UNIVERSITY OF TORONTO FACULTY OF LAW

INTERNATIONAL HUMAN RIGHTS PROGRAM

MEMORANDUM

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RE: **Holding Persons accountable for international Crimes under United Kingdom Law**

Please Note: This memorandum was prepared by a law student and is not legal advice and is not exhaustive. The information provided herein is not a substitute for legal advice or legal assistance. It is strongly recommended that CCIJ obtain a legal opinion from a qualified U.K. lawyer.

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I. Facts, Issues and Assumptions

This is an excerpt from a longer memorandum which applied these legal principles to a particular case. Due to confidentiality and the ongoing nature of the case, specific references to the particular case have been removed.

This memorandum sets out an objective overview of whether it would be possible to criminally charge and try suspects under United Kingdom (UK) law for acts, which constitute crimes under international law. The alleged acts may constitute inter alia torture, crimes against humanity and war crimes commited as part of an internal armed conflict. It is assumed for the purposes of this memorandum that the alleged acts do not constitute genocide or war crimes commited as part of an international armed conflict.

The memorandum also explores briefly whether it would be possible to bring a civil action under UK law, or to extradite suspects of such act to another jurisdiction to face criminal charges.

The following issues are examined:

1. **Criminal Prosecution:**

   1.1 Is it possible to criminally prosecute suspects for international crimes under domestic UK legislation? (Do the alleged acts constitute criminal offences under UK law? Were the alleged acts criminal offences under UK law at the time they were committed? Are the nexus requirements for exercising extraterritorial jurisdiction satisfied?)
   1.2 Is it possible to prosecute suspects under international criminal law?
   1.3 Do ex-state official, enjoy immunity from criminal prosecution?
   1.4 Do any statutes of limitations apply to acts committed prior to 1988?
   1.5 What is the procedure for bringing criminal proceedings?

2. **Extradition:** Is it possible to extradite suspects to face criminal prosecution in another jurisdiction?

3. **Civil claim:** Is it possible to file a civil claim in the UK?

II. SHORT CONCLUSIONS

1. Criminal Prosecution

1.1 Prosecution under domestic legislation

1.1.1 The *Geneva Conventions Act* 1*957* provides for universal jurisdiction over war crimes constituting grave breaches of the *Geneva Conventions 1949 (*and additional protocol I and III.) It is widely held that grave breaches of the Geneva Convention can only occur in the context of an international armed conflict. Acts which were committed as part of an internal armed conflict *prima facie* do not constitute an international armed conflict and, therefore, likely falls outside the jurisdiction of the *Geneva Conventions Act* 1*957*.

1.1.2 The *ICCA* made it an offence under the Law of England and Wales for a

person to commit genocide, war crimes and crimes against humanity. The alleged acts fall within the definition of “crimes against humanity” and may also fall within the definition of “war crimes” if it can be established that they were committed as part of an internal armed conflict. The *ICCA* has retroactive effect, but only in respect of crimes committed after 1991. The *International Criminal Court Act 2001* (the *ICCA*) does not provide for jurisdiction over acts committed prior to 1991 therefore it would not be possible to prosecute persons for acts commited prior to this date under the *ICCA*.

1.1.3 The *Criminal Justice Act* 1*988* implements the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* into domestic law. The *Act* was brought into force on 29 September 1988 and the statute does not explicitly provide for retroactive effect. It maybe possible to advance a novel argument that torture was a crime under customary international law at the time that the alleged acts were committed and, therefore, the statute should operate retroactively. However the decision of the House of Lords in *Pinochet III* that the *Act* does not operate retroactively suggests that such an argument is unlikely to be successful.

1.2 Prosecution under customary international law:

There may be space to advance a novel argument that would rely on customary international law as the basis for criminal prosecution. However, following the recent House of Lords ruling in *R v Jones; Ayliffe v DPP; Swain v DPP*[1], the current position appears to be that international criminal law cannot be used as the basis for establishing criminal liability in domestic law. That said the reception of customary international law in domestic law is a highly contested area in UK jurisprudence therefore there maybe some space for novel arguments on this issue.

1.3. Immunities

[1] *R v Jones; Ayliffe v DPP; Swain v DPP* [2007] 1 AC 136 [*R v Jones*].

Current jurisprudence suggests that there can be no *immunity rationae materiae* for torture and it is arguable that other international crimes fall within this exception. Thus it is unlikely that former public officials would be able to rely on state immunity as shield from prosecution.

1.4 Statute of limitations

No statutes of limitations apply to the prosecution of crimes under UK law. However the common law doctrine of "abuse of process" does allow judges to stay proceedings where a long delay in the bringing of the case causes an unjust trial for the accused. However stays are exceptional and it would be rare for a stay to be imposed in the absence of fault on the part of the prosecutor or complainant. It is unlikely therefore that the abuse of process doctrine would be a bar to proceedings.

1.5 Procedure for criminal proceedings

It is possible to bring a private prosecution by applying to a magistrate, who can then issue a warrant for an arrest. Following recent changes introduced by *the Police Reform and Social Responsibility Act 2011*[2] consent of the Director of Public Prosecution (DPP) is now required before an arrest warrant can be issued in respect of offences under the *Geneva Conventions Act 1957* or under the *Criminal Justice Act* 1*988*. However it appears that it is still possible to bring a private prosecution in respect of offences under the *ICCA* without the consent of the Attorney General or the DPP. However, subsequent consent of the Attorney General would be required if the prosecution under the *ICCA* were to proceed further.

2. Extradition

Extradition to all EU countries and countries with which the UK has an extradition treaty or arrangement are governed by the *Extradition Act 2003*. Crimes within the jurisdiction of the International Criminal Court ('ICC') (i.e. genocide, war crimes and

[2] *Police Reform and Social Responsibility Act 2011*, s153.

crimes against humanity) are extradition crimes[3] and the double criminality rule does not apply for requests for these international offences[4].

4. Civil Claim

It is possible under English law to bring a civil claim for the intentional torts of assault, battery and false imprisonment. However, under s 11 of the *Limitation Act 1980*, a three-year time limit from the accrual of the cause of action, or the date of knowledge (if later), applies to all personal injury claims. Where the tort is actionable per se (i.e. intentional torts) time runs from the date of its commission and not the date of damage. The court has discretion to disapply the limitation period where it considers that it would be equitable to allow an action to precede. When acts occurred over 3 years ago there are two possible ways to avoid civil action being time barred:

1. The claimant was not aware that that the injury in question was attributable to the defendant until more recently (i.e. less than three years ago); or
2. It would be equitable to allow the action to proceed. Relevant factors may include that the claimant did not know the location of the defendant and therefore could not bring proceedings until more recently, or that the claimant was fearful of possible reprisals.

Following the ruling In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*[5] officials likely would benefit from civil immunity for acts carried out in the exercise of duties as public officials including for all acts constituting international crimes.

III. ANALYSIS

1. Is it possible to bring criminal prosecutions against suspects?

[3] *Extradition Act 2003*, s137(5), (6).
[4] *Extradition Act 2003*, s196.
[5] *Jones v Saudi Arabia* [2006] UKHL 26 at 10.

In order to establish whether it is possible to criminally prosecute suspects in the UK, the following questions must be examined:

1.1 Is it possible to prosecute suspects under domestic UK legislation?
1.2 Is it possible to prosecute suspects under customary international law?
1.3 Do ex-state officials enjoy immunity from criminal prosecution?
1.4 Do any statutes of limitations apply?
1.5 What is the procedure for bringing a case? In particular, does the principle of subsidiarity apply? Is there prosecutorial discretion?

1.1 Is it possible to prosecute suspects under domestic UK legislation?

The legislative framework implemented in the UK varies depending on the respective crime. For the purposes of this memorandum, I have not attempted to classify the various acts but rather discuss the differing legal outcomes depending on classification.

The UK has enacted the following legislation to govern international crimes:[6]

a. The *Geneva Conventions Act* 1*957* – War crimes amounting to grave breaches of the *Geneva Conventions of 1949*
b. The *International Criminal Court Act 2001* (the *ICCA*) – War crimes and crimes against humanity
c. The *Criminal Justice Act* 1*988* – Torture

The following section sets out whether charges can be brought against suspects under these Statutes by addressing the following:

1. Subject matter jurisdiction: Do the alleged acts fall within the subject matter jurisdiction of the Statute?
2. Temporal jurisdiction: Was the Statute in force at the time the alleged acts were committed? If not, is retroactive application permissible?
3. Territorial jurisdiction: Does the Statute permit the exercise of extra-territorial

[6] The *War Crimes Act 1991* also governs war crimes, but only applies to crimes committed during World War II and is not examined here.

jurisdiction? if so, are the Statute's nexus requirements satisfied?

a. The *Geneva Conventions Act 1957* – War crimes amounting to grave breaches of the *Geneva Conventions of 1949*

Subject Matter Jurisdiction

The *Geneva Conventions Act* 1*957* provides that any person in or outside the United Kingdom who commits "grave breaches" of the four *1949 Geneva Conventions* (*"Geneva conventions")*[7] and Additional Protocol I and Additional Protocol III is guilty of an offence subject to the criminal jurisdiction of the courts.[8] A second category of war crimes consists of serious violations of Common Article 3 of the *Geneva Conventions* and other serious violations of the laws and customs (including violations of Additional Protocol II). These standards are applicable in non-international armed conflicts. According to common article 2 of the *Geneva Conventions* the grave breaches regime only applies in the context of international armed conflicts. According to traditional interpretations of the *Geneva Conventions* violations of Common Article 3 and other standards applicable in situations of internal armed conflict do not fall within the grave breaches regime and are not therefore made criminal under the *Geneva Conventions* Act 1*957* (they are made criminal under the *ICCA* see below). However it has been argued with increasing frequency that violation of common article 3 can be considered a grave breach of the Geneva Conventions. This would mean that breaches of common article 3 would fall within the remit of the *Geneva conventions Act 1957*. This argument relies upon the adoption of a teleological approach to the *Geneva Conventions,* or else through the development of a new customary rule to that effect. This somewhat contentious argument is set out in more detail below.

The key requirements for war crimes amounting to grave breaches under the

[7] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 12 August 1949 ["Geneva convention I"], Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 ["Geneva convention II"], Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 ["Geneva convention III"], Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 ["Geneva convention IV"].

[8] *Geneva Conventions Act 1957*, s1.

Geneva Conventions are set out below:

1. The underlying offences

Offences qualifying as grave breaches of the *Geneva Conventions* under the *Geneva Conventions Act* are set out in Articles 50, 51, 130, 147 of the *Geneva Conventions* and Protocol I Articles 11.4 and 85.2, 3 and 4, and include willful killing, torture or inhumane treatment, and willfully causing great suffering.[9]

2. Existence of an international armed conflict

According to common article 2 of the Geneva Conventions, "grave breaches" may only be committed in an international armed conflict, where "international armed conflicts" are defined as conflicts between states. According to the traditional reading of the Geneva conventions violations in an internal armed conflict do not fall within the grave breaches system.

Whether the law has developed to a point where grave breaches can equally be committed during internal armed conflict, such that the obligations to investigate those offences and to prosecute or extradite offenders now also apply, either through the adoption of a teleological approach to the *Geneva Conventions*, or else through the development of a new customary rule to that effect is a controversial issue and the subject of legal and scholarly debate[10]. The issue has been discussed in some detail by the International Criminal Tribunal of Yugoslavia (ICTY) which, as an international court, could perhaps be seen as effectively interpreting international humanitarian law in terms that are relevant for a wide variety of other conflicts, and not only for its own particular purposes. In light of this, the ICTY's pronouncements as to the scope and content of the law are vitally important. They are certainly likely to carry substantial weight in domestic criminal proceedings, where national courts may well be required to interpret relevant national provisions 'in accordance with the interpretation of equivalent international provisions, including that made by

[9] Offences qualifying as "grave breaches" are set out in *Geneva Convention I*, *supra* note 8, Art 50 *Geneva Convention II, supra* note 8, Art 51 *Geneva Convention III*, *supra* note 8, Art 130 and *Geneva Convention IV*, *supra* note 8, Art 147.

[10] For a useful analysis of this topic see Lindsay Moir, *Grave breaches in International armed conflict* J Int Criminal Justice (2009) 7 (4): 763-787 ['Lindsay Moir'].

international criminal tribunals'.[23]

Referring to widely held understandings of the *Geneva Conventions* (and rejecting the US government's amicus curae brief that the 'grave breaches' provisions of the *Geneva Conventions* also applied to armed conflicts of a non-international character), the ICTY in the *Tadic case* held that grave breaches of the *Geneva Conventions* can only occur in the context of an international armed conflict.[11] This precedent has been uniformly applied in subsequent judgments[12]. However it is worth noting that the Tribunal in *Tadic* did suggest that customary international law maybe evolving toward the application of the "grave breaches" provisions regardless of the character of the armed conflict.[13]

Relying on the *obiter* in *Tadic,* one could argue that, since the decision in that case, States and international bodies have come to share the view that "grave breaches" applies to internal armed conflict, and that this has become a customary international law norm. While the orthodox view is that the "grave breaches" regime only applies to international armed conflict it maybe possible to argue for a broader interpretation on the basis that some States and international bodies are coming to accept this interpretation. Evidence of "grave breaches" of war crimes applying to internal armed conflicts include for example the provision of the German Military Manual[14]; The Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina[15]; In 2006, the *Military Commissions Act* amended the United States Code so that Section 2441 of title 18 now provides for criminal jurisdiction over conduct 'which constitutes a grave breach of common Article 3 … when committed in the context of and in association with an armed conflict not of an international character'.[16] On 25 November 1994 the Third Chamber of the Eastern Division of the

[11] See *Prosecutor v Tadic,* IT-94-1-T, decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ['*Tadic']* at para 71, 83-84.
[12] See e.g. *Prosecutor v Brdjanin and Talic,* IT-99-36-A, Judgment, 2 April 2007 at para 256; *Prosecutor v Blaskic,* case No. IT-95-14-A, Judgment, 29 July 2004 at para 170; *Prosecutor v Aleksovski* case No. IT-95-14/1-A, judgment, 24 March 2000..
[13] See *Tadic, supra* note 13 at para 83.
[14] Grave breaches of international humanitarian law include some violations of common Article 3.
[15] Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts.
[16] Available online at uscode.house.gov/download/pls/18C118.txt

Danish High Court delivered a judgment on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia[17] The Court explicitly acted on the basis of the "grave breaches" provisions of the *Geneva Conventions*, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV [18], without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code.[19] This judgment indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal. There is also academic support for the proposition that the "two-legged edifice of the laws of armed conflict' has gradually begun to give way to a single law of armed conflict.[20] In 1998, the ICTY Trial Chamber in the *Čelebići* Case, taking due notice of the *Tadić* Appeals Chamber's recognition that a change in the customary scope of grave breaches may well be occurring, stated its view that, 'the possibility that customary law has developed the provisions of the *Geneva Conventions* since 1949 to constitute an extension of the system of "grave breaches" to internal armed conflicts should be recognised' significantly, the Chamber stopped short of putting such a view into practice. Whilst accepting that, 'in line with a more teleological interpretation … violations of common Article 3 … may fall more logically within Article 2 of the Statute', it nonetheless decided to take a 'more cautious approach'[21] As Lindsay Moir points out "state practice and *opinio juris* in support of the applicability of grave breaches to internal armed conflict remains relatively limited"[22] and "whether a new customary law rule has materialized on the issue remains doubtful."[23]

[17] The *Prosecution v. Refik Saric*, unpublished (Den.H. Ct. 1994).
[18] The *Prosecution v. Refik Saric*, Transcript, at 1, 25 Nov. 1994.
[19] *ibid.* at 7-8.
[20] See Sonj Boelaert-Suominen, "Grave breaches, universal jurisdiction and internal armed conflict: is customary law moving towards a uniform enforcement mechanism for all armed conflicts?" (2000) *5* Journal of conflict and security law *at 63, 102,* See also James G, Stewart, 'Towards a Single definition of Armed Conflict in International Humanitarian Law: A critique of Internationalized Armed Conflict', (2003) 85 International Review of the Red Cross at 313, 322.
[21] Judgment, Delalic¤ (IT-96-21), Trial Chamber, 16 November 1998, at 317.
[22] See *Lindsay Moir Supra* note at 774
[23] See *Lindsay Moir Supra* note at 784

In any event, some non inter-state conflicts may also fall within the definition of an international armed conflict. The appeal judgment in *Tadic* states three circumstances in which an armed conflict may be considered to be international: (1) the conflict takes place between states; (2) another state intervenes in an internal armed conflict through its troops; or (3) some of the participants in an internal armed conflict act on behalf of another state which exerts a certain degree of control over their activities. [24]

To date, there have been no prosecutions under the *Geneva Conventions Act* 1*957* and thus no judgments indicating how the UK Courts will interpret the requirement that there be an international armed conflict.

Temporal jurisdiction

The *Geneva Conventions Act 1957* came into force in 1957 and, therefore, war crimes constituting grave breaches of the *Geneva Conventions* were crimes under UK law at the time the Alleged acts were committed.

Extra-territorial jurisdiction

The *Geneva Conventions Act* 1*957* provides that "any person in or outside the United Kingdom" who commits "grave breaches" of the *Geneva Conventions* and Additional Protocol I is guilty of an offence subject to the criminal jurisdiction of the courts[25] Although the legislation provides for universal jurisdiction and does not set out any nexus requirements, the 2011 Crown Prosecution Service "War Crimes/Crimes Against Humanity Referral" guidelines do not list grave breaches of the *Geneva Conventions* as crimes for which the UK has universal jurisdiction and, instead, state that for all crimes other than torture or hostage taking the accused must be a UK national or resident as defined in s 67A *ICCA*. [26] To date, there have been no prosecutions of foreign nationals under the *Geneva Conventions Act* 1*957* therefore it is not clear how the territorial scope of the legislation would be

[24] See *Tadic, supra* note 13 at para 84.
[25] See the *Geneva Conventions Act* 1*957*, s1.
[26] Crown Prosecution Service, "War Crimes/crimes against humanity referral guidelines" (8 July 2011) online: <http://www.cpsgov.uk/publications/agencies/war_crimeshtml#a>.

interpreted in the Courts However, the clear statutory language provides for universal jurisdiction and therefore presence in the UK should be sufficient or the UK to exercise jurisdiction.[27]

b. The *International Criminal Court Act 2001* ("*ICCA*") – War Crimes and Crimes against Humanity

Subject Matter Jurisdiction

The *ICCA* makes it an offence under the Law of England and Wales for a person to commit genocide, war crimes, and/or crimes against humanity.[28] (The crime of Genocide is not applicable to the facts and so will not be examined here.)

The *ICCA* incorporates the definitions of these offences contained in the *Rome Statute of the International Criminal Court 1998* ("*ICC Statute*").[29] In interpreting and applying the definitions of crimes against humanity and war crimes, the *ICCA* requires courts to take into account any relevant decision or judgment of the ICC and any other relevant jurisprudence.[30]

Crimes against humanity

The *ICCA* incorporates the definition of crimes against humanity contained in Article 7 of the *ICC Statute*. Crimes against humanity are accordingly defined as acts (including murder, extermination, torture, imprisonment, persecution, and other inhuman acts) committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

The offences maybe committed whether or not in the context of an international or internal armed conflict [31]

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[27] Halsbury Laws of England, International Relations Law (Volume 61(2010) 5th Edition/14) para 432 (Lexis).
[28] *ICCA*, s51(1).
[29] *ICCA*, s50(1).
[30] *ICCA*, s50(5).
[31] *Prosecutor v Tadic,* Case No IT-94-1-A, Judgment, 15 July 1999 at para 248.

Command responsibility

Under the *ICCA*, a military commander, or a person effectively acting as a military commander, is responsible for offences[32] committed by forces under his or her effective command and control. The military commander is also responsible, for crimes committed as a result of his or her failure to properly exercise control over such forces where the commander: (1) either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences; and (2) failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[33] A person responsible under these provisions for an offence is regarded as aiding, abetting, counseling or procuring the commission of the offence.[34]

War crimes

The *ICCA* implements the definition of War Crimes contained in Article 8 of the *ICC Statute*, which covers conduct in international[35] and internal[36] armed conflicts. Provisions relating to war crimes occurring in an international armed conflict are not considered here.

1. The underlying offences

Non-international war crimes are set out in Art 8 2(c) and (e) of the *ICC Statute* and are defined as serious violations of Art 3 of the *Geneva Conventions 1949*[37] (namely certain acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause) and other

[32] I.e. offences under the *ICCA* Pt 5, ss 50-70, and offences ancillary to such offences, s65 (1).
[33] *ICCA*, s65(2).
[34] *ICCA*, s65(4).
[35] *ICC Statute* Art. 8. 2(a) (grave breaches of the *Geneva Conventions* \) and (b) (Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law).
[36] *ICC Statute,* Art. 8 2(c) and (e).
[37] *ICC Statute*, Art. 8(2)(c).

serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.[38] These come mainly from Additional Protocol II and include intentionally directing attacks against the civilian population or buildings dedicated to religion, ordering the displacement of the civilian population, killing or treacherously wounding a combatant adversary.

2. Existence of an armed conflict

Article 8(2) (c) and (e) of the *ICC Statute* apply to armed conflicts not of an international character and do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature[39] Article 8 2(e) applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.[40]

Definition of armed conflict

There does not appear to be a universally accepted definition of internal armed conflict. However, case law provides the main characteristics and methods to distinguish internal disturbances from an armed conflict. Chambers at both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have emphasized that, since an armed conflict suggests "the existence of hostilities between armed forces organized to a greater or lesser extent," it is "necessary to evaluate both the intensity of the conflict and the organization of the parties" The tribunals have looked at the following factors to determine whether the intensity of the conflict and organization of the parties lead to the conclusion that an armed conflict exists:

- The seriousness of the attacks;[41]
- Their spread over territory and over a period of time;[42]
- The increase in the number of government forces;[43]

[38] *ICC Statute*, Art. 8(2)(e).
[39] *ICC Statute*, Art. 8(2)(d) and 8(2)(f)).
[40] *ICC Statute,* Art. 8(2)(f).
[41] See *Prosecutor v Tadic*, IT-4-1-T, trial judgment, 7 May 1997, ('Tadic Trial) at Para 565.
[42] see *Tadic Trial, Supra* note 44*,* at Para. 566.

- The organized nature of the rebel group (taking into account such factors as the existence of head quarters, designated zones of operation and the ability to procure, transport and distribute arms);[44] and
- Whether the conflict attracted attention from the UN Security Council.[45]

The recent *Tablada* case before the Inter-American Commission on Human Rights[46] provides the most detailed jurisprudential discussion of the characteristics of an armed conflict. The Commission held that it is the level of violence that is the main distinguishing feature between armed conflicts and internal disturbances, rather than the conflict's duration. Internal armed conflicts do not "require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory."[47] Despite the fact that the armed confrontation in that case lasted only 30 hours, the Commission concluded that it amounted to an armed conflict due to the "concerted nature of the hostile attacks undertaken by the attackers, the direct involvement of governmental armed forces and the nature and level of violence attending the events."[48]

The same rules for command responsibility discussed above in respect of crimes against humanity apply with respect to war crimes (see above).

Temporal jurisdiction

Initially, the *ICCA* only covered crimes committed after its coming into force on 1 September 2001.[49] The *Coroners and Justice Act2009* amended the *ICCA* by providing for retroactive application of the *ICCA*'s jurisdiction for genocide, crimes

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[43] See *Prosecutor v Milosovic,* IT-02-54-T at Para. 30-31.
[44] *Prosecutor v Milosovic,* IT-02-54-T at para 23-24.
[45] *Prosecutor v Mrkscik and Sljivancanin,* Case No IT-95-13/I-T at paras 28-31.
[46] *Abella v Argentina*, Inter-American Commission on Human Rights, Report No.55/97, Case No 11 at 137 ['*Tablada*'].
[47] *ibid.* at para. 153.
[48] *ibid.* at para. 155.
[49] See Ministry of Justice, *The Government Response to the Joint Committee on Human Rights Report Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims*, (United Kingdom:TSO (The Stationery Office 2009) online at <http://www.officialdocumentsgov.uk/document/cm77/7704/7704.pdf>

against humanity, and war crimes committed on or after 1 January 1991.[50] The rationale for this amendment was that "all three categories of crime [genocide, crimes against humanity, and war crimes] were recognized in some form in international law at that time.[51]

It is well-established principle of Common law that customary international law may not be given effect contrary to the plain wording of a statute or, stated differently, if domestic legislation conflicts with customary law, the courts will apply the provisions of domestic law.[52] It has more recently been confirmed that when the protection available in an English statute purporting to give effect to an international treaty is narrower than that afforded by international law the statute will take precedence.[53] Therefore, even if it could be argued that crimes against humanity and war crimes existed at the time of the offence under customary international law, it would not be possible to argue that customary law allows for the *Act* to operate retroactively as this would be inconsistent with the provisions of the statute.

Extra-territorial Jurisdiction

Jurisdiction is limited to acts committed in England or Wales or committed outside the UK by either UK nationals or residents.[54] It applies to persons that were residents either at the time of the offence or who become residents after the crime was committed and still reside in the UK when proceedings are brought.[55]

The definition of a resident is set out in *ICCA,* s 67A[56] and includes:

- Anyone seeking asylum or who has been refused asylum but cannot be returned home.

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[50] *ICCA*, s65A.
[51] See Ministry of Justice, *The Government Response to the Joint Committee on Human Rights Report Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims*, (United Kingdom:TSO (The Stationery Office 2009) online at <http://www.officialdocumentsgov.uk/document/cm77/7704/7704.pdf>
[52] *Barbuit's Case* (1737) Cas temp Talb 28, per Lord Talbot, confirmed by Lord Mansfield in *Triquet v Bath* (1764) 3 Burr 1478; *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391; *Chung Chi Cheung v R* [1939] AC 160 at 167, [1938] 4 All ER 786 at 789, PC; *R v Secretary of State for the Home Department, ex parte Thakrar* [1974] QB 684 at 701, [1974] 2 All ER 261 at 265, CA.
[53] *Regina (Pepushi) v Crown Prosecution Service* (2004), Times Law Report, 21 May.
[54] *ICCA*, s51(2).
[55] *ICCA*, s68(1)(2).

- Anyone who has applied for or been granted indefinite leave to remain.
- Anyone who has leave to enter the UK to work or study.

The following categories of persons fall outside the definition of resident:

- Persons granted leave to enter the UK on a tourist visa for a period of up to 6 months. Persons admitted to the UK as visitors who stay for a longer period and are liable for removal under the Immigration and Asylum *Act* 1999 s10 do fall within the definition of resident.[57]
- Persons seeking leave to enter or remain in the UK in categories other than work or study. Other categories are set out in Rule 7 of the Immigration Rules. For example, until 2008 retired persons of independent means could apply for leave to enter the UK. Persons in the UK under this category may still apply to extend their leave to remain for a period of up to 5 years.

General visitors to the UK that have been here for less than 6 months, will fall outside the definition of resident and cannot be prosecuted under the *ICCA*.

There is no statutory requirement that suspects be in the UK for prosecution proceedings to be initiated. However the Crown Prosecution Service ('CPS') Guidelines confirm that proceedings "will be suspended until there is a reasonable prospect of the suspect returning to UK voluntarily"[58] suggesting that in practice the CPS may chose not to press charges if a suspect is not present in the UK. However it is worth noting that in private prosecutions these guidelines would not be binding on the Court in determining whether to issue an arrest warrant.

c. *The Criminal Justice Act* 1988 – Torture

Subject Matter Jurisdiction

The United Kingdom is a party to the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984*, and has implemented

[57] *ICCA*, s67A(9).
[58] Crown Prosecution Service, "War Crimes/crimes against humanity referral guidelines" (8 July 2011) online: <http://www.cpsgov.uk/publications/agencies/war_crimeshtml#a>.

that Convention in domestic law by virtue of the *Criminal Justice Act* 1*988*. For these purposes, torture is defined as severe pain or suffering inflicted on another by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity.[59]

Temporal Jurisdiction

Section 134 of the *Criminal Justice Act* 1*988*, came into force on 29 September 1988 (6 years after the alleged crimes occurred) and the statute does not explicitly provide for retroactive effect.

Is retroactive application of the law permissible?

Some national courts have allowed for expansions of jurisdiction covering genocide, crimes against humanity, and war crimes to be applied retrospectively in their national courts so long as the crimes existed in international law at the time of the acts at issue.[60] However, the leading UK authorities suggest that judicial retroactive expansion of jurisdiction is impermissible. The majority of the House of Lords in *Pinochet III* held that extraterritorial torture did not become a crime in the United Kingdom until section 134 of the *Criminal Justice Act* 1*988* came into effect on 29 September 1988, the section was not retrospective, and that, accordingly, all the alleged offences of torture and conspiracy to torture before that date were crimes for which the applicant could not be extradited.[61] It appears, therefore, that in the ordinary course, offences operate from the date of the coming into force of the statute unless statutory provision is made to give them retrospective effect.

Still, *Pinochet III* could be distinguished. In that case, the House of Lords was considering whether Pinochet could be extradited under the *1989 Extradition Act* and not whether he could be prosecuted in the UK. This distinction is relevant since in order to extradite under section 2 of the *1989 Act* the conduct had to be an offence in the United Kingdom on the date it took place and not merely at the date of the

[59] *Criminal Justice* Act 1*988*, s1 (1) and, s1(134).
[60] E.g. *Regina v Finta 104* ILR 285 (requires that the *Act* must have been a crime both under international law and Canadian law, but jurisdiction may expand retroactively to include extra-territorial acts).
[61] "*Pinochet III*", *supra* note 1.

request for extradition. The issue examined therefore was whether British courts had jurisdiction, before section 134 of the *Criminal Justice Act* 1*988* came into force, to try those accused of torture abroad and not whether they had jurisdiction once the section 134 of the *Criminal Justice Act* 1*988* came into force to try crimes retrospectively. It was not specifically argued by the appellants that the *Act* had retrospective effect. However, the applicants did argue that neither the Convention nor the *Act* was intended to have retroactive effect. Furthermore the House of Lords was definitive in its ruling that neither the *Convention* nor the *Act* was intended to have retroactive effect. Ascertaining the *ratio decidendi* in this case is complicated by the fact that all seven Law Lords gave separate opinions. However in so far as the non-retroactivity of the *Act* was argued by the applicants and endorsed by the majority of Law Lords it would appear that the principle that the *Act* does not have retroactive effect forms part of the ratio of the case.

Extra-territorial jurisdiction

Section 134 of the *Criminal Justice Act* 1*988* establishes universal jurisdiction within the UK for acts of torture, irrespective of where they are committed and the nationality or status of the alleged offender.

For the UK to exercise universal jurisdiction, the suspect has to be present in the UK. The CPS Guidelines suggest that a suspect's presence or reasonable prospect of their presence in the UK will be sufficient to initiate an investigation of the crime of torture.[62] If these conditions are not met, then SO15 (the Metropolitan Police Terrorism Command) will refer to UKBA Special Cases Directorate for potential future immigration action.[63]

1.2. Is it possible to prosecute suspects under customary international law?

[62] Crown Prosecution Service, "War Crimes/crimes against humanity referral guidelines" (8 July 2011) online: <http://www.cpsgov.uk/publications/agencies/war_crimeshtml#a>
[63] Crown Prosecution Service, "War Crimes/crimes against humanity referral guidelines" (8 July 2011) online: <http://www.cpsgov.uk/publications/agencies/war_crimeshtml#a>

It is widely accepted that war crimes and crimes against humanity had attained customary international law status by 1950.[64] It has also been suggested that torture was established as a crime in international law before the UN Torture Convention of 1984.[65] It is arguable therefore that some acts were crimes under customary international law at the time they were committed and automatically punishable under the UK domestic criminal law at that date irrespective of any statute. However it is worth noting that the UK has recently expressed some doubt as to which categories of crimes attract universal jurisdiction under customary international law. Pursuant to General Assembly resolution 65/33 the UN Secretary General prepared a report on the scope and application of universal jurisdiction the basis of information and observations received from Member States In its submissions to the Secretary General the United Kingdom acknowledged that there was a "limited group of crimes which some States consider to attract universal jurisdiction, including genocide and crimes against humanity" but stated that "there is a lack of international consensus on the issue. According to the UK "a careful study of State practice and *opinio juris* would be required to determine whether they are established under customary international law as crimes of universal jurisdiction and whether there are conditions for the exercise of such jurisdiction."[66]

Even if it can be established that the alleged acts constitute crimes of universal jurisdiction under customary international law the reception of customary international law within UK law is a highly complicated and contested area. The majority in the House of Lords in *Pinochet III*[67] (Lords Millet dissenting)[68] rejected

[64] See the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal 1950 International Law Commission (the 'ILC'), A/1316 (1950), principle VI. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951, 15 at 23; and *R v Jones, supra* note 2 at 19 per Lord Bingham.

[65] see *Pinochet III, Supra* note 1, at 108 per lord Brown Wilkinson "I have no doubt that long before the torture convention of 1984, torture was an international crime in the highest sense"

[66] The scope and application of the principle of Universal jurisdiction: Report of the Secretary General, UNGAOR, 66th session, UN Doc A/66/93, (2011), 10 at 48.

[67] *Pinochet III, Supra* note 1.

[68] *Pinochet III, Supra* note 1, at 177 per Lord Millet "The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law" and "In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international

the argument that torture was a crime under international law that was directly incorporated into national law. Instead, the majority held that, although state torture had long been an international crime in the highest sense[69] and a crime universally in whatsoever territory it occurred, extraterritorial torture did not become a crime in the UK until section 134 of the *Criminal Justice Act* 1*988* came into effect on 29 September 1988. In *R v Jones; Ayliffe v DPP; Swain v DPP ([R v Jones),* the House of Lords held that crimes under customary international law or treaties are not crimes in English law without implementing legislation.[70] However, Lord Bingham added a caveat to this general rule by stating that a crime recognized in customary international law may be assimilated into the domestic criminal law of the UK where the constitution permits. He further went on to state in *obiter* that war crimes, recognized as such in customary international law, had been assimilated into our domestic law since 1945 and that it is arguable that war crimes, recognized as such in customary international law, would now be punishable under the domestic criminal law irrespective of any domestic statute.[71]It is worth noting that although Lord Bingham refers to war crimes generally, all the examples referred to are war crimes occurring in an international armed conflict (which it is widely accepted had attained customary international law status by 1950) and not war crimes occurring in a internal armed conflict, which arguably did not attain customary international law status until the 1990s. However, the caveat in this ruling does suggest that there may be some possibility of raising novel arguments that torture and crimes against humanity were crimes under international law at the time the alleged acts were committed and that the constitution permits their direct incorporation into domestic law.

1.3 Immunities

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crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it.

[69] [Pinochet III, *Supra* note 1, at 108 per lord Brown Wilkinson "I have no doubt that long before the torture convention of 1984, torture was an international crime in the highest sense."

[70] *R v Jones; Ayliffe v DPP; Swain v DPP* [2007]*1 AC 136 [R v Jones] per Lord Mance "even crimes recognized in customary international law can no longer be, if they ever were, the subject of automatic reception or recognition in domestic law by the courts", per lord Hoffman "it is nowadays for parliament and Parliament alone to decide whether conduct not previously criminal should be made an offence."*

[71] *R v Jones;*, *Supra* note 2 *per Lord Bingham.*

By and large, the *Sovereign Immunity Act* 1*978* does not deal with criminal immunity of a state or its officials[72] and there is no formal statutory immunity for public officials. The UK rules prohibiting the bringing of criminal proceedings against a foreign state is based of common law.

The House of Lords in *Pinochet III*[73] confirmed that acting heads of state have immunity from criminal prosecution for any crime regardless of whether those acts are official functions carried out in the exercise of their duties. The House of Lords confirmed that former heads of state are only granted immunity *rationae materiae* (i.e. for acts carried out in an official capacity or in the exercise of the duty of a head of state). The majority of the House of Lords held that Pinochet was not entitled to immunity for acts of torture. It is unclear from the Law Lords' reasoning whether this exception would also apply to war crimes and crimes against humanity.

The question of whether high-ranking officials have immunity from criminal proceedings after they have vacated office is complex, however it would appear that under both classical law and current UK law that certain public officials and agents of the state, with the exception of certain international crimes, enjoy immunity from criminal prosecution for acts performed in the course of official functions.[74] Criminal proceedings may be brought against the official on vacating office, but criminal liability is restricted to private acts and acts committed outside their official functions. It is not clear from the case law, which public officials benefit from this immunity. In *Pinochet III* Lord Millet stated that rationae materiae is available to "former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official…." [75] However this statement was strictly obiter. Other Law Lords suggested that the finding that former heads of state were entitled to immunity was based on section 20 of the *State Immunity Act* 1*978* (which only

[72] *Sovereign Immunity Act 1978*, s14.
[73] *Pinochet III*, *Supra* note 1.
[74] See Hazel Fox QC, *The Law of State Immunity* [Oxford University Press 2002], pg 510-511 citing *Macleod* 20 November 1854 FO 83 McNairs Law officers Opinion ,Vol. 2.
[75] *Pinochet III*, supra note 1, at 269, per Ld Millet.

applies to a foreign sovereign or head of State and his household and private servants). It is arguable that former military commanders are not entitled to immunity *rationae materiae* however the more realistic position is that they are entitled. Following the principle established in *Pinochet III* it government officials would be unable to claim immunity for acts of torture and it is arguable that this exception should also apply to other breaches of international criminal law.

1.4 Statute of Limitations

No statutes of limitations apply to the prosecution of crimes under UK law. However the common law doctrine of "abuse of process" does allow judges to stay proceedings where a long delay in the bringing of the case causes an unjust trial for the accused. While the running of time does not in itself suffice to demonstrate an abuse of process it maybe considered as an element leading to such an account.

There is no rule precluding judges from applying the abuse of process doctrine to international crimes. In *R v Sawoniuk United Kingdom* [76] the Court of Appeal refused the claimant's application that his conviction for war crimes under the *War Crimes Act* 1*991* should have been stayed on account of the 56 year time delay. The judge directed himself in accordance with the principles laid down in *Attorney-General's Reference (No.1 of 1990)*[77], which he treated as applicable regardless of the 1991 *Act*. From that decision he derived the following principles: (1) that generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment and, where either demands a verdict, a judge has no jurisdiction to stand in the way of it and therefore the jurisdiction to stay proceedings is exceptional; (2) a stay should never be imposed where the delay has been caused by the complexity of the proceedings; (3) it would be rare for a stay to be imposed in the absence of fault on the part of the prosecutor or complainant; (4) delay contributed to by the actions of the defendant should not found the basis of a stay; and (5) the defendant needs to show on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. The prejudice that a defendant would have to show to justify the grant of a stay is

[76] Court of Appeal (Criminal Division) Judgment of 10 February 2000 [2002] 2 Cr App R 220.
[77] *Attorney-General's Reference (No.1 of 1990),* [1992], QB 630.

prejudice that could not be cured by an appropriate ruling in the course of a trial, or by a judicial exclusion of evidence, or by an appropriate direction to the jury. In this case it was held that the single evidence of the single eyewitness could be properly and rigorously tested within the confines of the trial process and therefore a fair trial could still be held despite the time delay.

Delay contributed to by the actions of the defendant is a relevant factor for determining whether there should be a stay of proceedings.[78] However there is no detailed case law establishing what type of conduct will be relevant. In particular there is no case law confirming whether conduct of the defendant unconnected to the conduct of the litigation will be taken into account and in particular whether the defendants absence from UK jurisdiction will be a relevant factor in preventing a stay of proceedings.

1.5 Procedure for bringing a case and prosecutorial discretion

The Metropolitan Police Terrorism Command (SO15) within the metropolitan police service is responsible for the investigation of all allegations of war crimes, crimes against humanity, genocide and torture. The criteria for S015 to decide whether to initiate an investigation are set out in the CPS "War Crimes/crimes against humanity referral guidelines" [79] (the CPS Guidelines). Factors to take into account include the nationality and location of the suspect, the availability and location of evidence (including witnesses) and legal issues such as immunity and jurisdiction.[80]

On completion of an investigation, So15 submit the file of evidence to the Counter Terrorism Department who review the file in accordance with the Code for Crown Prosecution Service and the Director of Public Prosecutor's guidance for charging and consider whether the prosecution will be in the public interest. The CPS

[78] Court of Appeal (Criminal Division) Judgment of 10 February 2000 [2002] 2 Cr App R 220.
[79] Crown Prosecution Service "War Crimes/crimes against humanity referral guidelines" 8 July 2011 online at <http://www.cpsgov.uk/publications/agencies/war_crimeshtml#a>
[80] Crown Prosecution Service "War Crimes/crimes against humanity referral guidelines" 8 July 2011 online at <http://www.cpsgov.uk/publications/agencies/war_crimeshtml#a>

Guidelines state that if there is sufficient evidence it is "highly likely" that a prosecution would meet the public interest test.

The Attorney General has absolute discretion over the prosecution of crimes under international law and his or her consent is required for such crimes.[81]

Under section 6(1) of the *Prosecution Offences Act* 1*985* private individuals are able to bring prosecutions by applying to a magistrate. This right applies to all offences including crimes under international law. Magistrates may issue an arrest warrant on the basis of information presented to the magistrate. The information must be sufficiently comprehensive to enable the magistrate to ascertain "at the very least (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not out of time; whether the informant has the necessary authority to prosecute."[82]

Following recent changes introduced by the *Police Reform and Social Responsibility Act 2011*[83] the consent of the Director of Public Prosecution (DPP) is now required before an arrest warrant can be issued in respect of offences under the *Geneva Conventions Act* 1*957* or under the *Criminal Justice Act* 1*988*. The *Act* and explanatory notes provide little guidance on the test to be applied by the DPP in determining whether to consent to such prosecutions

The legislative changes do not affect private prosecutions under the *ICCA* and it therefore appears that it is still possible to bring a private prosecution in respect of offences under the *ICCA* without the consent of the Attorney General or the DPP. [84] However, subsequent consent of the Attorney General would be required if the prosecution under the *ICCA* were to proceed further. [85]

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[81] *Criminal Justice* Act 1*988*, s135; *ICCA*, s53(3); *Geneva Conventions* Act 1*957*, s1A.
[82] *R v Brentford Justices, ex part Catlin* [1975] QB 455, at 464.
[83] *Magistrates Court Act 1980,* s, 1 4A as amended by *Police Reform and Social Responsibility Act*, s153.
[84] *Police Reform and Social Responsibility Act 2011*, s153 *Prosecution of Offences* Act 1*985*, s*25(2).*
[85] *ICCA*, s53(3).

The principle of subsidiarity is not enshrined in UK law nor is it a factor in the CPS Guidelines, however current CPS practice (as evidenced by the lack of prosecutions) appears to be to extradite cases to the territorial state rather than prosecute.

The prosecution of Afghan warlord Faryadi Sardad is the first and only domestic prosecution of a foreign national for acts of torture outside the UK.[86] There have been no prosecutions under the *ICCA* 2001 or the *Geneva Conventions Act* 1*957*. Zardad was convicted of acts of torture and hostage taking committed in Afghanistan during the 1990s and sentenced to twenty years imprisonment. Zarded was not a British national, all the offences took place outside the United Kingdom's territory and none of the victims were British. The case suggests the UK will prosecute crimes where it is apparent that domestic processes are entirely inadequate.[87].

2. Extradition

The rules governing extradition are set out in the *Extradition Act 2003*. Crimes within the jurisdiction of the ICC (i.e. war crimes and crimes against humanity) are on the European Framework List for the purposes of extradition in the United Kingdom,[88] they are extradition crimes[89] and the double criminality rule does not apply for requests for these international offences.[90] Where there is no extradition treaty or arrangement between the UK and the requesting state, the government may agree special extradition arrangements with that state.[91]

3. **Civil Claim**

It may be possible to bring extraterritorial civil proceedings against suspects.
In English law, there is no tort of 'torture'; the appropriate civil claims lie in the intentional torts of assault, battery and false imprisonment. However there are three obstacles to bringing such a claim: forum, immunity, and statutes of limitations.

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[86] *R v Zardad* [2007] All ER (D) 90 (Feb) (Un reported).
[87] see "How Afghan torture case sets precedent on prosecution of overseas crimes" LNB News, 25/07/2005.
[88] *Extradition Act 2003,* sch. 2.
[89] *Extradition Act 2003*, s137(5), (6).
[90] *Extradition Act 2003*, s196.
[91] *Extradition Act 2003*, s194.

3.1 Forum

It is always necessary in any English suit to establish some basis within ordinary domestic rules upon which it is technically possible for the English courts to exercise jurisdiction. Where such a basis exists, the appropriateness and proportionality of exercising such jurisdiction can arise as matters of discretion. Certain factors that could be relevant were set out by the Court of Appeal in *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Sudiya*[92] and include whether there is a more suitable alternative forum, as well as the general undesirability of adjudicating upon issues the UK, in circumstances under which a defendant is unlikely to appear and in which any civil judgment is unlikely to be enforceable and which would involve sensitive investigation of activities of officials alleged to have taken place with a foreign state. The Court of Appeal held that however powerful the desire to establish the fact of alleged torture, there are likely in practice to be limits to the extent to which claims for torture are brought in jurisdictions which have no connection with the alleged torture or the alleged individual torturer and where no practical recourse is likely to follow.[93]

3.2. Immunity

The *State Immunity Act* 1*978* confers immunity from civil proceedings not only on the state, but also on the sovereign or other heads of state in their public capacity, the government of that state, any department of that government, and any other entity done by it in the exercise of sovereign authority if the circumstances are such that a state would have been immune.[94] The *Act* does not mention individual employees or officers of the state but it has been held that the *Act* applies to such officers or employees if the state, which they are serving, was entitled to immunity in respect of that conduct[95]. The House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (*Jones*) confirmed that a state is entitled to claim immunity for its

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[92] *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Sudiya and another; Mitchell and others v Al-Dali and others* [2004] EWCA Civ 1394, 28 October 2004.
[93] *ibid.*
[94] *State Immunity* Act 1*978*, s*14*.
[95] *Propend Finance Pty Ltd v Sing* (1997) 3 ILR 611.

servants as it could if sued itself.[96] Thus, 'the foreign state's right to immunity cannot be circumvented by suing its servants or agents'.[97] So officials who were at all material times acting or purporting to *Act* as servants or agents of the state and their acts were accordingly attributable to the state were held to be protected from civil proceedings. In this case it was held that a colonel of the ministry of interior was an agent of the state.

The defendants in *Jones* were all acting officials and the House of Lords did not specifically state in this case whether former servants or agents of the state would be protected by the *State Immunity Act* 1*978*. However it would follow from the Lord's reasoning in *Jones* and *Pinochet III* that both current and former public officials enjoy *immunity rationae* for civil proceedings in respect of official acts. This is in line with older case law pre-dating the *State Immunity Act* 1*978*. The principle was well-stated by Diplock LJ in a case concerning the immunity of a former officer for an international organization: "To sue an envoy in respect of acts done in his official capacity would be, in effect to sue his government irrespective of whether the envoy had ceased to be in "post" at the date of the suit."

In *Jones,*[98] the House of Lords held unanimously that there was no exception to a claim for state immunity for civil claims based on allegations that the claimants had been tortured by officials of a foreign state in the territory of the foreign state (the exception in *Pinochet III* applied to criminal proceedings only and not civil proceedings).

3.3 Statute of Limitations

In English law, there is no tort of 'torture'; the appropriate civil claims lie in the intentional torts of trespass to the person by assault, battery and false imprisonment.[99] The substance of a claim must be looked at in order to decide the technical cause of action and type of tort a claim is founded on; the form of it as

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[96] *Jones v Saudi Arabia* [2006] UKHL 26 at 10.
[97] *ibid.*
[98] *ibid.* at 90.
[99] Mark Lunney, "Capacity to Commit a Tort and to Sue" in A Grubb (ed) *The Law of Tort* (London : Butterworths LexisNexis, 2002).

stated in the statement of case is not determinative.[100] Therefore it is not possible to avoid the relevant limitation period by attempting to found the claim on torture rather than the intentional tort of trespass.

Under the *Limitation Act* 1*980* s 11 claims for personal injuries, including claims in trespass for personal injuries must generally be brought within the special three-year limitation period for personal injury claims in tort.[101] Time starts to run from the date of the trespass, or from the date of the claimant's knowledge that the injury in question was significant and attributable in whole or in part to the act or omission alleged to constitute the trespass, and of the identity of the defendant.[102] Where the tort is actionable *per se* (intentional torts) time runs from the date of its commission and not the date of damage.

The court has discretion to disapply the limitation period where it considers that it would be equitable to allow an action to precede.[103]

In considering whether or not to exclude the time limit for claims in respect of personal injuries or death and to permit a claim to proceed, the court must have regard to all the circumstances of the case[104] and in particular to:

a. The length of, and the reasons for, the delay on the claimant's part;[105]

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[100] *Sachs v Henderson* [1902] 1 KB 612; *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, CA.

[101] *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, [2008] 2 All ER 1, departing from *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322, HL.

[102] *Limitation Act 1980,* ss 11(4), 14 (s 14 amended by the *Consumer Protection Act 1987*, s6, Sch 1 Pt I para 3). If it is alleged that the *Act*or omission was that of a person other than the defendant, the claimant must also know the identity of that person and the additional facts supporting the bringing of an action against the defendant: *Limitation Act 1980*, s14(1)(d).

[103] *Limitation Act 1980*, s33.

[104] *Limitation Act 1980*, s33(3) (s 33(3) amended by the *Consumer Protection Act 1987* Sch 1 para 6). These may include factors which have subconsciously prevented the defendant from litigating: *A v Hoare* [2008] UKHL 6, [2008] AC 844, [2008] 2 All ER 1; and see *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756, [1977] 1 WLR 1073, CA.

[105] *Limitation Act 1980*, s33(3)(a). The court is required to undertake a subjective inquiry to determine the reasons why the particular claimant failed to institute proceedings in time: *A v Hoare* [2008] UKHL 6, [2008] AC 844, [2008] 2 All ER 1; *Coad v Cornwall Health Authority* [1997] 1 WLR 189, CA; and see *Halford v Brookes* [1991] 3 All ER 559, [1991] 1 WLR 428, CA. As to the factors relevant generally in such an inquiry see *Halford v Brookes* (claimant, reasonably, did not realize that a civil claim could be brought in respect of the murder of her daughter); *Coad v Cornwall Health Authority* (claimant received no legal advice and did not believe that she could bring a claim if she still remained capable of working). *Young (suing as executrix of Young) v Western Power Distribution (South West) plc* [2003] EWCA Civ 1034, [2003] 1 WLR 2868, [2003] All ER (D) 328 (Jul); and see *A v H* [2008] EWHC 1573 (QB), [2008] All ER (D) 95 (Jul) (defendant convicted of serious sexual assault on

b. The extent to which, having regard to the delay,[106] the evidence adduced or likely to be adduced by the claimant or the defendant is or is likely to be less cogent than if the claim had been brought within the time allowed;[107]
c. The conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which were or might be relevant to the claimant's cause of action against the defendant;[108]
d. The duration of any disability of the claimant arising after the date of

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claimant and sentence to life imprisonment; while on day release he won £7m on the National Lottery; claimant learned of defendant's release from prison as a result of publicity afforded to his lottery win and commenced civil proceedings against him for damages for assault and battery resulting in psychiatric injury; delay of 16 years and 10 months between assault and commencement of proceedings; held that in the exceptional circumstances of the case, and since the principal reason for the claimant's delay was the defendant's impecuniosity prior to his lottery win, which meant that he was simply not worth pursuing in a claim for damages, the discretion under the *Limitation Act 1980*, s33 would be exercised in the claimant's favor). The relevant delay to be considered by the court is the delay after the expiry of the limitation period, rather than the delay from the accrual of the cause of action: see *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 2 All ER 296, [1981] 1 WLR 744, HL; *Donovan v Gwentoys Ltd* [1990] 1 All ER 1018, [1990] 1 WLR 472, HL; and *Ramsden v Lee* [1992] 2 All ER 204, CA. However, delay from the accrual of the cause of action will be relevant in weighing the degree of prejudice suffered by the defendant: *Donovan v Gwentoys Ltd* (claim not notified to defendant until five years after accident; writ issued late; claim not permitted to proceed), distinguishing *Thompson v Brown Construction (Ebbw Vale) Ltd* (claim notified a few weeks after accident, but writ issued 37 days late; claim permitted to proceed).
The court may take into account a claimant's ignorance of legal rights when considering the reasons for delay in bringing a claim: see *Halford v Brooke*s See further *Chappell v Cooper* [1980] 2 All ER 463, [1980] 1 WLR 958, CA; *Deerness v John R Keeble & Son (Brantham)* [1983] 2 Lloyd's Rep 260, HL; *Singh v Duport Harper Foundries Ltd* [1994] 2 All ER 889, [1994] 1 WLR 769, CA; and *Barrand v British Cellophane plc* (1995) Times, 16 February, CA.

[106] The relevant delay is that following the expiry of the limitation period: *Donovan v Gwentoys Ltd* [1990] 1 All ER 1018, [1990] 1 WLR 472, HL.

[107] *Limitation Act 1980*, s33(3)(b) (as amended) See *Napper v National Coal Board* (1 March 1990, unreported), CA (writ issued more than 30 years after death of claimant's father; some witnesses had died, others would have great difficulty in recalling what had happened: claimant's application dismissed).

[108] *Limitation Act 1980*, s*33(3)(c).* Section 33(3)(c) is concerned with purely procedural matters, where the forensic tactics of a defendant may lead to delay; conduct of the defendant which is totally unconnected with the conduct of the litigation will not be taken into account: *Halford v Brookes* [1991] 3 All ER 559, [1991] 1 WLR 428, CA. See also *Marshall v Martin* (10 June 1987, unreported), CA (making of interim payment led claimant to believe liability would not be contested); and *Marston v British Railways Board* [1976] ICR 124 (genuine mistake as to fact by defendants led claimant to believe he had no cause of action; writ issued 13 years after accident; claim permitted to proceed); *Hammond v West Lancashire Health Authority* [1998] Lloyd's Rep Med 146, CA (conduct of defendant health authority in destroying patients' X-ray records after three years, even where the patient's medical notes were requested in a letter before action, taken into account in allowing extension of limitation period).

the accrual of the cause of action;[109]

e. The extent to which the claimant acted promptly and reasonably once he knew whether or not the defendant's act or omission, to which the injury was attributable, might be capable at that time of giving rise to a claim for damages; [110]and
f. The steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received.[111]

To date there have been no civil claims in respect of international crimes which were committed outside the three-year time bar therefore it is difficult to know how the British courts would interpret the discretion to allow proceedings in the context of such claims. Much of the jurisprudence in this area arises in the context of sexual abuse cases. In these cases it has been held that the inhibiting effect of sexual abuse upon certain victims' preparedness to bring proceedings in respect of it ought to be considered.[112] Thus the inhibiting effect of state sponsored abuse on the victim's preparedness to bring proceedings should by analogy be a relevant factor.

[109] *Limitation Act 1980*, s*33(3)(d).* 'Disability' means a legal disability as defined in, s38(2) (see para 1170): see *Yates v Thakeham Tiles Ltd* [1995] PIQR P135, CA (meaning of 'disability' not to be construed as physical disability); *Thomas v Plaistow* [1997] PIQR P540, [1997] LS Gaz R 25, CA; *Pilmore v Northern Trawlers Ltd* [1986] 1 Lloyd's Rep 552.
[110] *Limitation Act 1980*, s*33(3)(e).* See *Firman v Ellis* [1978] QB 886, [1978] 2 All ER 851, CA. The fact that legal advice has been obtained and has indicated the probable outcome of the claim may help the court in deciding whether the claimant acted promptly and reasonably: see *Jones v GD Searle & Co Ltd* [1978] 3 All ER 654, [1979] 1 WLR 101, CA; and *Halford v Brookes* [1991] 3 All ER 559, [1991] 1 WLR 428, CA.
[111] *Limitation Act 1980*, s33(3)(f).
[112] *A v Hoare* [2008] UKHL 6, [2008] AC 844, [2008] 2 All ER 1.