section 33) and the taking of fingerprints and non-intimate samples (section 34 and Schedule 4) simply refer back to the relevant domestic criminal and mutual assistance legislation. For many practitioners, there will be nothing new in many of these procedures, and much of Part 3 of the ICC Act will cover familiar territory. However, there are also less familiar procedural measures, which are drawn directly from and are consistent with Part 9 of the Rome Statute. This blend of measures perfectly articulates the marriage of domestic and international criminal law that is a consistent feature of this legislation.

The sections in the Act follow the structure of Article 93 of the ICC Statute and address each of the sub-paragraphs of paragraph 1, creating powers and procedures for each form of assistance as follows:

3.2.1 Questioning of a person under investigation or subject to prosecution

Consistent with domestic law, the questioning of a suspect or person subject to an ICC prosecution can only be undertaken with the person's consent under the ICC Act. In addition, the person must be afforded the rights set out in Article 55(1) of the ICC Statute²⁴ and be questioned in accordance with the procedure set out in Article 55(2).

3.2.2 Taking or production of evidence

Requests of this nature will be referred by the Secretary of State to a nominated court in England and Wales or Northern Ireland that can receive the relevant evidence. The court will use its general powers applicable in other court proceedings to secure the attendance of witnesses and the production of documents or other articles. The legislation provides for the public to be excluded from these proceedings where necessary to protect victims,

24 Not to be compelled to incriminate himself or confess to guilt, not to be subjected to any form of coercion, duress or threat, torture or any form of cruel, inhuman or degrading treatment or punishment, to have the assistance, free of charge, of an interpreter/translator, not be subjected to arbitrary arrest or detention.

witnesses, persons subject to investigation or prosecution as well as sensitive or confidential legislation.

3.2.3 Service of process

Requests for service of documents in England, Wales or Northern Ireland will be sent to relevant chief officers of police for personal service. The chief officer will report back on when and how the document was served or on the reasons why service was not possible.

3.2.4 Transfer of prisoner to give evidence or assist in investigation

Section 32 of the ICC Act provides a framework of powers for the temporary transfer of a prisoner in the UK to the ICC to provide assistance or testimony.

3.2.5 Entry, search and seizure

The obligation regarding search and seizure is implemented by providing that the existing criminal law powers for search warrants and other relevant orders applicable to serious arrestable offences will apply in relation to an ICC crime.

3.2.6 Taking of fingerprints or non-intimate samples

Schedule 4 to the legislation sets out a detailed procedure for the taking of fingerprints and non-intimate samples, which includes the use of nominated courts to issue the relevant orders. The procedure contemplates both consensual and non-consensual scenarios. The schedule provides for limitations on the use of the samples taken and for the application of normal rules relating to the ultimate destruction of any samples taken.

3.2.7 Orders for exhumation

Similar to the provision for search and seizure, orders for exhumation are made available by applying the relevant powers of the Coroners Act to ICC proceedings.

3.2.8 Provision of records and documents

Interestingly, the UK law contains a special provision dealing with requests for records of evidence given in proceedings in respect of conduct that would constitute an ICC crime or the results of any investigation of such conduct with a view to such a proceeding. It is left to the Secretary of State to take appropriate steps to obtain the relevant documents and records.

We can see from the brief survey above that there are some interesting innovations alongside more familiar provisions. For example, where a person is suspected of having committed an ICC core crime, or is being prosecuted by the ICC, he can be questioned in the UK pursuant to a request received from the ICC. However, he can only be questioned if he consents to being interviewed and is informed of his rights under Article 55 of the ICC Statute. There is no provision in the ICC Act as to how this questioning would take place, by whom or where. In addition, the protections afforded to suspects by Article 55 are far broader than those enjoyed by suspects in domestic criminal proceedings. For

example, no one may be compelled to answer questions under Article 55. There have been compulsory powers of questioning in the UK since the 1987 Criminal Justice Act, and an abrogated right to silence since 1996. In marked contrast with Article 55(2)(b) of the ICC Statute, an inference of guilt may be drawn by the tribunal of fact where a suspect has remained silent in response to a question put to him by an investigator or prosecutor in UK criminal proceedings.

By way of contrast, a witness called to give evidence under the mutual assistance provisions of section 29 of the ICC Act could be compelled to attend court and produce documents and other material using the witness summons procedure available in domestic criminal proceedings (See section 29(4)).

3.2.9 Freezing and forfeiture

The ICC Act provides domestic courts with the power to investigate the proceeds of an ICC crime (section 37), to freeze or seize the proceeds of an ICC crime pending forfeiture by the ICC upon conviction (section 38) and to forfeit the proceeds of ICC crimes on the order of the ICC (section 49). The procedures for investigation and obtaining freezing and seizing orders are set out in Schedules 5 and 6 of the Act. Detailed provisions in relation to the confiscation of the proceeds of ICC crimes on the order of the ICC have not yet been made, although any application for forfeiture will have to be made to the High Court.²⁵

Where the Secretary of State (the Home Secretary) receives a request from the ICC for assistance in ascertaining whether a person has benefited from an ICC crime or identifying the whereabouts of property derived directly or indirectly from an ICC crime, s/he may direct a constable to make an application for a "production or access order" (section 37(1)). In certain circumstances, where it would be inappropriate or impracticable to grant a production or access order, a Circuit Judge may issue a search warrant.

The relevant procedure is set out in Schedule 5 to the Act. In summary, a Circuit Judge may grant an application for a production or access order where s/he is satisfied that there are reasonable grounds for suspecting that the person specified in the application has benefited from ICC crimes and "the material to which the application related is likely to be of substantial value to the investigation for the purposes of which the application is made" (para. 2(1)). A production order requires the person to whom the order is directed "to produce the material to a constable within a specified period for the constable to take away". An access order requires the person to give a constable access to the material within a specified period. The specified period is usually seven days, although the Circuit Judge can allow a longer period if appropriate.

A Circuit Judge may issue a search warrant to enter and search premises and seize and retain any material found there that is likely to be of value to the investigation in one of three circumstances: (1) where either the production or access order has not been complied with (para. 10(3)); (2) where it is not practicable to communicate with any person entitled to produce the material and immediate access to the material is required (para.

25 See International Criminal Court Act 2001 (Enforcement of Fines Forfeiture and Reparation Order) (Amendment) Regulations 2002 [2002/822].

10(4)); or (3) where the material cannot be particularised and it is not practicable to communicate with any person entitled to produce the material and immediate access to the material is required (paras. 10(5) & (6)).

The procedure for freezing assets or property is initiated by the Secretary of State, who receives a request from the ICC for “assistance in the freezing or seizure of proceeds, property and assets or instrumentalities of crime for the purposes of eventual forfeiture” (section 38). A freezing order may be made by the High Court if it is satisfied that a forfeiture order has been made in proceedings before the ICC, or that there are reasonable grounds for believing that a forfeiture order may be made in such proceedings (Schedule 6, para. 2). The effect of a freezing order is to “prohibit any person from dealing with the property specified in the order otherwise than in accordance with the order”. Property may also be seized in order to prevent its removal from the jurisdiction. Forfeiture may be ordered by the High Court upon the making of such an order by the ICC, subject to hearing representations from any third parties affected by the order.

3.3 Obligations outside the context of other forms of co-operation

3.3.1 Sitings of the ICC

Under section 2 of Schedule 1 to the Act delegated legislation in the form of an Order in Council can be introduced to make such provision as may be necessary or expedient to enable sittings of the ICC to be held in the UK. The section makes specific reference to provisions for the detention of a person in the custody of the ICC that would be necessary in order for the accused to participate in the proceedings held in the UK.

3.3.2 Legal capacity, privileges and immunities

Under Schedule 1 an Order in Council can be used to confer on the ICC the legal capacities of a body corporate. Similarly this mechanism will be used to confer the relevant privileges and immunities for the ICC, ICC judges, prosecutors and officials and counsel, experts witnesses and other persons involved in the proceedings in accordance with the ICC Statute or a related agreement to which the UK is or will be party. The latter is clearly a reference to the Agreement on Privileges and Immunities, which is now in force.

3.3.3 Extension of administration of justice offences

Under Article 70 of the ICC Statute States are obliged to extend offences against the administration of justice (such as giving false testimony and intimidating witnesses) in a domestic context to ICC proceedings for offences committed within its territory or by its nationals. Jurisdiction over such offences is concurrent with the ICC. The UK law accomplishes this through section 54 of the ICC Act, which provides that the offences under Article 70.1 of the ICC Statute may be dealt with as for the corresponding domestic offences. The specific corresponding domestic offences are then listed in the section. The offences apply to acts committed in the territory (England and Wales) or by nationals or permanent residents as mandated by the ICC Statute.

3.3.4 Measures for the enforcement of sentences

■ Enforcement of custodial sentences

The ICC does not have facilities for convicted prisoners. Part 4 of the UK law provides a basis for prisoners who receive custodial sentences at the ICC to be accepted to serve out their time in the UK. Once the Secretary of State informs the ICC that a designation of the UK as the State of enforcement is accepted, the prisoner will be brought to the UK. Thereafter the prisoner shall be treated as if he were subject to a sentence of imprisonment in the UK, with some exceptions.

ICC prisoners will not be subject to the Repatriation of Prisoners Act (which would allow for State to State transfers that in this case can only be ordered by the ICC) and Schedule 1 to the Crime Sentences Act (which allows the transfer of prisoners within the British Isles). There are also a number of statutory provisions relating to matters such as the calculation of the sentence, remission, discharge at weekend or holidays that are made inapplicable to ICC prisoners under Schedule 7 as this would otherwise conflict with the UK's obligations under Part 10 of the ICC Statute.

The law also provides powers for the temporary transfer of the prisoner to the ICC or the transfer of the prisoner into the custody of another State if the designation of the State of enforcement changes. Further there is provision to transfer the prisoner within the UK.

■ Enforcement of other orders

The UK has further obligations under the ICC Statute to enforce ICC fines, forfeitures or reparation orders. These obligations are met in section 46 of the ICC Act, which empowers the Secretary of State to make provision for enforcement by regulation. The regulations shall provide for the registration of the relevant order by a court as a precondition to enforcement. The legislation recognises the need to protect third party rights by providing that a court may not exercise any powers of enforcement unless satisfied that a reasonable opportunity has been given for persons with an interest in the property to make representations, and that the exercise of the powers will not prejudice the rights of *bona fide* third parties.

4 Incorporating the Crimes

It is a criminal offence in the UK to commit genocide, war crimes or crimes against humanity. The definitions of the three core ICC crimes in English law are identical to those in Articles 6, 7 and 8²⁶ of the Rome Statute, which are incorporated directly into UK law by Schedule 8 to the ICC Act.²⁷ The Elements of Crimes are also incorporated into UK law through the passage of secondary legislation under section 50(2) of the ICC Act. The

26 With one exception: Article 8(2)(b)(xx) (indiscriminate means and methods of warfare) is excluded. This provision was inserted in the ICC Statute with a view to the eventual prohibition of the use of nuclear weapons and other weapons of mass destruction. As yet no "comprehensive prohibition" on such methods and means of warfare alluded to in this provision of the ICC Statute has been agreed. As the UK had a 'nuclear deterrent' for many years, Parliament clearly envisaged very real obstacles to the incorporation of this provision.

27 See the discussion of 'dualism' above (part 1.2).

relevant regulations setting out the Elements of Crimes in detail, and which must be taken into account by any UK court when interpreting the three core ICC crimes, came into force shortly after the ICC Act became law.²⁸

There are also other offences connected to the commission of the three core crimes that are created by the ICC Act. These new offences, described as “ancillary offences” in section 52 of the ICC Act, are defined in section 55. They are familiar to lawyers who practice in common law jurisdictions, and are often described as ‘inchoate offences’. The ancillary offences are “aiding, abetting, counselling or procuring the commission of an offence”;²⁹ common law “incitement to commit an offence”; “attempting³⁰ or conspiring³¹ to commit an offence”; and “assisting an offender”³² or “concealing³³ the commission of an offence”. The relevant offence for the purposes of section 52 is one of the three core crimes proscribed in section 51 of ICC Act.

There are also offences created in the ICC Act that are designed to mirror Article 70.1 of the ICC Statute, which proscribes acts that are “against the administration of justice”. The proceedings contemplated by the ICC Act are those before the ICC, rather than domestic proceedings under section 51 or 52. Section 54(1) of the ICC Act provides that a person who intentionally commits any of the acts set out in Article 70.1 “may be dealt with as for the corresponding domestic offence committed in relation to a superior court in England and Wales”. The corresponding domestic offences are set out in section 54(3) of the ICC Act and include perjury, interfering with witnesses, corruption and bribery.

5 Jurisdiction of Domestic Courts and Principles of Liability

Jurisdiction under the ICC Act is exercised by the UK courts on two grounds. First, the UK courts have jurisdiction under the ICC Act to try crimes under section 51 (genocide, crimes against humanity and war crimes) where the acts complained of were committed in the UK. This species of jurisdiction is usually described as territorial jurisdiction.

Secondly, the UK courts have jurisdiction to try crimes under section 51, even if the acts complained of were committed outside UK territory, where the crimes were alleged to have been committed by a UK national, a person “resident in the UK” or a “person subject to UK service jurisdiction.” The definition of a UK national appears in section 67 of the ICC Act, which in turn refers to relevant immigration nationality legislation. A person “subject to UK service jurisdiction” is also given a precise statutory definition. A UK resident is given a rather tautologous definition in section 67, being described as “a person who is resident in the United Kingdom”. It is likely that any decision as to whether or not a person charged with an offence under section 51 of the ICC Act who is not a UK citizen or serviceman, but who is alleged to be a resident in the UK, will turn on the facts of each individual case.

28 International Criminal Court Act (Elements of Crimes) Regulations 2001 [SI 2001/2505].

29 See section 8, Accessories and Abettors Act 1861.

30 See section 1, Criminal Attempts Act 1981.

31 See section 1, Criminal Law Act 1977.

32 See section 4(1), Criminal Law Act 1967.

33 See section 5(1), Criminal Law Act 1967.

During the passage of the International Criminal Court Bill through the House of Lords, two scenarios were discussed by a Government Minister, Baroness Scotland, during the debate over the relevant clause. On the one hand, Baroness Scotland suggested that a person who had been in the UK for some months, but had no intention of residing in the country permanently, might not be subject to the jurisdiction of the UK courts. Alternatively, a person who had been in the UK for only a few days, but who intended to live permanently in this country, might fall within the definition that appears in section 67.³⁴ A person who is resident in the UK for the purposes of the ICC Act does not have to have been a resident at the time that the offence was alleged to have been committed.³⁵ This species of jurisdiction is usually described as active nationality principle jurisdiction.

The position is rendered slightly more complicated by the jurisdictional provisions as they relate to the ancillary offences provisions of section 52 of the Act. It is contemplated that individuals can be prosecuted under section 52 even where the act to which the conduct is ancillary was committed outside the UK. The act in this context is an act that if committed in the UK would be an offence under section 51 (genocide, crimes against humanity or war crimes). For example, an offence is committed where a person who is resident in the UK incites another to commit a war crime outside the UK. Even where both the act and ancillary conduct take place abroad, it may be prosecuted under section 52 if the suspect is a UK national, resident in the UK or subject to UK service jurisdiction.

It is a general common law rule that the English criminal law is not retroactive. This rule was expressed by the House of Lords in *Waddington v. Miah*.³⁶ Article 7 of the ECHR prohibits not only the creation of retroactive offences by legislation, but also the retroactive application of existing criminal offences through the development of the common law. Article 7 is subject to the qualification that it does not “prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations”. This provision permitted the passing of the War Crimes Act 1991 into law. However, it is quite clear from the ICC Act 2001 and the relevant Parliamentary debates, taken together with the Rome Statute, that the new ICC Act does not apply retroactively.

The usual principles of liability of the English criminal law apply to offences under the ICC Act. Criminal liability potentially attaches to all those over the age of 10 years in the UK. Provisions for the trial of child and juvenile defendants in the English criminal courts are complex and outside the scope of this work. In general terms, all those over the age of 10 can potentially be tried on indictment in adult courts. All offences under the ICC Act are triable on indictment only.

6 Rights of the Accused

The ICC Act forms part of the ordinary criminal law of the UK. As such all the rights of the accused that are available in criminal proceedings, that emanate from the common law

34 Official Report, House of Lords, 12 February 2001, Hansard Volume 622 c.85.

35 Section 68 of the Act.

36 1 *WLR* 683 (1974).

and statute, in addition to the protections afforded by the ECHR, apply to those persons who are investigated and charged with offences under the ICC Act.

7 Available Defences

The Rome Statute sets out a comprehensive framework of general principles of liability and defences in Part 3 of the Statute. The ICC Act expressly incorporates the relevant parts of Article 28 (responsibility of commander and other superiors) and Article 30 (mental element) at sections 65 to 70.³⁷ In addition, section 66(4) expressly provides that “in interpreting and applying the provisions of this section (which corresponds to Article 30 [of the Rome Statute]) the court shall take into account any relevant judgment or decision of the ICC...account may also be taken of any other relevant international jurisprudence”. An almost identical provision appears at section 65(5) of the Act in relation to command responsibility.

There is nothing in the ICC Act that suggests that defendants could not avail themselves of defences traditionally available to those who are tried in indictment in the criminal courts in the UK, including duress, self defence and mistake.

8 Immunity and International Crimes

The immunities usually afforded to Heads of State, senior governmental officials and diplomats in UK law are of limited application in proceedings under the ICC Act. Section 23(1) provides that: “Any state or diplomatic immunity attaching to a person by reason of a connection with a State Party to the Rome Statute does not prevent proceedings under this Part in relation to that person”. State or diplomatic immunity in the ICC Act “means 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 relevant domestic law³⁸ and “any rule of law derived from customary international law”.

Where the person who is potentially the subject of domestic investigation or even proceedings under the ICC Act is a national of a State that is not a party to the ICC Statute, s/he may benefit from the protections afforded to State officials and diplomats under relevant domestic and customary international law. Of course that immunity can be waived, and provided that confirmation of the waiver of immunity is received by the ICC, that person can be surrendered to the ICC or subjected to domestic proceedings under the ICC Act.³⁹

Hence, with certain exceptions, it is only the nationals of State Parties to the Rome Statute who are deprived of the protections afforded by the doctrine of immunities. There are a number of interesting practical dilemmas that arise as a result of the drafting of this particular section, which are best explained by way of an example. A non-UK national can

37 See Richard May and Stephen Powles, ‘Command Responsibility - A New Basis of Criminal Liability in English Law?’, 21 *Criminal Law Review (Crim LR)* 363-378 (2002).

38 Including the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968, the International Organisations Act 1968 or the State Immunity Act 1978.

39 See section 23(2) of the ICC Act.

be tried in the UK courts for an offence under sections 51 or 52 of the ICC Act where the crime was committed in UK territory. Where the non-UK national accused of the relevant crime is a national of a State that is not a party to the Rome Statute, (e.g. the United States) AND is a person to whom diplomatic immunity usually attaches, that person may be immune from the process of the criminal courts in the UK.

However, where that person is charged with a core crime that is international in character, (e.g. war crimes, crimes against humanity or genocide) the protection from the criminal process of the UK courts afforded by the operation of the doctrine of immunities may be limited, according to whether that person is still in office, and whether the acts concerned were committed in a personal or official capacity.

Hence, if the United States national in our example was a senior member of the United States Government, he would benefit from personal immunity or immunity *rationae personae* for the duration of his time in office. Once he had left office he would benefit from functional immunity or immunity *rationae materiae* after he left office.

The most recent exposition of the distinction between personal and functional immunity appears in *DRC v. Belgium*.⁴⁰ That case was concerned with an Interpol warrant issued for the arrest of the Congolese Foreign Minister for crimes against humanity and war crimes. In that case the International Court of Justice (ICJ) held that;

“...the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an ‘official’ capacity, and those claimed to have been performed in a ‘private capacity’, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless...whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an ‘official’ capacity or a ‘private’ capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions....

....after a person ceases to hold office...he or she will no longer enjoy all of the immunities accorded by international law in other states. Provided it has jurisdiction under international law, a court of a state may try a former Minister of Foreign Affairs

40 In *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ, 14 February 2002, para. 52 (*‘DRC v. Belgium’*).

of another state in respect of acts committed prior to or subsequent to his or her period in office, as well as in respect of acts committed during that period of office in a private capacity.”

The distinction between personal and functional immunity afforded to diplomatic envoys in the English Courts was explained with admirable clarity by Diplock L J, as follows:⁴¹

“The immunity of an envoy from suit or legal process arises from the duties owed by states to one another in international law. In respect of acts of an envoy in his private capacity the purpose of his immunity from suit or legal process is so that he may perform his duties to his government without harassment while ‘en poste’. The immunity is from legal process, not from liability, and its purpose is fulfilled when he ceases to be ‘en poste’ and has had a reasonable time to wind up his affairs in the country to which he is accredited....But quite different considerations apply to acts done by him in his official capacity. Such acts are done on behalf of his government. His government being a foreign sovereign government, under the principles of English law...is immune from the jurisdiction of the English courts. The propriety of its acts cannot be examined in a municipal court unless it consents to waive its immunity. A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in an official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be ‘en poste’ at the date of the suit.”

It can be seen that the functional immunity enjoyed by diplomatic agents and government officials is therefore “grounded on the notion that a state official is not accountable to other states for acts he accomplishes in his official capacity and that therefore must be attributed to the state”. On the other hand, his personal immunity is predicated on the notion that the activities of (serving) diplomatic agents must be immune from foreign jurisdiction to “avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act”.⁴²

It is clear from the decisions in *DRC v. Belgium* and *Pinochet No. 3*⁴³ that state officials or diplomatic agents who are not nationals of a State that is party to the Rome Statute, who are said to have committed core international crimes in UK territory, are immune from the process of the UK courts whilst in office, whether or not those crimes were committed in a personal or official capacity.

Where the same scenario arises, but the person accused of committing the core international crime had left office, the position is less clear in law. If the international crime was said to have been committed in a private capacity, there is no immunity from

41 In *Zoernick v. Waldock* [1964] 1 WLR 675 at 692.

42 Cassese, *International Criminal Law*, Oxford (2003).

43 See above, note 6.

process. However, even where the relevant criminal act is said to have been committed in an official capacity, the accused may not be able to claim immunity from prosecution. Lord Hope in *Pinochet No. 3* declared that there were two types of criminal acts that gave rise to exceptions to functional immunity in customary international law: "The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which are in reality for his own pleasure and benefit...[e.g.]...the head of state who kills his gardener in a fit of rage or who orders his victims to be tortured so he may observe them in agony... The second category relates to acts the prohibition of which has reached the status of *jus cogens*".

Therefore, where it is alleged that a diplomat or State official who has left his/her post has committed an international crime of a *jus cogens* character whilst in office in an official capacity, in English law he may not be immune from the process of the UK courts.

There is a sting in the tail of section 23. Section 23(4) grants the Secretary of State discretion (in consultation with the State concerned and the ICC) to halt proceedings against a person alleged to have committed international crimes, where that person would have been entitled to immunity but for the immunity cancelling provisions of section 23(1) and 23(2) discussed above. It is not clear from the section what the relevant State is, but it is assumed it is the sending State. The Secretary of State may exercise his discretion "in any particular case", suggesting that the interests of diplomacy, international comity and the peaceful relations between States are likely to remain a relevant factor in the exercise of prosecutorial discretion in UK international criminal cases for some time yet.

9 Trial Procedure and Punishment in Domestic Courts

All proceedings under the ICC Act are on indictment; that is, they are heard in the Crown Court. Any prosecution must be with the consent of the Attorney General, the senior government law officer. As such, all relevant laws of procedure as apply to criminal proceedings in indictment in UK courts are applicable to proceedings under the ICC Act. Expressly included are the provisions that provide protection for child and vulnerable witnesses, and victims of sexual offences (see sections 57 of the ICC Act).

As to sentencing, all offences under the ICC Act, except murder, are punishable with a term of imprisonment of up to 30 years. In English law, the sentence for murder is "fixed by law" following the passage into law of the Murder (Abolition of Death Penalty) Act 1965. Section 1 of that Act provides "No person shall suffer death for murder, and a person convicted of murder shall...be sentenced to imprisonment for life". In section 53(5) of the ICC Act, a person convicted of "an offence involving murder, or an offence ancillary to an offence involving murder, shall be dealt with as for an offence of murder or, as the case may be, the corresponding ancillary offence in relation to murder". In other words, life imprisonment upon conviction.

In relation to those offences set out in section 54 (offences against the administration of justice) the relevant penalties are those that are available in domestic law for the corresponding domestic offences.

10 Article 98 Agreements

The UK Government considers itself to be the United States' closest ally. It is perhaps for this reason that it is not easy to discern the UK position on Article 98 Agreements, discussed elsewhere in this Guide, although the Government has apparently recently declared that it believes US concerns about the ICC to be unjustified.⁴⁴ However, the UK did sign up to the common EU position, which was adopted by all 15 member States in September 2002. The essence of these guidelines is that such agreements are allowed under Article 98(2) of the Statute provided that they comply with the following basic principles:

- They must only cover persons who are not nationals of a State Party;
- They must have operative provisions to ensure that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy immunity;
- They should cover only persons officially 'sent' by the State in question on government business; they cannot cover all that State's citizens.⁴⁵

Regardless of the US assault on the authority and effectiveness of the ICC, the UK has been wholehearted in its support for the ICC and its institutions. This is evidenced by its active participation in the 'Like Minded Group' at the Rome Conference and its support for the establishment of a permanent international criminal court, together with the rapid passage of the relevant implementing legislation into UK domestic law.

44 See the latest reports in the UK media, for example David Rennie, 'Republicans In Threat To Block Overseas Aid', *The Daily Telegraph*, 27 November 2004, London.

45 Also the EU position is set out in greater detail in, *Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*, Council Of Europe Draft Council Conclusions on the ICC. Brussels, 30 September 2002. Available at: <http://www.iccnw.org/documents/declarationsresolutions/intergovbodies/EUConclusions30Sept02.pdf>