CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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I. Diplomatic Representations and Diplomatic Protection
II. Implementation of the Criminal Court Statute in England and Wales

DIPLOMATIC REPRESENTATIONS AND DIPLOMATIC PROTECTION

I. THE *AL-ADSANI* CASE

The European Court of Human Rights has decided in the last three years five cases dealing with state or international immunities.[1] Although the facts differed, the arguments of the applicants were much the same. They contended that allowing a foreign State or an international organisation to claim immunity in a civil action in proceedings in the defendant State violated the applicants' rights to access to a court for the determination of a civil right.[2] The European Court accepted the claims in principle but concluded in each case that the limitation imposed on the right of access was for a legitimate reason (the protection of State or international immunities, a condition for effective co-operation between States or with international organisations) and was proportionate to this aim, because in each case, the grant of immunity was required by international law and that in each case there was the possibility of the applicant using another procedure to try to assert his rights, action in the courts of the foreign State or under the special staff regime of the international organisation.

In one of the cases, *Al-Adsani*, the British government, after taking the position that the grant of immunity was in conformity with 'universally applicable principles of international law', noted that an interpretation of the Convention which held that granting the immunity to be a violation would lead to irreconcilable obligations for States, the immunity also being required by the Basle Convention on State Immunity.[3] The government said,

> There were other, traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim.[4]

The argument is an interesting one, the more so because Al-Adsani was a UK–Kuwaiti dual national and the subject matter of his claim was that he had been

* This section deals with recent developments in British practice against the international and domestic context in which it takes place.

[1] *Waite and Kennedy v Germany* ECt HR (1999–I); *Beer and Regan v Germany* (1999) (international immunity); *Al Adsani v UK* (2001); *Fogarty v UK* (2001); *McElhinney v Ireland* (2001) (state immunity).

[2] On the right of access to a court, see R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2000), 637–43.

[3] European Convention on State Immunity, 1972, ETS No 74.

[4] *Al Adsani*, above n 1, para 50.

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tortured in Kuwait. The acts of torture, he alleged, were committed in Kuwait and were attributable to the government of Kuwait. As part of his case, Al-Adsani said that the government of the UK had refused to assist him in pursuit of a claim against the government of Kuwait.[5] Although the text is not entirely free from doubt, I take it that the 'or' in the quotation from the Government's case is disjunctive—that 'diplomatic representations' are to be distinguished from 'inter-State claims', the latter, in this context referring to the presentation of a formal legal complaint to the foreign State with a demand for settlement.

The position of the British government on the protection of its nationals has been well-established.[6] The government adheres to the orthodoxy of the 'Vattelian' fiction that diplomatic protection is the right of the State, that it is a right to claim for breaches of international law (usually breaches of the international minimum standard for the treatment of aliens) which affect its nationals. Whether or not to bring the claim, on what terms it is settled and the destination of the proceeds of any settlement are for the State alone to decide. This international perspective is replicated in domestic law, where the presentation of claims is an exercise of the foreign affairs prerogative, which, despite the advances in accountability for the exercise of prerogative powers in recent years, has remained outside the scope of judicial review. On the face of it, then, to refer to the 'traditional means' of redress available to Al-Adsani was to refer to channels of complaint which were not accessible to him in his own right and which strain the meaning of 'remedy' beyond that which the Court must have in mind in making the proportionality calculation in the other immunity cases. Is there anything to be said which would absolve the British government of a charge of disingenuousness?

It is worth looking at the British government's statement in a little more detail, not least because the field of diplomatic protection is under review by the International Law Commission (ILC) and the International Law Association (ILA). There have been proposals in both fora which amount to calls for a fundamental review of the institution of diplomatic protection, principally to integrate the traditional law with more recent developments in the law of human rights. The response of States, it has to be conceded, has not been one of whole-hearted approval.[7]

II. DIPLOMATIC REPRESENTATIONS AND DIPLOMATIC PROTECTION

To go back to the Government's statement in *Al Adsani*: it is necessary to draw a distinction between diplomatic representations and diplomatic protection. The former is not a legal term of art. Diplomatic representations cover a wide range of communications from one government to another, in which one expresses its disapproval about some action or inaction of the other. They do not necessarily impute unlawful conduct to the other State; the complaining State cannot, therefore, in all cases demand a response; it runs the risk of a brisk retort that the matter complained about lies exclusively and unaccountably within the jurisdiction of the State to which the complaint is addressed. A current example is the representations that are made, within and outside

[5] Although it is not mentioned in the judgment of the European Court, it is understood that there was a criminal prosecution in Kuwait of a person alleged to be responsible for the ill treatment of Al Adsani.

[6] See Protection of Nationals Abroad, B: Diplomatic Action and Claims Practice, (1988) 37 *ICLQ* 1002, 1006–8.

[7] See GA/L/3159 (30 Oct 2000) and GA/L/3160 (31 Oct 2000).

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the European Union, to the imposition of the death penalty in the United States. It is by no means always possible to show that carrying out the execution would be in breach of any international obligation of the United States—representations that it be not carried out notwithstanding, are simply attempts to reinforce the calls for clemency.[8] Diplomatic representations may be the prelude to the exercise of diplomatic protection (though they do not appear to be a pre-condition for it, as, for instance, the exhaustion of local remedies would be). Even more clearly than with respect to diplomatic protection, the making of representations lies within the discretion of the government, though the political factors in particular circumstances might be strong enough to compel a response from the government to the action of the other State. The British government's policy on making diplomatic representations in some of the fields falling within the scope of diplomatic protection will be considered below. The government has said,

> The [Claims] rules cover only the requirements for the presentation of a formal claim. It may sometimes be permissible and appropriate to make informal representations even where the strict application of the rules would bar the presentation of a formal claim,[9]

again drawing the distinction between representations and protection.

The Claims Rules take a particularly narrow position on the right of the UK to protect dual UK/State X nationals against the other State of nationality, deriving in part from the UK's obligations under the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.[10] Al Adsani was a dual national and his complaint was against his other State of nationality, Kuwait. If the Claims Rules are regarded as a statement of customary international law, rather than merely an discretionary extension by the UK of the regime of the Hague Convention to all States, whether parties or not, then all that was available in Al Adsani's case was 'informal representations', with which, even if there had been any, Al Adsani expressed himself dissatisfied in his pleadings to the European Court. He was, it should be remembered, complaining about having being tortured and arguing that there was a special obligation on the government to intervene. The close relationship between the mechanisms of diplomatic representations and diplomatic protection and those for the protection of human rights is clear but they are by no means identical, neither in purpose nor accessibility. This is made clear by the intervention made on behalf of the Nordic States when the Sixth Committee of the General Assembly was considering the ILC's report in November 2001. He said,

> diplomatic protection was a sovereign prerogative of the State of nationality of the person concerned, as a subject of international law. That prerogative provided for a discretionary right of the State. For all practical purposes, the person concerned was in that connection to be a beneficiary of international law. There was no obligation on the State to present a claim on behalf of an injured national. Moreover, there should be no doubt that diplomatic protection was not recognised as a human rights institution and could not be enforced as such.[11]

[8] For the most recent example, see the representations made on behalf of Tracy Housel. In this case, the fifteen governments of the European Union made a further protest. The Prime Minister's spokesman said, 'there was a limit to what we can do ultimately'. Housel was executed. See <http://news.bbc.co.uk/hi/world/americas/newsid_1867000/1867916.stm>.

[9] United Kingdom Materials on International Law 1999, in (1999) LXX *BYIL* 527 (emphasis in original).

[10] Ibid, Rule III.

[11] UN Press Release GA/L/3194 (7 Nov 2001).

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III. THE INTERNATIONAL MINIMUM STANDARD

The traditional concept of diplomatic protection embraces a primary rule of conduct and an associated regime of responsibility if the rule be violated.[12] The primary rule will usually be the international minimum standard, which establishes an objective standard of treatment of aliens on a State's territory, distinct from the national standard (the way a State treats its own people). The books usually cite the statement of the Claims Tribunal in *Neer* for the content of the international minimum standard:

> The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.[13]

Although there are no substantive limits on the *kind* of treatment that could fall within the *Neer* test, it cannot be pretended that the test is either precise or demanding. It stands in contrast to the prescriptions of human rights law.

If an individual claims to be a victim of the violation of the standard and is unable to obtain redress in the local courts, his State may take action at the international level to seek rectification of what is now a breach of the State's right (the ill-treatment of one of its nationals). As indicated already, according to international law, the State of nationality (and only the State of nationality) may present such a claim; the claim is the State's own (and not an act of agency on behalf of the injured individual) and so it is for the State to decide whether or not to present any claim; while any reparation will be assessed in relation to the injury suffered by the individual, the award is an award to the State. According to this view of the law, the individual is simply an object of any wrong, his injury similar, say, to the pollution of a lake or an unlawful incursion into airspace. Over the years, thousands of such claims have been settled by a variety of means, ranging from a negotiated disposition of a single claim, through lump-sum settlements, judicial settlement by claims tribunals, to the elaborate schemes like the Iran-US Claims Tribunal and the UN Claims Commission. These latter two arrangements are important in demonstrating that there is no objection in international law to States setting up tribunals before which individuals have a right of audience and in which they can argue the claims of mistreatment by the defendant government as their own.

Generally though, save for his obligation to exhaust domestic remedies, the individual rather stands outside the process of diplomatic protection, a perspective distinctly at odds with the developing law of human rights, for, although it is not necessarily the case that a diplomatic claim will involve an allegation of a violation of human rights, in most cases, it will be a central element of the complaint—ill-treatment, failure of due process, interference with property rights. A prominent objector to the continued dislocation of the two fields was Professor Richard Lillich, who encouraged the adoption of General Assembly Resolution 40/144, 'The Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live'. Lillich was not concerned to overthrow the old dispensation in one go but to provide a more

[12] I Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Oxford University Press, 1998), who properly separates his treatment into three chapters, 'The Responsibility of States', 'The Admissibility of State Claims', and 'Injury to the Persons and Property of Aliens on State Territory'.

[13] *United States v Mexico (Neer)* IV UNRIAA 60, 61–2.

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individual-centred understanding of the real nature of diplomatic protection and, by converting the individual's interests to rights, to give him some purchase against the otherwise, wholly discretionary power of the State.[14]

IV. UK POLICY

In addition to the institutions of diplomatic representation and protection, the UK places weight on consular protection as a means of securing the interests of British nationals overseas. In the context of the predicaments of British nationals that are our present concern, it will often be the case that the person will be detained. The first item in the Foreign & Commonwealth Office advice on consular protection says, '*The Consul cannot get you out of jail.*' (emphasis in the original) but, it goes on, 'the Consul will take action if your rights have been denied or abused.' and, if you are detained,

> Insist that the British Consul be notified. IT IS YOUR RIGHT. (emphasis also in original).[15]

There then follow lists of what the consul can and cannot do for detainees. Where the consul can do something, eg, provide information on qualified, English-speaking lawyers, the advice says that the Consul 'Will' do whatever it is. One thing the Consul cannot do is to give or pay for legal advice. Instead, a UK ngo, 'Prisoners Abroad' is commended as a source of assistance.[16] For all the limitations, the services of the Consul might be valuable. The language of 'right' and the use of 'will', though, perhaps hold a stronger guarantee than is actually available. It remains to be seen if the English courts would be prepared to require any specific action from a consul at the suit of a British national detained or on trial in another jurisdiction.

A. Diplomatic Protection

In its reply to the International Law Commission seeking the comments of governments on diplomatic protection, the British government reasserted its continued commitment to the orthodox position that was expressed in the Claims Rules. While the basis for the Rules was in customary international law, the reply indicated that the position in an individual case could be modified by treaty.[17]

B. Diplomatic Representations

The government has recently revised its policy on making representations about the convictions and sentencing of British prisoners abroad. The previous policy was that representations would be considered (note) after local remedies had been exhausted and there was evidence of a miscarriage or denial of justice. Now,

> We are extending this to include those cases where fundamental violations of a British national's human rights had demonstrably altered the course of justice. In such cases, we

[14] R Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984), 51–61.
[15] The advice is available on the FCO Website, <http://www.fco.gov.uk/travel>.
[16] <http://www.prisonersabroad.org.uk>.
[17] Above, n 9, 526–8.

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> would also consider supporting their request for an appeal to an official human rights body in the country concerned, and subsequently giving advice on how to take their cases to relevant international human rights mechanisms.[18]

In a letter accompanying the announcement of the change in policy, the FCO wrote to an MP,

> We are very conscious of the other government's obligations to ensure the respect of the rights of British citizens within their jurisdiction. This includes the right to fair trial. In cases where a British citizen may have suffered a miscarriage of justice we believe that the most appropriate course of action is for the defendant's lawyers to take action through the local courts. If concerns remain, their lawyers can take the case to the United Nations Human Rights Committee, where the State in question has accepted the right of individual petition under the ICCPR. The UK government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations.[19]

This statement shows the overlap of representations and protection. Where local remedies are exhausted, it seems that recourse to international measures of redress might have to be resorted to by the individual if they are available against the State complained about. Here, of course, there would be a claim of illegality. The final sentence, which refers to representations also is contingent on a claim of illegality. The 'also' in this sentence hides another ambiguity—will consideration be given to representations only where there is no alternative international avenue of potential redress for the individual or, if it does not, is exhaustion of the international procedure a necessary pre-condition for representations? What remains quite clear is that the government will continue to give 'consideration' to making representations, not that it will make them, even when all other steps have been taken by the individual, and it would be a matter of speculation to estimate whether or not the government might be encouraged to intensify its representations if an international human rights body had reached the conclusion that the treatment of a British national was in breach of another State's international human rights obligations.

Another feature of the two statements, explicable by the context in which they were made, is their relatively narrow field of application—breaches of fair trial rights that lead to a miscarriage of justice. There is nothing here about torture (although, eg reliance on confessions obtained by torture could raise it collaterally as a fair trial issue) and nothing that would be guaranteed to have helped Al Adsani. Certainly, as Al Adsani's predicament shows, there is no necessary connection between exposure to torture and the denial of fair trial rights. It might be thought that cases such as his would be *a fortiori*. The difficulty for people like him, though, is blatant: nothing in the restatement or the supporting letter suggests that the making of representations is anything other than a matter of executive discretion, as would be the case about any further action which might more properly be seen as a form of claims protection, even if the sentiments of the statements could be extended to other violations of human rights. In particular, there is nothing to suggest that allegations of torture necessarily would induce a more positive reaction from the British government.

There is an interesting juxtaposition of diplomatic intervention and recourse to human rights procedures. There are, of course, a few cases where States have used international human rights mechanisms in cases where an international claim might

[18] Above, n 9, 528. [19] Ibid, 529.

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have been made—*Austria v Italy*[20], *Denmark v Turkey*[21]—or where States have intervened in an individual case in support of a national applicant—*Soering*[22], *Selmouni*.[23] This is not to say that all inter-State cases are simply States taking advantage of an available forum, the human rights tribunal, to bring the claim: in some cases, there are political considerations of high importance involved, such that the dispute is essentially an inter-State dispute in substance, as well as in form, eg *Ireland v UK*[24], although even in cases like this, the obligation to exhaust local remedies will put some focus on the injured individuals. We should not forget that the government said in *Al Adsani* that the alternative remedies for Al Adsani included 'an inter-State' claim. While the UK has accepted the inter-State complaints provisions of the International Covenant on Civil and Political Rights (Article 41) and of the UN Torture Convention (Article 21), no use has ever been made of them. Although the *Denmark v Turkey* case shows that an inter-State complaint to the European Court in Strasbourg is feasible, the British government has shown no inclination to use it.

V. THE INTERNATIONAL LAW COMMISSION

It was the close connection between the substance of the interests protected under human rights law and by diplomatic protection which inspired the first submission of Professor Dugard, the ILC's rapporteur on Diplomatic Protection.[25] He set himself to integrate the two bodies of law. It is not the first time that an ILC rapporteur has taken on this kind of task. Famously, Dr Garcia-Amador tried to bring together the substantive rules on human rights and the secondary consequences of their violation in his work on the law of State Responsibility. That work did not succeed. It was conceptually confused about the relationship between the primary rules imposing duties and the secondary rules of responsibility. Here, Professor Dugard's project avoided that error.

First of all, he considered whether or not diplomatic protection was obsolete, given the overlap between the substantive law on the treatment of aliens and the law of human rights (and on the protection of foreign investment). In some of these cases, the individual will have an international avenue of redress, not dependent on his nationality, with his claim measured against a more certain (and generally higher) standard than under the international minimum standard. The right of diplomatic protection involving inter-State action, it is then argued, should be reserved only for those situations where there really is damage to the State as such, in addition to the damage suffered by individual nationals.[26] Dugard rejects these arguments—the regimes for the protection of human rights are far from comprehensive; the fiction of injury to the State serves a useful purpose, for he says, 'most States will treat a claim of diplomatic protection more seriously than a complaint against its conduct to a human rights monitoring body'.[27] So, Dugard sees diplomatic protection as a valuable, additional institution for the protection of human rights. For present purposes, Dugard's draft Articles 3 and 4 are of importance:

[20] No 788/60, (1961) 4 *YbECHR* 112.
[21] *Denmark v Turkey* ECtHR (2000) (friendly settlement), text in (2000) 21 HRLJ 58.
[22] *Soering v UK* ECtHR A/161 (1989).
[23] *Selmouni v France* ECtHR (1999–V).
[24] A/25 ECtHR (1979).
[25] JR Dugard, First Report on Diplomatic Protection, Fifty-second Session of the International Law Commission, A/CN 4/506, paras 19–32 (Report).
[26] Report, para 17.
[27] Report, para 32.

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Article 3
The State of Nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to Article 4, the State of Nationality has a discretion in the exercise of this right.

Article 4
1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a ius cogens norm attributable to another State.
2. The State of Nationality is relieved of this obligation if:
(a) the exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;
(b) another State exercises diplomatic protection on behalf of the injured person;
(c) the injured person does not have the effective and dominant nationality of the State.

On Article 3, Dugard said that it was intended to maintain the position that the claim was the claim of the State and that in exercising the right of diplomatic protection, a State asserted its own right and did not act as agent for the individual.[28]

The Rapporteur identified a large but mixed bag of practice and writing which suggested that an unfettered discretion about whether or not to exercise diplomatic protection may no longer be an accurate representation of the law.[29] However, as he conceded, there is an obscurity about much of the practice and the reliance on a constitutional base rather than an international legal one may account for some of the apparently most helpful examples. Certainly, some of Dugard's colleagues expressed their reservations and these were reinforced by the reaction of States' representatives in the Sixth Committee. He concluded,

> the general view was that the issue was not yet ripe for the attention of the Commission and that there was a need for more State practice and, particularly, more opinio iuris before it could be considered.[30]

This indicates that, for the time being, at least, fundamental reform of diplomatic protection is not something contemplated by States. Dugard acknowledged that Article 4 was progressive development.[31] His attempt to limit the duty of protection to situations involving grave breaches of an *ius cogens* norm did not assuage the opposition, although a very similar formulation in the Articles on State Responsibility, which provides a *power* of intervention to States does not seem to have engendered the same degree of opposition.[32]

VI. OTHER DEVELOPMENTS

Despite his conclusion, the accuracy of which is hard to contest, there are other developments in support of Dugard's original position.

One of the rapporteurs of the ILA Committee on Diplomatic Protection, Professor Orrego Vicuna, places emphasis on the expanding opportunities for individuals to bring their own claims in the international legal system. He writes,

[28] Report, para 73.
[29] Report, para 87.
[30] ILC Report on the work of its fifty-third session, A/56/10, para 456.
[31] Report, para 88.
[32] Articles on State Responsibility, 41, 48, and 54. For diplomatic protection, see the summary of the debate in the ILC by the Rapporteur, ILC Report, above n 30, paras 450–5.

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> The essence of the evolution points towards the fact that in both diplomatic protection and in that of direct standing of the individual, it is increasingly the right of the individual that is asserted in its own merits and no longer that of the sponsoring State. The State may still act as a conduit, an agent or on behalf of the individual but no longer in substitution of his rights.[33]

Accordingly, the rapporteur saw a residuary role for diplomatic protection where there were no international procedures available to the individual. This is not yet the confirmed view of the Committee as a whole.

The position in international law for the moment seems to be that diplomatic protection remains a discretion of the State and that, in particular, there is no human right to diplomatic protection to supplement the established position in customary law.[34] However, it is necessary to take account of the judgment of the ICJ in *LaGrand*.[35] There is an irony here in that the formal structure of the case makes it look like a one of diplomatic protection—the applicant State brings a case in international law alleging a breach of treaty, the Vienna Convention on Consular Relations which had direct consequences for one of its nationals. (The source of the primary rule is, of course, not the customary law on the treatment of aliens but is to be found in the treaty.) Yet, in striking language, the Court said,

> Based on the text of [Article 36], the Court concludes that Article 36 paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the State of the detained person.[36]

It might be that *LaGrand* is confined to the particular provision that clearly identifies the 'right' of the detained individual to consular assistance, albeit a right against the receiving State, but the language is surely adventitious. If one addresses the substance of the matter, two possibilities emerge. The one is that any 'right' should operate also against the detainee's own State, to enable him to require visits and help (though finding a forum to require that might not be so easy). The other, much more controversial, prospect is that similar treaty provisions, say, in the fields of extradition and mutual assistance, should be read in the same way, whether or not they speak of a 'right' of the individual, when they identify an important individual interest. Even so, this would not take us all the way. Diplomatic protection is a creature of customary international law. Identifying a forum where the individual could even test the hypothesis would be difficult, except, perhaps, where a national court were able to interpret the treaty and provide the appropriate remedy.

VII. CONSTITUTIONAL LAW

So we go back to domestic law. Much of the national legislation referred to by Professor Dugard comes from the constitutions of old communist States and it is easy to imagine that the possibilities of national judicial enforcement of even an express duty of protection would have been remote in the conditions prevailing in such States.

[33] International Law Association, *Report of the Sixty-Ninth Conference* (2000), Interim Report on 'The Changing Law of nationality of Claims' by Professor Francisco Orrego Vicuna, 631, 633.

[34] See *Jasinskij v Lithuania* No 38985/97, European Court of Human Rights (admissibility), THE LAW, para 2.

[35] *Germany v United States (LaGrand)* ICJ (2001).

[36] Ibid, para 77.

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Nonetheless, the existence of the constitutional examples unearthed by Dugard indicates that some States do not preclude binding themselves to some limit on their governments' power to initiate diplomatic protection.

There is German Constitutional case law that suggests that the State has a duty to protect German nationals. The limit on the duty is that exercising protection must not run counter to 'truly overriding interests' of the State—but the question is a justiciable one at the suit of an individual, though one in which the authorities have a certain margin of appreciation.[37]

Partly relying on the German case law and the theory which underlies it, two South African writers have recently argued for a constitutional right of diplomatic protection.[38] They take it as one of the claims of citizenship that the State should actively protect its nationals when their rights are interfered with by foreign States. They too concede the need to balance the protective function against broader public concerns and the rights of others.[39] What they look for is clarity, predictability and certainty—characteristics they suggest which should apply if diplomatic protection is seen as a legal institution and not as an instrument of State power.

VIII. UK DOMESTIC LAW

The attitude of the South African writers comports with the substance of the British government's reference to protection in *Al Adsani*: if it were an alternative remedy which justified the exclusion of the applicant from the civil courts, surely it is implicit that the individual should have some standing with respect to its exercise.

However, that is not the case as a matter of domestic law. Diplomatic protection is afforded under the prerogative in foreign affairs. Since *GCHQ*,[40] it is no longer possible to say that the exercise of prerogative powers is wholly beyond judicial scrutiny and in *Pirbhai*,[41] there was a hint that there might be a justiciable issue in some cases between an individual and the FCO. However, all subsequent attempts to persuade the courts to exercise this jurisdiction have failed.[42] The remedy sought in *Butt* was an ambitious one—that the Foreign Secretary make personal representations to the President of Yemen to halt a trial in progress. There may be a difficulty about the timing of any action, assuming that in some cases, one were possible (which should not readily be assumed). Local remedies will have to be exhausted, a plausible claim of a violation of the appropriate standard will have to be made out—but in many cases the continuation of criminal proceedings will be part of the local remedies process, the

[37] WK Geck, 'Diplomatic Protection', in R Bernhardt (ed), *Encyclopaedia of Public International Law, Volume 1* (Amsterdam, London: North Holland, 1992), 1045, 1051–2.

[38] G Erasmus and L Davidson, 'Do South Africans have a Right to Diplomatic Protection?' (2001) 25 *SAYIL* 113.

[39] Ibid, 119.

[40] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[41] *R v Secretary of State for Foreign & Commonwealth Affairs ex parte Pirbhai* 129 SJ 756.

[42] See esp, *R v Secretary of State for Foreign & Commonwealth Affairs, ex parte Butt* CA (1999) (unreported) and *R v Secretary of State for the Home Department ex parte Kamalposhany* (2001) (unreported), per Sir Richard Tucker, 'there is no duty upon the Secretary of State to ensure that nations comply with their human rights obligations . . . There may be cases where the United Kingdom government has, for example by diplomatic means, chosen to seek to persuade another state to take a certain course of action in its treatment of British nationals; but there is no *duty* to do so', para 19.

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demonstration of a breach of duty will not be possible until the trial is complete and its fairness as a whole assessed. There is, though, a very important exception to these general propositions. Where what is being complained of by the individual is ill-treatment in advance of or during criminal proceedings, there are strong reasons for requiring prompt action—where the treatment is torture or something like it, it would be argued that there is a pre-emptive obligation on the detaining State to investigate and, if necessary, bring the ill-treatment to an immediate end. In such circumstances, requiring the exhaustion of remedies in the local law that do not promise this peremptory remedy is superfluous and unjust. What would be required of the English court is to identify a minimum obligation on the government to give an account of what steps it has taken by way of intervention and why, given the circumstances, it has not done more.

It has to be conceded that even this modest proposal would by no means be sure to be delivered upon and, of course, it would be even less likely for diplomatic representations. This note is being concluded on the day the Administrative Court was asked protect the rights of a British national detainee at Camp X-Ray, Guantanamo Bay, Cuba, the United States detention facility for persons captured in Afghanistan or taken elsewhere in connection with the 'September 11th' attacks on the United States. The applicant maintained that the conditions of his detention and the lack of access to legal advice violated his human rights. The case was a strong one, given that legal advice was available about breaches of human rights law and, with respect to contact with lawyers, at least, a specific demand could have been put to the United States authorities. Richards J confirmed the orthodoxy—any rights claimed by the applicant were based on unimplemented treaties and against a foreign State; there was no remedy in English law to require the government to exercise any rights it might have had.[43] Abbasi found himself in much the same position as Al Adsani. The dislocation between human rights law and diplomatic protection remains. In the absence of any domestic constitutional framework on which to hang a claim of a right to protection, it is difficult to see how any accommodation between them will be reached by the courts. It is hard to escape the rhetorical value of the assertion by the government in *Al Adsani*, that there were alternative means of protection of his rights, in his case the right to a remedy for having been tortured.

COLIN WARBRICK**

II. IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT STATUE IN ENGLAND AND WALES

I. INTRODUCTION

Although a few States ratified the Rome Statute for the International Criminal Court[1] soon after it was promulgated, the UK decided to prepare and pass implementing

[43] *The Independent*, 16 Mar 2002, 2.

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[1] A/CONF.183/9* [hereafter 'ICC Statute'].

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legislation prior to submitting its ratification. In England and Wales (and Northern Ireland),[2] the ICC Statute is implemented by the International Criminal Court Act 2001,[3] which came fully into force on 1 September 2001.[4] The UK ratified the ICC Statute on 4 October 2001, fulfilling its aim of being amongst the first sixty States to do so.[5] The Act has two major purposes, to ensure that the UK is able to co-operate fully with the International Criminal Court (ICC), and to enact into domestic law the substantive offences the ICC may assert jurisdiction over when it comes into being.[6] It is the purpose of this note to introduce the Act and point to some interesting issues that may arise in the future.

II. CO-OPERATION WITH THE INTERNATIONAL CRIMINAL COURT

The ICC is not intended to exercise powers directly on the territories of States party to the ICC Statute. Nor, with rare exceptions,[7] is its Prosecutor. Instead, the ICC is entitled to co-opt the national law-enforcement systems of those State parties, to assist its operations. Article 93 of the ICC Statute allows the ICC to make orders requiring State parties to, *inter alia*, find people or items, question suspects, serve documents and execute searches and seizures.[8] The ICC is entitled to demand 'any other type of assistance which is not prohibited by the law of the requested State'.[9] The UK is obliged to comply with these requests,[10] and to have the relevant procedures in its national law to perform such acts of assistance.[11] The same applies to requests for surrender and provisional arrest of suspects.[12]

A. Assistance to the Court

Taking 'Other forms of assistance [than delivery of persons to the ICC]' first, these are dealt with by part 3 of the Act (ss 27-41). Some of the provisions of this part merely extend the relevant law applicable to investigations relating to prosecutions in England and Wales (and Northern Ireland) to those of the ICC. For example, section 33 allows the Secretary of State to direct a constable to apply for a warrant for entry, search and seizure under the relevant part of Part 2 of the Police and Criminal Evidence Act 1984 (PACE)[13] when a request from the ICC appears to require such action. Similarly, proceedings before the ICC are criminal proceedings for the purpose of section 23 of the Coroners Act 1988.[14] Other means of co-operation, such as the taking of finger-

[2] Scotland has its own implementing legislation, the International Criminal Court (Scotland) Act 2001, 2001 ASP 13. However the procedures in the Act discussed in this piece relating to arrest and surrender apply, *mutatis mutandis*, to Scotland.

[3] 2001 c 17 [hereafter 'the Act']. Section references otherwise unattributed are to this act.

[4] Pursuant to s 82, Secretary of State Jack Straw brought the Act into force with the International Criminal Court Act 2001 (Commencement) Order 2001, 2001 SI 2161, as amended by 2001 SI 2304.

[5] *HC Hansard*, vol. 316, col. 807 (20 July 1998) (Mr Cook).

[6] That is, genocide, crimes against humanity, and war crimes. These crimes are referred to collectively hereafter as 'ICC crimes' Aggression is not included, as pursuant to Art 5(2) of that Statute, the ICC is not yet entitled to assert jurisdiction over aggression.

[7] e.g. ICC Statute, Art 99 [8] Ibid, Art 93(1). [9] Ibid, Art 93(1)(l).

[10] Ibid, Art 86. [11] Ibid, Art 88.

[12] Ibid, Art 89 and 92 respectively. [13] 1984 c 60.

[14] 1988 c 13.

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prints are subject to detailed regulation in the Act.[15] The procedures are similar to those under PACE, but reflect the fact that the request for co-operation has been made by the ICC for the purposes of its investigations, not to assist the UK in criminal investigations unrelated to ICC crimes.[16] Section 39(1) of the Act provides that nothing in that Act shall require the production of national security information or documentation.[17]

Perhaps the most interesting example of differential treatment of suspects being investigated by UK authorities on behalf of the ICC and UK authorities acting in their purely domestic capacity arises in the context of questioning. A 'person being investigated or prosecuted by the ICC'[18] to be questioned pursuant to a request from the ICC is not to be so questioned unless he has been informed of his rights under Article 55 of the ICC Statute and he consents to the interview.[19] The rights granted to suspects under Article 55 include the right to silence, 'without such silence being a consideration in the determination of guilt or innocence'.[20] The ICC Statute requires those national authorities questioning a suspect for the ICC to grant the rights under Article 55 to that suspect, and to inform him of them prior to questioning.[21] This is to avoid the type of situation that arose at the ICTY in the *Celebici* case.[22] In that case, evidence taken by Austrian authorities in accordance with Austrian law and the European Convention on Human Rights was excluded by the ICTY as the procedure followed violated the rights granted to suspects by the ICTY Rules of Procedure and Evidence.[23]

Bearing the above in mind, the inclusion of section 28 is eminently sensible. Section 28's inclusion does, nonetheless introduce an anomalous situation into the law. If a suspect is being questioned on behalf of the ICC, he is entitled to certain rights unavailable to suspects being investigated for the same crimes, but with a view to prosecution in the UK. If there is a possibility that someone being investigated by the UK may be surrendered to the ICC,[24] investigators may be well advised to take a 'belt-and-braces' approach to the suspect's rights and grant him those rights in Article 55, not otherwise found in domestic law.

B. Surrender and Extradition

As with information, so with persons. The ICC cannot normally gain custody of suspects without the intercession of national jurisdictions. The process for transfer of suspects to the ICC is by no means identical to extradition.[25] Under Article 89 of the ICC Statute, the ICC is entitled to 'transmit a request for the arrest and surrender of a person . . . to any State on the territory of which that person may be found.' These requests, like requests for provisional arrest from the ICC,[26] bind the UK.

[15] S 34, Sch 4.
[16] See ss 7(2)(5) of Sch 4.
[17] This is acceptable, see ICC Statute, Art 72.
[18] S 28(1).
[19] S 29(2).
[20] ICC Statute Art 55(2)(b).
[21] Ibid, Art 5(2).
[22] *Prosecutor v Delalic, Delic, Mucic & Landzo*, IT–96-21.
[23] Ibid, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, IT-96-1-T, 2 Sept 1997 (PR D5082–D5105).
[24] A good faith investigation by the UK would prevent the ICC from requiring the UK to defer a prosecution to it (see ICC Statute, Art 17). But the UK could decide to waive its complementarity rights.
[25] Art 102 of the ICC Statute differentiates extradition between States and surrender to the ICC.
[26] Issued by the ICC under powers grated to it in Art 58.

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The procedure for dealing with such orders in the law of England and Wales is provided by Part 2 of the Act. This part, and the procedures contained within it betray the considerable differences between surrender to the ICC and extradition. A warrant for arrest and surrender issued by the ICC is to be transmitted by that court to the Secretary of State. If the judicial officer to whom the warrant is passed 'is satisfied that the warrant appears to have been issued by the ICC, he shall endorse the warrant for execution' in the UK.[27] Nothing more is required. The ICC warrant is enforceable in the UK.[28] This process is similar to that applicable to endorsing warrants from Ireland provided for in the Backing of Warrants Act (Republic of Ireland) Act 1965.[29]

Having been arrested in pursuance of the warrant, the arrestee is to be brought before 'a competent court as soon as is practicable'.[30] According to section 5(2) of the Act, to make a delivery order, under the authority of which the suspect is to be transferred to the ICC in accordance with directions from the Secretary of State,[31] the court has only to be satisfied of two things. These are that there is a duly endorsed or issued ICC warrant, and the person before the court is the one named in the warrant.[32] The court making such an order 'is not concerned to enquire' whether the warrant was duly issued by the ICC or, where the person to be surrendered is 'alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed'.[33] Unlike many extradition proceedings there is no requirement that a prima facie case be shown against the suspect.[34] This should not be considered problematic. To obtain a warrant of arrest and surrender from the ICC the Prosecutor would have to have convinced a Pre-Trial Chamber that there were 'reasonable grounds to believe' the suspect had committed an ICC offence.[35] Therefore a similar evidential hurdle has already been surmounted by the Prosecutor to obtain the warrant.

Article 91(2) of the ICC Statute allows States to require the submission of evidence equivalent to that required for extradition. The UK has, by not requiring such evidence, placed faith in the ICC in a similar way it has in relation to parties to the European Convention on Extradition.[36] In 1989 the UK provided for the removal the *prima facie* requirement for parties to that Convention.[37] This show of trust in the ICC is appropriate,[38] and in line with the call to make the requirements for surrender 'less burdensome' than for extradition, 'taking into account the distinct nature of the Court'.[39] Two other traditional bars to extradition are also not relevant to delivery order proceedings. These are double criminality and the political offence exception. Again, this seems

[27] S 2(3).
[28] S 14.
[29] 1965 c 45. On which see I Stanbrook and C Stanbrook, *Extradition Law and Practice*, 2nd edn (Oxford: Oxford University Press, 2000), 257–60. The analogy was made by Lord Williams of Mostyn, *HL Hansard*, vol. 621, col 1287 (8 Feb 2001).
[30] Ibid, s 5(1).
[31] Ibid, ss 5(3)(a), 15. Or (in the case of a person already convicted by the ICC, to the State in which he is to serve his sentence (ibid, s 5(3)(b)). The procedure for reviewing decisions of the court to grant, or refuse, delivery orders is given by ss 8 and 9 (for refusals) and ss 12 and 13 (for review of decisions to make an order).
[32] Ibid, s 5(2)(a)(b).
[33] Ibid, s 5(5).
[34] See M Forde, *The Law of Extradition in the United Kingdom* ((Dublin: Round Hall, 1995), 67–73.
[35] ICC Statute, Art 58.
[36] European Convention on Extradition 1957, ETS No 24.
[37] This was implemented in 1990, 1990 SI 1507, reg 3.
[38] The objections identified by Lady Fox ('The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal' (1997) 46 *ICLQ* 434) to surrender to the ICTY are not applicable here.
[39] ICC Statute, Art 92(1)(c).

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appropriate.[40] The ICC exists to try offences such as genocide, crimes against humanity and war crimes, so double criminality (which would be likely to be satisfied in any event because of the definition of the offences in s 51 of the Act) does not apply to surrender to the ICC. As the ICC is not a State, the political offence exception would seem inapplicable anyway.

Section 5(2) of the Act notwithstanding, certain matters not included in that section are also of relevance to the proceedings. The Act grants the court competence to determine if the person brought before it was lawfully arrested in pursuance of the warrant and if his rights have been respected.[41] If it determines that the arrest was not lawful or the person's rights have not been respected though, it is limited to making a declaration of that fact, but it is unable to grant any further relief.[42] The court cannot, for example order release or compensation. It must still make the transfer order. The reason for this is, as Lord Williams of Mostyn explained, that upon transfer to the ICC, the suspect is able to raise the issue of violation of his rights. At that time the ICC may determine if 'the abuse of process is so grave that to proceed with a trial would go against the interests of justice'.[43]

The most difficult issue relating to the proceedings may be immunity. As the *Pinochet*[44] and *Yerodia*[45] cases show, allegations of international criminality are often made against those in the higher echelons of government. Section 23 of the Act provides for cases of immunity, and reads:

> (1) Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this part in relation to that person.
> (2) *Where*—
> State or diplomatic immunity attaches to a person by reason of a connection with a State other than a State party to the ICC Statute, and
> waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender, the waiver shall be treated as extending to proceedings under this part in connection with that request. . . .
> (4) The Secretary of State may in any particular case, after consultation with the ICC and the State concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by State or diplomatic immunity attaching to a person shall not be taken against that person.

An incautious dictum in *Yerodia* notwithstanding,[46] there is now a strong argument that international law does not recognise immunity *ratione materiae* for the crimes included in the ICC Statute.[47] The position in national jurisdictions[48] with respect to diplomatic or similar personal immunities is less clear. Recent case law has tended to the view that such immunities prevent national courts from dealing with allegations of international crimes absent a waiver.[49]

[40] SS 72–3 remove these hurdles from extradition, the reasons for removal apply *a fortiori* to surrender to the ICC.

[41] Act, s 5(6). The procedure is required by Art 59 of the ICC Statute. [42] Ibid, s 5(8).

[43] *HL Hansard*, vol. 621, col. 1300. The ICC has the power, under Art 85 of the ICC Statute, to order compensation. As the Joint Appeals chamber confirmed in *Prosecutor v Barayagwiza*, Decision, ICTR-97-19, 3 Nov 1999, paras 73–7, a court has inherent jurisdiction to refuse to proceed if to do so would amount to an abuse of process. S 4(9) requires to inform the ICC of any declarator on violations of a suspects rights made by the court issuing the delivery order.

[44] *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte [No 3]* [1999] 2 WLR 827.

[45] Arrest Warrant of 11 Apr 2000, ICJ General List 121, 14 Feb 2002, available at <http://www.icj-cij.org>.

[46] Ibid, para 61. [47] Ibid. [48] ICC Statute, Art 27.

[49] *Pinochet* above n 44, 844–5, *Yerodia*, above n 45, paras 56–7. Equally, the *Cour de*

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The separation off of parties and non-parties to the ICC Statute for different treatment here is a measured response to the problem of immunities. For States party there is no requirement for an express waiver. There is clear justification for this. Having ratified an instrument creating a court to prosecute international crimes, and in front of which no immunities may be pleaded, it would seem inconsistent for a State to assert that its immunities prevent surrender.[50] As Lord Avebury put it, 'in accepting Article 27, a State party to the ICC Statute has already agreed that the immunity of its representatives, including its head of State, may be waived before the International Criminal court and that their status is not a barrier to their arrest and surrender to the court'.[51] Of course, this does not apply to non-parties to the ICC Statute.[52] This explains the requirement in section 23(2) that the ICC obtain a waiver before the UK can surrender the arrestee. Article 98(1) of the ICC Statute makes it clear that the onus is on the ICC to obtain the relevant waiver.[53] The ICC cannot not place a State under conflicting obligations, one to the court, and one to the State entitled to insist on immunity for its officials.[54]

The discretion to end proceedings given to the Secretary of State by section 23(4) is of uncertain impact.[55] It is to be hoped that the requirement of prior consultation with the ICC will ensure directions to not take proceedings under section 23(4) will ensure that such directions are only made with the agreement of the ICC. Otherwise, a violation of the ICC Statute could occur.[56] It should be mentioned, however, that this provision only applies when limited classes of immunities are at stake.[57]

Other States may wish to prosecute persons in the UK who are suspected of international crimes and there is clearly a role for such national prosecutions. The ICC is intended to be complementary to domestic courts. To ensure prosecution of international crimes at the national level, the Act simplifies extradition. Section 73 removes the political offence exception when extradition is sought for an ICC crime. This does not alter the previous position on genocide,[58] or, probably, war

Cassation, in *Abetz* (28 July 1950), noted (1952) 46 AJIL 161 declared that international law removed diplomatic immunity from those accused of war crimes.

[50] ICC Statute, Art 27.

[51] *HL Hansard*, vol.622, col.11 (12 Feb 2001). D Sarooshi, 'The Statute of the International Criminal Court' (1999) 48 *ICLQ* 386, 391–2, considers there to be no obligation, even on States party, to waive immunity, At the least, Art 93(1)(l) might be considered sufficient authority for the ICC to make an order for waiver to States party to the ICC Statute.

[52] '[A] non-State party to the ICC Statute has not accepted that provision [Art 27] and the immunity of their diplomats remains intact unless there is an express waiver', *per* Lord Avebury, ibid, col. 12. Where the ICC has jurisdiction by virtue of a Security Council referral, s 23(3) allows the Secretary of State to make Orders in Council applying the procedure normally applicable to State parties to all States. This may be done as the Security Council Resolution is likely, to provide for a regime that does not take note of immunities.

[53] '[T]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.'

[54] See K Prost and A Schlunck, 'Article 98', in O Triffterer (ed), *Commentary on the Rome Statute for the International Criminal Court* (Baden Baden: Nomos, 1999), 1131, 1131.

[55] Baroness Scotland, accepted 'The situation we are providing for will be rare. Precise details are difficult to predict', *HL Hansard*, vol 623, col 411 (8 Mar 2001).

[56] This provision caused considerable disagreement in the House of Lords, ibid, cols 410–13.

[57] Baroness Scotland, ibid, col 411.

[58] S 23 Extradition Act 1989 c 33, (prior to amendment). S 73 of the Act amends s 23 of the Extradition Act to include crimes against humanity and war crimes.

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crimes.[59] Nonetheless section 73 is useful, adding crimes against humanity, and clarifying the position on war crimes. It also accords with customary international law.[60] Double criminality is excluded from extradition proceedings for ICC crimes by section 72 of the Act. This was included to ensure that where the UK's extradition partners criminalise ICC crimes on the basis of universal jurisdiction the fact that the UK does not go quite as far in asserting jurisdiction[61] will not bar extradition. It amounts to at least an implicit acceptance that universal jurisdiction over these crimes is permitted by international law.[62]

III. PROSECUTING ICC CRIMES IN ENGLAND AND WALES

A. Crimes and Defences

Prior to the entry into force of the Act the domestic legislation covering international crimes was fragmentary.[63] The *Pinochet* litigation also, for all practical purposes, made it impossible to prosecute international crimes directly on the basis of customary international law.[64] So, if it wanted to take advantage of the complementarity provisions in the ICC Statute, by investigating and prosecuting offences itself, the UK had to incorporate the ICC crimes into domestic law. This is done by part 5 of the Act. Part 5 of the Act begins by defining, in section 50, genocide, crimes against humanity and war crimes by reference to Articles 6, 7, and 8(2) of the ICC Statute. These are made offences under municipal law (s 51).[65] Crimes against humanity and war crimes, other than grave breaches of the Geneva Conventions and Additional Protocol I, are criminalised in the UK for the first time in the Act. Offences against the ICC, such as giving false testimony or interfering with witnesses are to be dealt with under the corresponding domestic offences (s 54)(1)(3)).[66]

The incorporation of ICC crimes into the law of England and Wales in section 51 should ensure that those crimes may be effectively prosecuted at the national level, but certain matters require comment. The first of these is the relationship between grave

[59] See G Gilbert, *Transnational Fugitive Offenders in International Law* (The Hague: Nijhoff, 1998), 392–3.

[60] Ibid, 395.

[61] Although it is possible that the jurisdiction granted over residents may also be based on a limited universal jurisdiction claim, see later.

[62] For example, there are similar provisions in the Extradition Act 1989 (ss 2(1)(b)(ii), 2(3)(a)) allowing for extradition to countries prosecuting on the basis of nationality jurisdiction, despite the UK, for the most part, not doing so. This is easily explained by the fact that nationality jurisdiction is established in international law. See Stanbrook and Stanbrook, op cit, 44.

[63] In short, genocide and grave breaches of the Geneva Conventions and Additional Protocol I were crimes under UK law (pursuant to the Genocide Act 1969, c 12, and the Geneva Conventions Act 1957 c 53 (as amended by the Geneva Conventions (Amendment Act 1995 c 27) respectively). See D Turns, 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom' (1999) 4 *Journal of Armed Conflict Law*, 1–39. The Act repeals the Genocide Act, s 83, Sch 10.

[64] Above n 44, only Lord Millett was willing to accept customary law was capable of creating offences in domestic law, ibid, 912.

[65] Ancillary offences are criminalised by s 52. These are aiding, abetting, counselling or procuring, inciting, attempt, or assisting an offender or concealing the commission of an offence, s 55(1).

[66] Although the court is to take into account judgements and decisions of the ICC on such offences (s 54(2)).

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breaches of Additional Protocol I, prosecutable under the Geneva Conventions Act (s 1A(b)), and war crimes based upon those breaches in Article 8(2)(b). The definitions of these crimes in the Protocol and ICC Statute are not always identical. An example is launching attacks that cause excessive collateral civilian damage, a grave breach under Article 85(3) of Additional Protocol I. The corresponding provision in the ICC Statute is Article 8(2)(b)(iv), which sets a higher threshold for conviction.[67] A prosecution under the Act would also have to take account of the restrictive Elements of Crimes drafted by the PREPCOM for this offence (ICC Act s 50(2)(a)(b)).[68] A prosecutor may avoid some of these difficulties by charging a suspect under the Geneva Conventions Act when allegations relate to a conflict to which Additional Protocol I applies.

Definitions of particular crimes need to operate in a framework of general principles of liability and defences. One of the innovations of the ICC Statute was its provision of a 'general part' of international criminal law.[69] The UK has decided, with two exceptions, not to adopt this, and rely instead on the corresponding principles of domestic law. The two exceptions are intention, which is defined in accordance with Article 30 of the ICC Statute,[70] and command responsibility.[71] Command responsibility is new to domestic law, and relates to the liability of military and civilian superiors for offences committed by those under their authority which they have failed to prevent or punish. For military superiors, it is a form of criminal negligence.[72] The Act adopts the definition of command responsibility in Article 28 of the ICC Statute (s 65), although, in a rather ambiguous provision, declares that 'a person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring an offence.' Why a person convicted on the basis of command responsibility should be so regarded is unclear.

The use of domestic criminal law here means that certain defences available to defendants before the ICC will be unavailable to a person prosecuted in England and Wales. For example, duress is available as a defence to all ICC crimes in the ICC Statute.[73] It will not be available to those accused of offences involving murder under the Act.[74] Also, the defence of self-defence for war crimes, is probably more broadly drawn than the equivalent domestic law.[75] The customary status of the ICC on this point is dubious so using domestic law here is unobjectionable.[76] One surprising aspect of the Act is that it does not include any provision on superior orders. Article 33 of the ICC Statute allows the defence for war crimes. A defendant might be able to raise the defence in a prosecution under the Act, by claiming that Article 33 represents customary international law. The arguments against using customary international law to found liability would not apply with the same force to grounding defences in it.[77]

[67] Lord Mostyn noted in during the passing of the ICC Bill that Art 8(2)(b)(iv) was a weaker version of the corresponding offence in Protocol I. *HL Hansard*, vol 623 col 1303 (20 Mar 2001).

[68] See D Frank, 'Article 8(2)(b)(iv)—Excessive Incidental Death, Injury, or Damage' in RS Lee, *et al* (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational, 2001) 147, 149–51.

[69] See A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 144, 148.

[70] S 66.

[71] On which see I Bantekas, 'The Contemporary Law of Command Responsibility' (1999) 93 *AJIL* 573.

[72] For civilian superiors, more is required, see s 65(3)(a).

[73] ICC Statute, Art 31(d).

[74] *R v Howe* [1987] A.C. 417.

[75] ICC Statute Art 31(c).

[76] Cassese, loc cit, 154–5.

[77] The arguments against such action are, in essence, those against judicial creativity in offence

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An argument founding a defence of superior orders on customary law would have to overcome a number of obstacles. The first obstacle comes from *R v Clegg*[78]and *Yip Chiu-Cheung*[79] which appear to reject the defence. However, both comments are probably *obiter*,[80] and the latter case is only of persuasive authority, being a decision of the Privy Council. Therefore it may be doubted if these pronouncements can be considered 'judicial decisions of final authority' on the point.[81] The same could be said of Lord Hailsham's comments in *R v Howe*.[82] Even if this were not the case, given that all the above cases were decided in relation to crimes committed during peacetime, it would be open to argue that the courts should take a different approach for offences in times of armed conflict.[83]

In 1995 the House of Lords laid out moderately strict criteria for the recognition of new defences.[84] One of these is that if Parliament has legislated, 'leaving the difficulty untouched',[85] then the Courts would not interfere. This could arguably be the case here, although it must be said that the criteria set down by the House have been criticised not only as overly restrictive,[86] but also 'at variance from what it has done in the recent past'.[87] However, there is still the considerable problem of proving that Article 33 of the ICC Statute is customary in status.[88] There is a small possibility of successfully pleading a defence of superior orders, albeit not one which would be of much assistance to British soldiers, who are only obliged to obey lawful orders.[89]

Another possible candidate for a customary law defence is reprisal.[90] Although there are limits on the use of reprisals,[91] certain reprisals, for example against the civilian population may still be accepted in custom.[92] That the UK accepts that such reprisals are lawful under customary international law is implicit in its reservation to Articles 51–5 of Additional Protocol I.[93] A defendant could conceivably attempt to use such a defence to a charge of intentionally directing attacks against the civilian population or civilian

making. As ATH Smith notes, 'Judicial Law Making in the Criminal Law' (1984) 100 *LQR* 46, 63–7, these do not apply to the formation of novel defences.

[78] [1995] 1 All ER 334, 344. [79] [1994] 2 All ER 924, 928.

[80] JC Smith, *Smith and Hogan, Criminal Law* , 9th edn (London: Butterworths, 1999) 263.

[81] I Brownlie, *Principles of Public International Law*, 5th edn, (Oxford: Clarendon Press, 1998), 42. Comments in *Abbott v R* [1976] 3 WLR 462, 469, are both *obiter* and in the Privy Council.

[82] Above n 74, p 427. See P Rowe, 'Murder and the Law of War' (1991) *NILQ* 216, 227.

[83] I am grateful to Professor Andrew Simester for this point. It should be noted that Art 33 only offers the defence of superior orders to those accused of war crimes, not offences that may be committed in peacetime.

[84] *C* v *DPP* [1996] AC 1, 28. [85] Ibid.

[86] AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 2000, 650.

[87] ATH Smith, 'Reshaping the Criminal Law in the House of Lords' [1995] 54 *CLJ* 488, 490.

[88] See P Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law' (1999) 10 *EJIL* 172 *contra* H McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders, (2001) 50 *ICLQ* 386.

[89] Art 33 limits its operation to those under an obligation to obey the particular order.

[90] On which see CJ Greenwood, 'The Twilight of the Law of Belligerent Reprisals' (1989) 20 *Netherlands YBIL* 35. [91] eg, see Geneva Convention I, Art 46.

[92] F Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Convention of 1949' (1988) 37 *ICLQ* 818, 832–5. Although see *Prosecutor v Kupresic et al* Judgment, IT-95-16-T, 14 Jan 2000, paras 510–36. The ICTY appears to have rather over-read the state practice and *opinio juris* in this case.

[93] Repr in A Roberts and R Guelff, *Documents on the Laws of War*, 3rd edn (Oxford: Oxford University Press, 2000), 511.

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objects (contrary to ICC Statute Article 8(2)(b)(i)(ii)). The case for accepting the defence might be strengthened by the requirement that these offences are stated to be 'within the established framework of international law.'[94] This may include any customary right to take reprisals that exists, as the UK interpretative declaration submitted with the ratification of the ICC Statute avers, the framework referred to 'include[s] customary international law'.[95] Thus a defence of reprisal, to the extent it exists under customary international law, may be raised. After all, there is no reason in principle why defences based on customary international law cannot be pleaded before UK courts, and pursuant to Article 31(3), a defendant is entitled to raise defences based on custom before the ICC. A defendant before courts in England and Wales should not be deprived of such an entitlement without clear statutory authority.

B. Jurisdiction and Procedure

Proceedings in relation to the above crimes may be instituted on a number of different jurisdictional bases. The ICC Act asserts jurisdiction over offences committed on the territory of the UK (s 51(2)(a)), and by UK nationals, residents and those subject to UK service jurisdiction abroad (s 51(2)(b)).[96] Territoriality and nationality jurisdiction are uncontroversial in international law, as are state claims to assert jurisdiction over members of their forces. If an offence is committed abroad by a person who is an UK resident at the time of the offence, then jurisdiction is unobjectionable.[97] However the ICC Act extends jurisdiction to a person who 'commits acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom'.[98] In this situation a close and substantial connection with the United Kingdom does not exist at the time of the offence. Therefore it is difficult to avoid the conclusion that jurisdiction in this instance may rely on a limited universal jurisdictional claim,[99] albeit one which utilises later residency as a limiter.

Prosecutions for ICC crimes or crimes against the ICC may only occur on the authority of the Attorney General,[100] and are triable only on indictment (s 53(2)). On conviction for an ICC crime a person must, if the offence involves murder, be sentenced to life imprisonment (s 53(5)). If it does not, then a person may be sentenced to a maximum of 30 years (s 53(6)). Section 53(5) is more severe than its equivalent in the ICC Statute, which reserves life imprisonment for when it is 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.[101]

[94] ICC Statute, Art 8(2)(b) *chapeau*.
[95] Text at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.
[96] Defined in s 67.
[97] RY Jennings and A Watts (eds), *Oppenheim's International Law Vol I: Peace*, 9th edn (London: Longman, 1992), 469.
[98] S 68(1).
[99] For such an interpretation of the similar jurisdictional claim in the 1991 War Crimes Act, see T Meron, 'International Criminalisation of Internal Atrocities' (1995) 89 *AJIL* 554, 573.
[100] ICC Act, ss 53(3), 54(5) respectively.
[101] ICC Statute, Art 77(1)(b).

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IV. CONCLUSION

In sum, it is clear that the ICC Act is complex piece of legislation, although this complexity is dictated by the regime of co-operation with the ICC that had to be created, and the necessity of ensuring that prosecution of ICC crimes may occur in the UK. Overall, the statute appears to have done what is required. The co-operation provisions should ensure that the UK is able to fulfil its obligations to the ICC. Definitions of crimes are in accordance with the ICC Statue, although the general principles of criminal law may give rise to a number of issues in practice. The jurisdictional provisions are sensible, and together with the abolition of dual criminality for extradition of these offences to States prosecuting on the basis of universal jurisdiction should ensure that the ICC Act will 'provide a robust regime which will prevent the UK being, or being seen as, a safe haven for war criminals'.[102]

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[102] Baroness Scotland, *HL Hansard*, vol 623, cols 418–19.

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