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Suspected War Criminals and Génocidaires in the UK

Proposals to Strengthen
our Laws

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Aegis Trust

Aegis was established in 2000. The word Aegis means 'Shield' or 'Protection', reflecting the need to protect people against genocide and crimes against humanity. Aegis activities include: research, policy, education, remembrance, awareness of genocide issues in the media and humanitarian support for victims of genocide.

It works to:

- Research, advocate and campaign for policy reform to prevent genocide and crimes against humanity
- Tackle the root causes of genocide and crimes against humanity by educating young people about the consequences of racism and exclusion
- Support survivors, especially orphans and widows, by helping to rebuild individual lives and communities damaged by genocide

The Aegis Trust is based at the UK Holocaust Centre, in Laxton, Nottinghamshire, where it runs education programmes for young people and professionals. It is also responsible for Education and Memorial Centres in Rwanda, which commemorate the 1994 genocide and play a vital role in educating a new generation about the dangers of ethnic division.

Table of Contents

1. Executive Summary	5
2. The scale of the problem	6
3. Options under the current legal framework	10
4. The current legal framework	11
5. Proposals for strengthening the law	15
6. Discussion: Retrospective application of jurisdiction	16
7. Discussion: Presence vs 'Residence'	18
8. Discussion: Public interest test and Immunities	20
9. Discussion: International Criminal Court	21
10. Costs: a specialised war crimes unit	22
Annex. Proposed Amendments to the International Criminal Court Act	23

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Any errors of fact or interpretation are the responsibility of the authors alone.

1. Executive Summary

There are significant numbers of suspected war criminals and génocidaires who are either in the UK, or who have visited this country. These suspects come from Rwanda, Liberia, Sierra Leone, Sri Lanka, Iraq, Zimbabwe, Sudan, Congo, Afghanistan and the former Yugoslavia.

There are two 'impunity gaps' in UK law, which prevent the prosecution of suspects:

- Those suspected of genocide, crimes against humanity and most war crimes cannot be prosecuted in the UK if they committed those acts before 2001.
- Non-residents such as students, visitors, and asylum seekers without residence status, cannot be prosecuted. This contrasts with torture, hostage taking and war crimes in international armed conflict; for these crimes the suspect merely needs to be present. Most other countries such as Canada, South Africa, and the USA (for genocide) permit prosecutions on the basis of 'presence' rather than 'residence'.

Suspects who have been present in the UK, but not resident, include Félicien Kabuga, the alleged financier of the Rwandan genocide, and Chucky Taylor, head of the anti terrorist unit in Liberia – recently convicted in the US for torture. There may be other suspects present who the Government are trying to deny residence status through immigration action, but cannot remove for human rights reasons. Those alleged to have committed genocide before 2001 include suspects who were recently freed after winning their battle against extradition to Rwanda.

It is proposed to strengthen UK law by amendments to the International Criminal Court Act which address these 'impunity gaps'. These reforms will not make the UK a global prosecutor. The suspect will need to be present in the UK, the Director of Public Prosecutions and Attorney General will retain their role in assessing the strength of the evidence and whether or not proceedings are in the public interest, and there are no proposals to remove head of state or diplomatic immunities. Alternatives such as transfer to the International Criminal Court or trial in another country will often not be possible because the small capacity of the ICC and the possibility that human rights concerns, such as the risk of torture, will prevent extradition or deportation.

It may be advisable to re-establish a specialised war crimes unit within the Metropolitan Police Service that deals with war crimes, crimes against humanity and genocide. The Swedish equivalent costs about USD\$2.6m per annum. In 2003 the Metropolitan police apparently made a £1.139m bid for funding for more capacity to investigate these types of crimes.

2. The scale of the problem

The impunity enjoyed by suspected war criminals and *génocidaires* is a serious global problem, in which the UK plays a perhaps unsuspecting part.

How many suspected war criminals and *génocidaires* are there?

A definitive answer is impossible. Yet some rough, back-of-an-envelope, calculations are available. One estimate of the numbers of perpetrators in the Rwandan genocide was 200,000.¹ Perhaps 20,000 janjaweed militiamen and military personnel were involved in the killings in Darfur.² The late 2008 crisis in the eastern Democratic Republic of Congo (DRC) featured an estimated 6,000 members of General Nkunda's CNDP militia, 6,000-7,000 FDLR Hutu-extremist militia members, approximately 3,500 pro-government Mai-Mai militia, and thousands of DRC government troops.³ When these numbers are considered alongside those involved in the brutal conflicts such as those in Algeria, Sri Lanka, northern Uganda, Angola, southern Sudan, and the former Yugoslavia; the torturers of Burma, Chile and Argentina; and the *génocidaires* and camp guards of Saddam's Iraq, Guatemala and Cambodia, it is clear that the numbers of those suspected of war crimes and crimes against humanity could run into the hundreds of thousands. Perhaps more importantly, those in positions of command responsibility could, at least, number several thousand.

By contrast the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, the International Criminal Court and national governments have dealt with a few hundred suspects between them.⁴

How many suspects have been or are in the UK?

The total number of suspects in the UK is not in the public domain.

Since 2004 the war crimes team in the Border Agency has screened 1,863 individuals for genocide, war crimes or crimes against humanity.⁵ The specialist war crimes team recommended further immigration action for 16% (c.300) of these cases. Immigration action (including decisions to refuse entry, indefinite leave to remain and naturalization, and exclusions from refugee protection) was taken against 138 people.⁶ Since 2005, 22 cases have been referred to the Metropolitan Police.⁷

There may be more, given that there will be suspects who entered the UK before the Border Agency started recording statistics; and that others may enter the country undetected.

Where have the suspects come from? What types of crimes are they alleged to have committed?

The following examples, drawn from media reports and publicly-reported determinations of the Asylum and Immigration Tribunal (AIT), give a flavour of the seriousness of the crimes alleged to have been committed by individuals either currently here, or who are reported to have visited the UK in the past.

A health warning is necessary: the AIT determinations often give very truncated accounts of the evidence presented to the Tribunal. The standard of proof required for immigration action ("serious reasons for considering") is much lower than the criminal standard of proof. Descriptions of their stories have been provided to demonstrate the range of countries from which suspects have arrived; often details have been omitted in order to protect their identities. In some of the cases the individuals' appeals to stay in the UK were rejected, in others they were allowed. The fact that immigration files exist and the Government is screening for such crimes is testament that in many cases the 'system' is working. In many of the cases below the Home Office quite rightly, and successfully, sought to remove the individual: indeed not all of the individuals mentioned below will still be in the UK (it is sometimes difficult to tell this from the AIT determinations). However, in other cases the authorities can not remove, extradite, or prosecute the suspect.

All of the individuals mentioned, or alluded to, below are innocent unless proven guilty.



Rwanda

1. Félicien Kabuga is a Rwandan whom the prosecutors of the International Criminal Tribunal for Rwanda suspect of being one of the chief financiers of the genocide. He is alleged to have been President and major shareholder of RTLM, the hate-radio station which broadcast many incitements to genocidal violence towards Tutsis and Hutu moderates.⁸ From 1992 onwards prosecutors accuse Kabuga of purchasing 'massive numbers' of machetes through his company ETS Kabuga.⁹ On 25 April 1994 he, with colleagues, allegedly established the *Fonds de Défense Nationale* to help finance the purchase of weapons, vehicles and uniforms of the interahamwe militia.¹⁰ *The Times* reports that:

"At times, Kabuga has even felt secure enough to travel to Europe. One of his journeys has been traced. In 1999 he left Nairobi for Madagascar, travelling on his Kenyan diplomatic passport. Arriving in Brussels on August 12, he held a meeting at the Royal Windsor hotel with several notorious genocide suspects who had flown in especially to see him. Then he went to France and passed briefly through Britain on his way back to Kenya. He also travelled to the Far East on an arms-purchasing mission."¹¹

Félicien Kabuga is still at large. He is, of course, innocent until proven guilty.

2. In 2000 Tharcisse Muvunyi was arrested in Lewisham, South East London, and was transferred to the International Criminal Tribunal for Rwanda in Arusha, Tanzania. His trial is ongoing. He is innocent until proven guilty.¹²
- 3-6. Four genocide suspects were recently freed by the Court of Appeal following their successful appeal against extradition to Rwanda. The Crown Prosecution Service acted for the Rwandan Government during the extradition hearings. In one paper the Crown advocate wrote "For the purpose of dual criminality, we had to identify from the conduct detailed in the [extradition] requests, what the equivalent offences would have been had the conduct occurred in the UK. In the main the conduct reflected charges of genocide, conspiracy to commit genocide, aiding and abetting genocide, inciting genocide, soliciting to murder and murder."¹³ Doubts have been raised about the evidence of at least one of the four.¹⁴ All four individuals are innocent until proven guilty.
7. Rwandan interahamwe militia member: One determination of the Asylum and Immigration Tribunal in 2008, hearing an appeal against the removal of a Rwandan, mentions that he, allegedly, was a member of the interahamwe.¹⁵ There is no indication whether or not the individual personally committed any crimes and he is innocent until proven guilty.

Zimbabwe

8. Zimbabwean alleged torturer: The immigration judge found that "the appellant, although not a member of ZANU-PF, had worked for the Criminal Investigations Office,

Zimbabwe, from 1981 onwards and had taken part in the torture of those detained by the CIO. He concluded that the appellant came within the provisions of Article 1F(a) of the Refugee Convention in that he had committed a "war crime or a crime against humanity as defined in the relevant international instrument" and that therefore he was not entitled to asylum."¹⁶ For the purpose of assessing criminal culpability he is innocent until proven guilty.

Iraq

9. Iraqi alleged torturer in Saddam Hussein's regime: The immigration judges wrote in their determination: "When cross-examined by [name redacted] the appellant was asked how often he had been involved in torture and he said it was on about seven or eight times. They used to beat people with cables when they did not give them the information they wanted. On average the torture would last about half an hour until they admitted the crime. Some did not admit it and they kept pressurising them for months until they gave in and gave the correct address." Later they wrote that in his interview he admitted that "For a period of some three months in 1994 he was involved in sending people to other detention centres knowing that they would have their ears cut off surgically."¹⁷ For the purpose of assessing criminal culpability he is innocent until proven guilty.

Box 1. Former police chief, Democratic Republic of Congo, interviewed in the UK

Suspect: We had politicians, people who were active against the government who had to be processed for interrogation and there were military deserters, criminals, people who had been sent back from Europe and who also had to be interrogated

Interviewer: And were people tortured?

Suspect: Yes. Torture at that police station was very common. Routine, in fact. Everyone who was brought there was tortured.

Interviewer: Do you remember the first person who you tortured?

// Break //

Interviewer: Denial. We went off the record for a few moments.

Interviewer: I know that you are concerned that you could be identified, and that you could end up in front of the war crimes tribunal and that's why I have guaranteed your anonymity but I want to still ask you about what you yourself did. Let me ask it in a different way. To torture someone is not a normal thing to do. It must be difficult to do it for the first time.

Suspect: You have to understand that to start with, we inspectors we're not there primarily to torture people. There are soldiers specialising in dealing with these type of people. They will come and take you and torture you. I am a chief. I cannot go and torture people. I have lots of work to do.

Interviewer: But you gave the order to torture...

Suspect: If someone has come to my office and I have been asking questions and trying to obtain information and the person doesn't speak. I will then call someone to come and take him to the torture cell. And I have to be there taking notes while the person is being beaten. Notes and putting down information.

Interviewer: You saw people suffering like this – what went through your mind?

Suspect: It's not good. It's not good to see people suffering.

Interviewer: Do you think that torturing people produced useful information?

Suspect: The African race is very, very stubborn. The black race. If you try to get information from people by asking politely for example did you kill this man? They will say No – I know nothing about it. Or, did you try and mount a coup against the government, against the president? No. They will say no. Black people need to be hit. To get the truth. And when you get the stick. And you hit them. Hit them. Hit them. Hit them. And hit them again. Then you will get the truth. And that's why we use these type of measures and torture in order to get information. There are other ways – you can electrocute them. You use car jump leads and attach them anywhere on the body. The thumbs, the fingers, the ears, it doesn't matter. And as soon as you press the button the current goes through the body and they start to shake. And you say, if you don't talk we will carry on. It usually produces results.

Source: Torturer's Tale, Radio 4, 27 October 2008

Liberia

10. Roy Belfast Jr. a.k.a. Chucky Taylor was sentenced to 97 years in January 2009 for his role in torture in Liberia. The son of the Liberian dictator, Charles Taylor, Chucky was the commander of a paramilitary organization known as the Anti-Terrorist Unit, which was directed to provide protection for the Liberian president and additional dignitaries of the Liberian government. Between 1999 and 2003, in his role as commander of that unit, Belfast and his associates committed numerous and varied forms of torture, including burning victims with molten plastic, lit cigarettes, scalding water, candle wax and an iron; severely beating victims with firearms; cutting and stabbing victims; and shocking victims with an electric device.¹⁸ *The Observer* reports that between 2003 and 2006 Chucky Taylor travelled to Trinidad, "South Africa, Libya, Paris and London."¹⁹

Democratic Republic of Congo (see box 1)

11. Alleged torturer. In October 2008 a BBC Radio 4 broadcast featured a man who claimed to be a former police chief in

Kinshasa, Democratic Republic of Congo. In the interview he discussed his alleged role in commissioning acts of torture. The interviewer stated that the man was currently in the United Kingdom. See box 1. He is innocent until proven guilty.

Afghanistan

12. An Afghan warlord, Faryadi Zardad, was convicted of torture and hostage taking in Afghanistan during the 1990s. He was said to have kept a 'human dog' for purposes of extorting money at a series of checkpoints between 1992 and 1996.²⁰ His was the first extra-territorial prosecution since those of suspected Nazi-era war criminals.
13. Lieutenant Colonel in KHAD (communist-era Afghan intelligence service). The individual worked in KHAD in the 1980s, reaching the position of Dagarman, a rank equivalent to Lieutenant Colonel. On reaching the UK and claiming asylum the Home Office alleged he "was directly involved in administering torture and had been involved in the process leading to the sentencing to death of persons in custody". The immigration judge agreed: "I am entirely satisfied that the appellant was responsible for torturing people as part of his activities for KHAD. I consider that those activities comprise a crime against humanity and/or a war crime..."²¹ For the purpose of assessing criminal culpability he is innocent until proven guilty.
14. Senior captain in KHAD in the late 1980s and early 1990s who occupied an administrative role within the organization. On appeal, the immigration judge stated "To be involved in torture does not, in my view, require the person concerned physically to inflict torture with their own hands. A person will be involved in torture if that person is present when torture is conducted, for example as a questioner, guard, medical attendant, clerk, or in any other capacity. A person will also be involved in torture if his or her role involves detaining or processing a person as part of an investigative process in which torture is likely to take place. This it seems to me is precisely the role which the Immigration Judge found the Appellant occupied, on the basis of which he found him involved in torture." ... "There is no question but that torture was inflicted upon those in the custody of or under the control of KHAD, in which the Appellant was an officer with a responsible position, including the initial processing of detainees against whom torture would be likely to be used. Viewed on this basis, the conduct of the Appellant falls squarely within that categorised as a crime against humanity."²² For the purpose of assessing criminal culpability he is innocent until proven guilty.
15. Afghan warlord: Jamiat Islami (JI) Commander who led 300 troops, from the late 1980s to early 1990s. The immigration judges stated: "we conclude that the appellant was in a leadership role within JI and it was engaged in war crimes in Kabul in the relevant period. He is therefore complicit in those crimes. We also conclude that the respondent has established there are serious grounds for considering that he was complicit in what was for a period a principle purpose of JI which were the commission of war crimes. He was intentionally involved in

directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (see Part 2: Article 8(e) of the Rome Statute above).” For the purpose of assessing criminal culpability he is innocent until proven guilty.

Sudan (see box 2.)

16. Janjaweed militia member. In 2006 *The Times*, and BBC Newsnight, interviewed an alleged member of the Janjaweed militia who described being involved in attacks upon civilians in Darfur, Sudan. He is innocent until proven guilty.

Sierra Leone

17. A member of the Sierra Leone “Mosquito” rebel group. The immigration judges wrote that “In his most recent statement the appellant said that he was with a high profile group called the Mosquito group led by [Name redacted], travelling all over the country on different operations and was involved in war crimes and crimes against humanity such as murder, rape, looting, burning, sexual slavery and amputations.”²³ For the purpose of assessing criminal culpability he is innocent until proven guilty.

Sri Lanka

18. An alleged Tamil Tiger assassination hit squad driver who is accused of taking part “repeatedly, over a period of years, in missions to eliminate civilians – politicians, businessmen and members of rival Tamil groups.” The immigration judges found “on the account of his activities put forward by the appellant and accepted by the immigration judge on his appeal, that he has indeed committed war crimes and crimes against humanity, and is guilty of acts contrary to the purposes and principles of the United Nations, thus warranting his exclusion from the protection of the Refugee Convention.”²⁴ For the purpose of assessing criminal culpability he is innocent until proven guilty.

Other immigration files list child soldiers from Sierra Leone, officers and soldiers in Charles Taylor’s army in Liberia, a Somali warlord, another Afghan warlord, a member of the Serb militia ‘Arkan’s Tigers’, and a rebel from Angola allegedly implicated in hostage taking.²⁵ There have also been two extradition requests for suspects from the former Yugoslavia.²⁶ Finally, the media have also previously made accusations about four individuals from Somalia²⁷ who travel frequently to the UK, and about three individuals, resident in the UK, from Bangladesh²⁸ for war crimes allegedly committed in 1971.

Box 2. Interview with former Janjaweed militia member, from Sudan, interviewed in UK.

What did you do to the people who lived there [refers to name of Darfuri village]?

Many, many people were killed. Many, many were killed. People have weapons, and they're ignorant. The result, when people get to the village, everybody has a weapon to shoot everybody who you meet. You will not distinguish between children, the elderly or women; you just shoot and kill everybody. You can't tell if this is an innocent person, or not fighting, you just kill everybody indiscriminately.

Were any people in this village burned in their houses?

In this village in particular, I did not see anybody being burned, but presumably if there were elderly people they must have died in the fires.

Did you take part in the killing? Are you aware that you personally killed people in this village?

Yes.

How old were the youngest children who were killed there?

Young.

Young children.

Four or five.

Was anyone raped in this village?

Rape can happen. Rape can happen. There are too many people. It depends, from one person to another. Some people rape, some do not.

Did it happen in this village?

Yes, it happened in this village.

Did you take part in rape?

No, I did not. No, I did not.

3. Options under the current legal framework

When a suspected war criminal or *génocidaire* arrives or is found in the UK there are five options:

1. Criminal investigation, and if the evidence is strong enough, prosecution.

Any investigation is carried out by officers from SO15, the counter-terrorism branch of the Metropolitan Police, which has national responsibility for investigating such crimes. Any subsequent prosecution is the responsibility of the counter terrorism unit of the Crown Prosecution Service.

There have been at least twenty two³⁰, and almost certainly more, investigations of modern day war criminals in the UK. There has been one, successful, prosecution; of Faryadi Zardad, for torture and hostage taking in Afghanistan.

2. Extradition to a country willing to put the suspect on trial.

Most famously, this was the case with the request by Spain to extradite the former Chilean dictator General Pinochet. In addition extradition requests have been made for four Rwandans suspected of genocide and two individuals from the former Yugoslavia suspected of war crimes.³¹ Extradition is relatively rare.

3. Transfer to an international tribunal or the International Criminal Court (ICC).

Tharcisse Muvunyi, a Rwandan suspected of genocide was arrested in the UK and transferred to the International Criminal Tribunal for Rwanda. Due to the winding up of the ad hoc tribunals for Rwanda, Yugoslavia and Sierra Leone, and the limited budget and capacity of the ICC, transfer will be an option which is not widely used for the foreseeable future.

4. Immigration action such as refusal of entry or removal

This is by far the most common action both in the UK and in other countries. In the UK around 600 people are screened each year by the specialist war crimes team in the Border Agency.³² By comparison, in 2006/7 Canada screened 3,463 cases, resulting in 361 entries prevented, 31 exclusions and 35 removals.³³

5. Doing nothing

As detailed below, there are gaps in British law which prevent prosecution. It is also possible that attempts to remove or extradite suspects fail because of human rights concerns, such as the risk of torture or the lack of a fair trial in the receiving state. On occasion, the relative lack of resources given to law enforcement agencies to investigate such crimes may mean that there may be policy-related decisions to prioritize resources elsewhere.

After attempts to extradite them, suspected Rwandan *génocidaires* released by the High Court on April 8 2009 presently fall into this category. The former Director of Public Prosecutions (DPP) has said:

'As part of the extradition process, the CPS considered whether it would have jurisdiction to prosecute the four fugitives should extradition fail. This type of review is consistent with the obligation on States to either extradite or prosecute perpetrators of certain international crimes. We concluded that we didn't have jurisdiction to prosecute them for acts of genocide or for war crimes committed in Rwanda in 1994.'³⁴

4. The current legal framework

Note: The following discussion omits civil law remedies.

Criminal law

The current legal framework is set out in table 1. It is apparent that the current framework is a patchwork-quilt of law which contains significant jurisdictional gaps. The former Director of Public Prosecutions (DPP) has stated that these amount to ‘impunity gaps’.

In particular, there is a distinction between torture, hostage taking and war crimes in international crimes – which only require the suspect to be present in the UK – and genocide, war crimes and war crimes in civil wars – which require the suspect to be resident here. The former DPP has said that these distinctions lack ‘moral logic’.³⁵

Table 1: the current legal framework in the UK: extra-territorial jurisdiction for atrocity crimes

Crime	Prosecutable if you are a UK resident and if crimes committed in following years?	Prosecutable if you are present on UK soil but not a UK resident?
Genocide	Yes – from 2001 (ICC Act)	No
Crimes against Humanity	Yes – from 2001 (ICC Act)	No
War Crimes – internal conflicts	Yes – from 2001 (ICC Act)	No
War Crimes – Nazis	Yes – 1939-45 (War Crimes Act)	No
War Crimes – international conflicts	Yes – from 1957 (Geneva Conventions Act)	Yes – from 1957
Torture	Yes – from 1988 (Criminal Justice Act)	Yes – from 1988
Hostage taking	Yes – from 1982 (Taking of Hostages Act)	Yes – from 1982

Torture

If present, a torturer may be prosecuted in the UK irrespective of his nationality or where his crimes were committed. The elements that need to be proved in a prosecution for torture are that the accused (i) intentionally; (ii) inflicted severe pain or suffering; (iii) at the instigation or with the consent or acquiescence of person acting in an official capacity. This is set out in section 134 of the *Criminal Justice Act 1988*, which implemented the 1984 *Convention against Torture*. Section 134 was successfully used to prosecute Faryadi Zardad.

Hostage Taking

A similar situation exists with respect to the crime of taking hostages. *The Taking of Hostages Act 1982*, which implements the 1979 *International Convention against the Taking of Hostages*, provides that the offence may be committed by a person irrespective of his or her nationality and irrespective of where the offence occurred. Again Zardad was also

successfully prosecuted for hostage-taking (s.2, *Taking of Hostages Act 1982*). Again, the hostage taker should be present in the UK to enable a prosecution.

Genocide

Genocide is any of a specified set of crimes committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.³⁶

The 1969 Genocide Act incorporated the 1948 Genocide Convention into UK law. It did not provide for extra-territorial jurisdiction and only covered acts of genocide committed within the UK. This act was repealed with the introduction of the *International Criminal Court Act 2001* (although technically it still applies in respect of genocide committed between 1969 and 2001). Unlike torture and hostage taking, genocide may be prosecuted in the UK only if the accused is a UK resident or national, or if the genocide occurred in the UK. The *International Criminal Act (2001)* only covers acts of Genocide committed after 2001.

Crimes Against Humanity

Crimes against humanity are defined in Article 7 of the ICC Statute as any of a list of acts (murder, extermination, enslavement, deportation, etc.) “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

Crimes against humanity were first codified during the Nuremberg Tribunal following the Second World War. However, there has never been a Convention on Crimes against Humanity, as there are the Geneva and Hague Conventions on the laws of war and the 1948 *Genocide Convention*. Accordingly, in the UK, there has never been a *Crimes against Humanity Act* and no provision for prosecuting crimes against humanity in the UK until the advent of the ICC Act 2001.

Like genocide, crimes against humanity committed outside the UK cannot be prosecuted at all if they occurred prior to 2001, and only after that date if the person is a UK national or resident, or in the unlikely event that the crimes were committed in the UK.

War Crimes

In the UK, war crimes may be prosecuted under, broadly speaking, three categories of case.

1. First, there is universal jurisdiction for grave breaches of the *Geneva Conventions of 1949* under the *Geneva Conventions Act 1957*:

Geneva Conventions Act 1957, ss.1, 1A

1. Grave breaches of scheduled conventions

(1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence.

(1A) For the purposes of subsection (1) of this section -

(a) a grave breach of a scheduled convention is anything referred to as a grave breach of the convention in the relevant Article, that is to say -

[...]

(b) a grave breach of the first protocol is anything referred to as a grave breach of the protocol in paragraph 4 of Article 11, or paragraph 2, 3 or 4 of Article 85, of the protocol.”

Thus “grave breach” is a term of art, specifically defined in each of the four Geneva Conventions of 1949 and in Additional Protocol I. Typically, “grave breaches” are certain acts committed against “protected persons” or “protected property” – both also terms of art, defined precisely in each Convention (e.g. prisoners of war, civilians, the wounded and the shipwrecked) – and typically include such acts as: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, willfully depriving a prisoner of

war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian and taking civilians as hostages.

The *Geneva Conventions Act 1957*, and the concomitant universal jurisdiction over grave breaches, remains in force in the UK, notwithstanding the entry into force of the *International Criminal Court Act 2001* (the “ICC Act”).³⁷

Since the Geneva Conventions of 1949 only apply to an international armed conflict, arguably there is no jurisdiction in England and Wales to prosecute crimes committed in a non-international or internal armed conflict under the *Geneva Conventions Act 1957*. So, for example, war crimes committed in the conflict in Sri Lanka or Rwanda could not be prosecuted in the UK, those conflicts having been, arguably, internal.

2. Second, war crimes involving homicide committed during the Second World War on what was, at the time, German territory may be prosecuted where the accused is or has become a UK national or resident under the *War Crimes Act 1991*:

“1 Jurisdiction over certain war crimes

(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. [...]

This statute has been applied in two cases: *R. v. Sawoniuk*³⁸ and in the case of Simeon Serafanowicz.³⁹

3. Third, war crimes within the definition of article 8 of the ICC Statute are offences under section 51 of the ICC Act 2001 provided that (i) the crimes were committed after ICC Act entered into force, and (ii) the accused is a UK soldier, resident or national:

“51 Genocide, crimes against humanity and war crimes

(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.

(2) This section applies to acts committed—

(a) in England or Wales, or

(b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.”

It will be clear from the above that a whole host of war crimes would escape prosecution in the UK, in particular war crimes committed in an internal armed conflict prior to 2001, or after 2001 where the accused is not a UK soldier, national or resident.

Immigration Law

Broadly, two sources of law govern the response by immigration authorities to the challenge of suspected war criminals and *génocidaires* attempting to enter the UK: the Refugee Convention (1951) and the European Convention on Human Rights.

Article 1F of the Refugee Convention states:

1.F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations

Article 1F(a) was designed to prevent war criminals from the Second World War gaining asylum, and thereby potentially evading justice. It is used to refuse refugee status to those suspected of war crimes. The standard of proof – ‘serious reasons for considering’ – is lower than that for criminal or civil proceedings.

The Government, in the 2002 White Paper ‘Secure Borders, Safe Haven’ set out its aim:

The UK should not provide a safe haven for war criminals or those who commit crimes against humanity. Action should be taken to bring such individuals to justice wherever possible within the rule of law and depending on the sufficiency of the evidence available. However, our experience, and that of a number of other countries which have been very active in this field, is that an effective response cannot be founded solely on criminal prosecution. Frequently, evidence will be insufficient to meet the high standard of proof required to convict a particular individual. Governments must be prepared to use their full range of powers, including the selective use of immigration and nationality provisions, to make it clear that those who are suspected of involvement in atrocities are not welcome in a civilized society. All of this needs to be balanced against our obligations to individuals who are in genuine need of protection.⁴⁰

The European Convention on Human Rights protects any suspects from abuses of their own human rights, including their rights to life, and not to be tortured.

UK Border Agency policy guidance⁴¹ sets out how individuals suspected of committing, or complicity in, war crimes or crimes against humanity, will be treated:

- Cases involving applications for asylum will be referred to the specialist War crimes team who will assess the individual’s case and make a recommendation to the Border Agency case worker, who makes the decision.
- Entry to the UK – whether under a tourist, student or any other type of visa, can also be denied to suspects under rule 320(19) of the Immigration Rules.⁴²

If it is considered that returning or removing the individual would breach their right to life or right not to be tortured, and in some cases, their right to a private and family life, then the cases are referred to the Chief Executive of the Border Agency who has the power to grant discretionary leave: “Individuals who have been granted a limited period of Discretionary Leave by agreement of Ministers will be subject to a review of their leave every six months until removal becomes a viable option. In order to be eligible to apply for settlement in the United Kingdom, they will need to have accrued ten years’ continuous grants of limited leave.”⁴³ In December 2008 it was announced that there were “three applicants who, following a recommendation from the war crimes team, have been refused asylum under Article 1F(a) of the 1951 United Nations Convention Relating to the Status of Refugees since October 2007 and who have also been granted discretionary leave.”⁴⁴

Laws relating to transfer to an International tribunal, the International Criminal Court or extradition to another country*

Suspects wanted by the International Criminal Tribunals for Rwanda or the former Yugoslavia can be transferred from the UK relatively easily; reflecting the obligatory nature of the relationship between states and the Tribunals (which are founded under a Chapter VII mandate from the UN Security Council).

Section 4(1) of the Order governing the relationship between the UK and the Tribunals provides:

Where the Secretary of State receives from the International Tribunal a warrant of arrest issued by the International Tribunal ... The Secretary of State shall transmit the warrant to an appropriate judicial officer who shall ... endorse the warrant for execution in any part of the United Kingdom.⁴⁵

Such a process was followed for Tharcisse Muvunyi in 2000.

The relationship with the International Criminal Court is one of co-operation, rather than obligation – reflecting the ICC’s status as an independent organ born through a voluntary treaty between states. The ICC Act 2001 governs the process of arrest and surrender to the ICC.

*In this section, the discussion of the legal framework relating to transfer and extradition is less detailed than that relating to criminal and immigration law, partly reflecting the relatively rare nature of extradition and transfer.

Finally, individuals who are suspected of war crimes may be extradited if (among other requirements):

- there is sufficient evidence to establish a *prima facie* case;
- the alleged crime satisfies the requirements of double criminality – the rule that the act has to be a crime in both the requesting and receiving state. This caused a problem in the extradition of Pinochet when many alleged acts of torture were disregarded because they occurred before 1988, when torture became a crime in British law;
- the courts are satisfied that the receiving country will provide a fair trial and respect that person's human rights. This proved the barrier to the extradition of four Rwandans suspected of genocide, who successfully argued that they would suffer a flagrant denial of the right to a fair trial.

5. Proposals for strengthening the law

There are suspected war criminals and *génocidaires* in the UK who cannot be prosecuted, deported, extradited or transferred to the ICC.

The solution is to strengthen the law to allow for the investigation of their alleged crimes, and, if the evidence is strong enough, to enable prosecution. The International Criminal Court Act 2001 should be amended to allow UK courts to try individuals for crimes against humanity, war crimes and genocide where:

- a. A person suspected of these crimes is *present* in the United Kingdom, as opposed to being *resident* in the United Kingdom. This would enable suspects such as Félicien Kabuga to be prosecuted; and
- b. The crimes in question were committed *prior* to 2001. Currently UK courts can only try suspects for these crimes if the crimes were committed *after* 2001. This would allow suspects such as the alleged Rwandan *génocidaires* to be prosecuted here.

Law reform in this area will only be effective if police officers are appropriately resourced to investigate such crimes. It may be advisable to re-establish a specialised war crimes unit within the Metropolitan Police Service that deals with war crimes, crimes against humanity and genocide.

Box 3. Precedent: Nazi-era war criminals in the UK

In 1989 Sir Thomas Hetherington and William Chalmers published the findings of their War Crimes Inquiry. They considered 301 allegations that people, who had subsequently become British residents, had committed war crimes in Nazi-occupied Europe between 1939 and 1945. They found three cases with a realistic prospect of a conviction for murder, and recommended that further investigations should be carried out in 75 other cases.

They concluded that British courts did not have jurisdiction over the alleged crimes whilst alternatives, such as extradition to the Soviet Union or deprivation of citizenship and deportation, were unsatisfactory. Accordingly, they recommended that the law be changed to give British courts retrospective jurisdiction over war crimes. This led to the War Crimes Act 1991 and the establishment of a War Crimes Unit in the Metropolitan Police.

These proposals raise the following questions – each addressed in the following sections:

- Isn't retroactive legislation wrong, and unlawful?
- Why should we move from a residence to a presence test?
- These are complex issues which sometimes raise

questions about the balance between peace and justice, concerns about national security and threats to diplomatic cooperation. Shouldn't there be a public interest test?

- Isn't this the job of the ICC?
- What are the costs?

6. Discussion: Retrospective application of jurisdiction

The retrospective application of the jurisdiction of UK courts is not the same as retroactively creating a new law – which would be contrary to the basic legal principle of ‘no crime without law’. The crimes over which the writ of the UK courts would be conferred were already crimes under customary international law, conventional international law, and, in many cases, in British law also. For example, genocide has been a crime in customary international law since 1948, in Rwanda since its accession to the Genocide Convention in 1975 and in the UK since the Genocide Act 1969. Therefore any Rwandan *génocidaires* in the UK cannot argue that they did not know that their acts were not criminal in 1994.

Such retrospective application of jurisdiction is compatible with human rights law: the framers of both the European Convention on Human Rights and International Covenant on Civil and Political Rights drafted clauses to allow for the retrospective application of jurisdiction relating to war crimes, crimes against humanity, genocide and other similar crimes, so long as they were recognized as such by customary international law at the time of the offence.⁴⁶

Article 7 of the European Convention on Human Rights provides that:

- (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- (2) 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.

These clauses have been used to retrospectively apply jurisdiction in countries including Senegal,⁴⁷ New Zealand,⁴⁸ Norway⁴⁹ and the UK (the 1991 War Crimes Act).

The Hetherington-Chalmers Inquiry, which led to the 1991 War Crimes Act, considered this question:

“...by 1939 ... violations of the customs and uses of war, or war crimes as they were later called, were internationally recognized as crimes, both Britain and Germany being among the signatories of the Hague Conventions which confirmed them as such. The Nuremburg judgment also held that such acts were also recognized as crimes under customary international law, which bound even those nations which had not become party to the Conventions. Genocide was not recognized until 1948 and we find the position of what were subsequently called crimes against humanity to be unclear ...

Therefore it can be argued that enactment of legislation in this country to allow the prosecution of ‘war crimes’ in British courts would not be retrospective: it would merely empower British courts to utilize a jurisdiction already available to them under international law since before 1939, over crimes which had been internationally recognized as such since before 1939 by nations including both the United Kingdom and Germany. We are less certain that a similar stance can be adopted with regard to crimes against humanity.” [Emphasis added.]⁵⁰

Box 4. Retroactive application of jurisdiction: rape within marriage

This is not the first time the UK has had to consider this issue. In 1991 the Law Lords declared that the general principle that a husband cannot rape his wife, no longer formed part of the law of England and Wales.⁵¹ In the case of *S.W. v the United Kingdom*⁵² the applicant had been charged with raping his wife in 1990. He argued that the common law principle that a husband could not be found guilty of rape upon his wife, was still effective on the date he committed the act of rape. At the time, therefore, his act was not unlawful. The court held that the essentially debasing character of rape is so manifest that the applicant could be convicted of rape, irrespective of his relationship with the victim. This was not at variance with the object and purpose of art 7 of the ECHR. Rather, abandoning a husband’s immunity against prosecution for rape of his wife was in conformity, not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom.⁵³

Proposals to retrospectively apply the jurisdiction of UK courts over atrocity crimes must find a balance between

- Avoiding retroactively creating laws;
- Providing as much certainty and clarity as possible;
- Effectively extending jurisdiction over criminal acts.

This can be difficult as debates persist over when certain acts became widely recognized as criminal according to “the general principles of law recognised by civilised nations”. For example, there are difficulties in determining when ‘war crimes’ committed during civil wars became prohibited, and then criminal: some acts, such as those listed in ‘common article 3’ are listed in the 1949 Geneva Conventions, some in Additional Protocol II of 1977. By the time of the statute of the International Criminal Tribunal for Rwanda (1994), and the Tadic judgment of the Yugoslavia tribunal, many of the

distinctions between international and internal armed conflicts had been eroded: resulting in the relatively expansive list of crimes in the 1998 Rome Statute.

Different countries have approached this in different ways when retrospectively applying the jurisdiction of their courts

- In **New Zealand** their International Crimes and International Criminal Court Act retrospectively applied the jurisdiction of their courts to:
 - 28 March 1979 for genocide, being the date at which New Zealand became a party to the Genocide Convention;
 - 1 January 1991 for crimes against humanity, being the date at which the UN Security Council, under a Chapter VII mandate, conferred on the International Criminal Tribunal for Yugoslavia jurisdiction over crimes against humanity.

- **Senegal** did not specify dates. The country is currently (and slowly) proceeding towards the prosecution of former Chadian dictator Hissène Habré. A constitutional amendment passed in July 2008 says that the principle of the non-retroactivity of criminal law does not bar the prosecution of acts “which, when they were committed, were criminal according to the rules of international law relating to genocide, crimes against humanity and war crimes.”⁵⁴

- **Canada** followed the same model as Senegal but added specific dates as ‘back-up’ clauses to provide greater certainty. Their Crimes Against Humanity and War Crimes Act declares that crimes against humanity are offences “according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” Subsequent clauses set out that:
 - (4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.
 - (5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:
 - (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

Finally, many of the underlying offences have always been crimes. Justice Jackson, the chief prosecutor at Nuremberg Tribunal discussed the novelty of the concept of crimes against humanity in his opening statement: “It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them by surprise....The fourth Count of the Indictment is based on Crimes against Humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?”⁵⁵

7. Discussion: Presence vs 'Residence'

Currently, crimes against humanity, war crimes in civil wars and genocide can only be prosecuted in Britain if the suspect is a UK national or resident. Visitors, non-residents or persons passing through Britain may not be prosecuted. This contrasts with UK laws against torture, hostage-taking and war crimes in international wars, which do not distinguish between residents and visitors. The anomalous result is that a person suspected of extremely serious crimes can be present here in the UK (without being resident) and, in effect, has 'immunity' from prosecution in British courts.

There are two broad categories of non-resident suspects:

1. Visitors to the UK: including students, those receiving medical treatment, or tourists. Suspects such as Félicien Kabuga, the alleged financier of the Rwandan genocide, would fall into this category.
2. Suspects who are present in the UK, who are refused asylum under Article 1F(a) of the Refugee Convention, but who cannot be removed for human rights reasons. The Government in these cases is attempting to deny the individual status as a resident (by refusing applications for indefinite leave to remain) and therefore they are denying the basis on which they can prosecute.

Why might a 'residence test' be preferable to a 'presence test'?

The only stated justifications for the residency requirement given by the Government during the debate on the International Criminal Court Act was that the residency requirement would be flexible and that it was used in the War Crimes Act 1991 and the Sex Offenders Act 1997.⁵⁶

Two justifications (unstated in public) are that:

- (i) *it might be costly to monitor suspects travelling through British airports.*

Other countries, however, with presence requirements seem to manage. A move from a residence to a presence test doesn't create a requirement to monitor suspects, it merely enables prosecutions where desirable. Moreover, the UK Border Agency's Warnings Index already performs some of this role – by creating a database of individuals whose presence in the UK is not conducive to the public good.

- (ii) *a residence requirement acts as a brake against the prosecution of foreign officials in the UK – thus avoiding the diplomatic problems which might come with an arrest or investigation.*

The residence test is, in effect, being used as a *complement* to laws on head of state and diplomatic immunities, and as a *substitute* for a public interest test on whether prosecution is desirable. There may be occasions when immunities are appropriate or when a prosecution is not in the public interest

(these situations are discussed later). However, using a residence test in this way throws the prosecution baby out with the bathwater: at the same time as stopping the prosecution of officials of our closest allies, it also prevents the arrest of suspects such as Félicien Kabuga.

Problems with the residency requirement and the case for a simple 'presence' requirement

The residency requirement is uncertain. The definition of residency in the ICC Act is circular and unhelpful: "a 'United Kingdom resident' means a person who is resident in the United Kingdom"⁵⁷ When the residence requirement of the ICC Act was being debated at report stage in the House of Lords, Lord Goodhart QC explained that 'there is no single definition of residence for the purposes of the law of England or the law of the United Kingdom. Residence for tax purposes is not the same as the residence that is necessary for founding jurisdiction in divorce cases.'⁵⁸ The former Director of Public Prosecutions, Sir Ken Macdonald QC has said that the 'current residency requirement presents certain difficulties for the CPS and it lacks certainty.'⁵⁹

There is an unreasonable disparity between UK nationals and non-UK nationals. Lord Lester QC recognised this at Second Reading, noting that if a UK citizen and an Iraqi citizen were to be involved in a crime against humanity abroad and fled to the UK, the UK national could be prosecuted under the Bill before the domestic courts but the Iraqi citizen could not be prosecuted and conceivably his crimes could go unpunished.⁶⁰

There is an unreasonable inconsistency between the ICC Act and the Geneva Conventions Act 1957. Under the Geneva Conventions Act, UK courts have jurisdiction over offenders, 'whether in or outside the United Kingdom' who commit a breach of the Act.⁶¹ A residency test does not apply to people suspected of grave breaches of the Geneva Conventions committed after 1957 or to suspects of torture committed after 1988. There is no practical or sensible reason for a jurisdictional difference between these crimes, all of which belong to the same bracket of serious violations of international criminal law.

The UK is out of line with other Commonwealth countries. A simple presence requirement would bring the UK into line with other common law countries such as the US, New Zealand, Canada and South Africa.

Box 5. Presence requirement in other countries

Other countries, whether common law or civil law traditions, operate a simple presence test:

The **US** in its 2007 Genocide Accountability Act allows for prosecutions if “after the conduct required for the offense occurs, the alleged offender is **brought into or found in**, the United States, even if that conduct occurred outside the United States.”⁶²

Canada’s Crimes Against Humanity and War Crimes Act (2000) allows for prosecutions ‘if, after the time the offence is alleged to have been committed the person is **present** in Canada.’⁶³

In **South Africa**, the **Implementation of the Rome Statute of the International Criminal Court Act 2002** grants jurisdiction to South African courts over genocide, crimes against humanity and war crimes, even when committed outside the territory of South Africa, if the alleged perpetrator is a South African citizen or an ordinary resident of the Republic, or is **present** in the territory of the Republic.⁶⁴

Senegal exercises jurisdiction over suspects found in their territory: “Tout étranger qui ... s’il trouve sous la juridiction du Sénégal ou si une victime réside sur le territoire de la République du Sénégal, ou si le gouvernement obtient son extradition.”⁶⁵

8. Discussion: Public interest test and Immunities

Public interest test

Before any prosecution for war crimes, crimes against humanity and genocide can proceed the Attorney General needs to consent to the prosecution. There are two hurdles to be overcome by Crown Prosecutors before this consent can be given, first that there should be a reasonable prospect of a conviction, second, that it is in the public interest.

The Government has recently reviewed the role of the Attorney General and has decided to retain her role in the public interest test in cases involving atrocity crimes.⁶⁶ The former Director of Public Prosecutions has argued that the public interest test should not be performed by a member of the Government.⁶⁷ There have also been proposals to publish guidelines on the public interest test, so that decision making process can be more transparent.⁶⁸

Whoever makes the decision it is critical that a public interest test is performed. In many cases, as the former Director of Public Prosecutions has stated, 'it is highly likely that a prosecution for an international crime would meet the public interest test'.⁶⁹ In others there may be good reasons not to proceed.

The proposed changes to the law would simply expand the power of the Director of Public Prosecutions to bring charges under the ICC Act; it does not oblige him to do so. The roles of the Director of Public Prosecutions and Attorney General would be retained – to stop proceedings where the evidence is not of a high enough standard or where it would not be in the public interest. These reforms would be consistent with UK law regarding the crimes of torture and hostage taking.

Heads of State and Diplomatic Immunity

Sitting Heads of State enjoy immunity from prosecution under customary international law. This position was reaffirmed in the 'arrest warrant' case between Belgium and the Democratic Republic of Congo at the International Court of Justice (ICJ) in 2002. In British law too, sitting heads of state, and diplomats, also are immune from prosecution under, respectively, the State Immunity Act (1978) and Diplomatic Privileges Act (1964). UK courts have also interpreted the ICJ ruling such that head of state immunity also extends to high-level Government ministers involved in functions which require them to travel. Using such reasoning in February 2004 a London court rejected an application for an arrest warrant to be issued against Israeli Defense Minister Shaul Mofaz, and in November 2005 a magistrate refused to issue an arrest warrant against Chinese Trade Minister Bo Xilail, arguing that as part of an official delegation to the United Kingdom, he enjoys immunity. Complaints filed in the UK against George Bush and Robert Mugabe were also not investigated.

The proposed amendments would have no impact on the immunities that currently exist.

Box 6. International Court of Justice 'arrest warrant' ruling

The ICJ, in the 2002 *DR Congo v Belgium* 'arrest warrant' case, ruled that the incumbent Congolese Foreign Minister was immune from prosecution by Belgian courts seeking to exercise universal jurisdiction over alleged breaches of international humanitarian law.⁷⁰ They found that "the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances":

- Firstly, in the courts of the Minister's own country;
- Secondly, if the state which the minister represents waives immunity;
- "Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity;"
- Fourthly, in certain international criminal courts and tribunals, where they have jurisdiction.⁷¹

9. Discussion: International Criminal Court

Transfer to an international tribunal or the International Criminal Court

Transfer to an international tribunal or the International Criminal Court (ICC) may be preferable to prosecutions in UK courts, but often will not be possible. The tribunals for Rwanda, the former Yugoslavia and the Special Court for Sierra Leone are winding down. In addition, the ICC does not have capacity to take many of the suspects who may be found in the UK. The UK Government has noted that 'the ICC's budget for 2009 has not yet been finalised, but the court will base its planned expenditure on the assumption that two trials will take place consecutively; there will be some pre-trial activities for a third and the prosecutor will continue investigations in three of the situations currently before the court, with no new investigations envisaged.'⁷² This effectively means that the ICC only has the capacity for a handful of cases each year and that only high-level suspects might be suitable for trial at the ICC.

It is in keeping with the objectives of the ICC for the UK to extend its jurisdiction. The jurisdiction of the ICC is limited to crimes committed after the date on which the court came into existence i.e. 2002. This is because the plenipotentiaries of states which drafted the Rome Statute limited the jurisdiction of the court in this way for purely pragmatic reasons. But the ICC's lack of retrospective jurisdiction does not wipe the slate clean and grant impunity to previous offenders. Those responsible for atrocities committed prior to entry into force of the Rome Statute may and should be punished by national courts.

10. Costs: a specialised war crimes unit

Changes in the law may have a resource implication for the police, prosecutors and the courts. The precise extent of resources required to implement the changes would be influenced by guidance given by Parliament, the Government and the Greater London Authority about the relative importance of the investigation and prosecution of crimes against humanity, war crimes and genocide.

Law reform in this area would be most effective if accompanied by the establishment of a specialised war crimes unit. The UK used to have such a unit. The Hetherington-Chalmers Inquiry recommended that "Adequate resources should be made available...to the respective investigating and prosecuting authorities and the courts to allow war crimes to be fully investigated and, where appropriate, prosecutions to take place."⁷³ Following the 1991 War Crimes Act a specialist unit was established in the Metropolitan Police service (MPS) – which was disbanded in the late 1990s.

In 2003 the Metropolitan Police made an apparently unsuccessful bid to re-establish a war crimes unit, applying for £1.139m funding to the Greater London Authority.⁷⁴ The budget submission set out the rationale:

'War Crimes currently sits within SO13 (Anti-Terrorist Branch). It is a commitment the MPS have to undertake – yet not independently funded or staffed. Current workload has increasing impact on staff available to undertake other SO13 core roles. The increasing number of war crime investigations clearly warrants its own Unit, if SO13 are to continue within this investigative area...'

And the "consequences of not obtaining funds":

Clearly impacting upon core roles of this OCU – SO13 suffer the loss of one full investigation team to staff this function at the moment – decrease in high level of service is always a possibility – reputation in relation to the MPS's ability to investigate such crimes could be up for scrutiny."⁷⁵

It appears that the request for the increase in funding (2004/5) was turned down by both the GLA and Home Office and instead funded through the use of year-end reserves.⁷⁶

The establishment of such a unit would be in keeping with the recommendation of the Council of the European Union on the investigation and prosecution of genocide, crimes against humanity and war crimes.⁷⁷ The Council Decision recommends that:

'Member States shall consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question.'⁷⁸

Several other countries, including Belgium, the United States, Denmark, Norway, the Netherlands and Canada, have established specialised war crimes units with a view to ensuring that they do not provide a safe haven to suspects of serious international crime. These specialised units successfully investigated and prosecuted almost all cases of serious international crimes leading to a conviction since 2001.⁷⁹ On April 20th 2009, Germany's Ministry of Justice announced that it has created three dedicated positions in the General Prosecutor's Office to investigate cases of genocide, crimes against humanity and war crimes that fall under Germany's universal jurisdiction law. In addition, the Federal Criminal Police will establish a specialised war crimes unit with seven investigators working on international crimes.⁸⁰

Some indication of costs can be found by looking at the Swedish War Crimes Unit. This comprises 10 investigators and has a budget of US\$2.6m for 2008/9. There are currently 30-40 investigations ongoing in Sweden.⁸¹

Annex. Proposed Amendments to the International Criminal Court Act

(Via amendments to the Coroners and Justice Bill)

AMENDMENTS TO BE MOVED IN COMMITTEE

NEW CHAPTER, AFTER PART 2, CHAPTER 1, RELATING TO GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

Insert the following new Clause after Clause 51:-

“Retrospective operation

In Part 5 of the International Criminal Court Act 2001 (offences under domestic law) after section 69 insert the following section –

“69A Retrospective operation of this Part

- (1) The provisions of this Part shall be treated as having had effect –
 - (a) in respect of genocide, since 9 December 1948 (being the date when the Genocide Convention was approved by the General Assembly of the United Nations),
 - (b) in respect of crimes against humanity, since 1 January 1991 (being the date from which the United Nations, through the adoption of the Statute, recognised crimes against humanity as being part of customary international law),
 - (c) in respect of war crimes –
 - (i) which fall within article 8.2(a), since 12 August 1949 (being the date the Geneva Conventions were done),
 - (ii) other than those referred to in sub-paragraph (i), since the date when they were criminal according to the general principles of law recognised by civilised nations.
- (2) If the date referred to in subsection (1)(c)(ii) is earlier than 6 June 1945, that date shall be treated as 6 June 1945 (being the date in respect of which jurisdiction under the War Crimes Act 1991 (c. 13) ended).
- (3) War crimes referred to in subsection (1)(c)(ii) are deemed criminal according to the general principles of law recognised by civilised nations from 17 July 1998 (being the date the ICC Statute was done) and may be so before that date.
- (4) In this section –

“the Geneva Conventions” means the international conventions done at Geneva on 12 August 1949,

“the Genocide Convention” means the Convention on the Prevention and Punishment of the Crime of Genocide approved by the General Assembly of the United Nations on 9 December 1948,

“the Statute” means the Statute of the International Tribunal adopted by the Security Council of the United Nations, and

“the International Tribunal” means the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 established by Resolution 827(1993) of the Security Council of the United Nations.”

Insert the following new Clause after Clause 51:-

“Extension of extra-territorial application

- (1) Part 5 of the International Criminal Court Act 2001 (offences under domestic law) is amended as follows.
- (2) In sections 51(2)(b), 52(4)(b) and 54(4)(b) (application to acts committed outside the United Kingdom) for “or a person subject to UK service jurisdiction” in each place that it occurs substitute –

“, a person subject to UK service jurisdiction or any other person (whatever that person’s nationality) who is subsequently present in the United Kingdom”.
- (3) In sections 58(2)(b), 59(4)(b) and 61(4)(b) (application to acts committed outside the United Kingdom) for “or a United Kingdom resident” in each place that it occurs substitute –

“, a United Kingdom resident or any other person (whatever that person’s nationality) who is subsequently present in the United Kingdom”.
- (4) After section 68 insert –

“68A Proceedings against persons subsequently present within the jurisdiction

- (1) This section applies in relation to a person who commits acts outside the United Kingdom at a time when that person is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who is subsequently present in the United Kingdom.
- (2) Proceedings may be brought against such a person in England and Wales or Northern Ireland for a substantive offence under this Part if –
 - (a) that person is present in the United Kingdom at the time the proceedings are brought, and
 - (b) the acts in respect of which the proceedings are brought would have constituted that offence if they had been committed in that part of the United Kingdom.

- (3) Proceedings may be brought against such a person in England and Wales or Northern Ireland for an offence ancillary to a substantive offence under this Part (or what would be such a substantive offence if committed in that part of the United Kingdom) if –
- (a) that person is present in the United Kingdom at the time the proceedings are brought, and
- (b) the acts in respect of which the proceedings are brought would have constituted that offence if they had been committed in that part of the United Kingdom.
- (4) In this section a “substantive offence” means an offence other than an ancillary offence.
- (5) Nothing in this section shall be read as restricting the operation of any other provision of this Part.”

Notes

1. Scott Straus, How many perpetrators were there in the Rwandan genocide? An estimate, *Journal of Genocide Research*, 6(1), March, pp. 85–98, 2004.
<http://www.polisci.wisc.edu/users/straus/Straus%20JGR%202004.pdf> (last accessed December 2008).
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