

REDRESS

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Seeking Reparation for Torture Survivors

CHALLENGING IMPUNITY FOR TORTURE

A Manual for bringing
criminal and civil
proceedings
in England and Wales
for torture
committed abroad

Austin

ALL THE PEOPLE I'M RUNNING AWAY FROM ARE ALREADY THERE.



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PREFACE

People are shocked by horrific stories of torture which emanate from around the world. But what might shock them more is the knowledge that those suspected of committing torture visit or even live in the UK. Since our establishment in 1992 REDRESS has been approached by an ever-increasing number of torture survivors, or groups on their behalf, bringing news that individuals involved in torturing them in their home countries are here in the UK whether residing here or only on a short visit. One man had literally bumped into his torturer in Hyde Park. Another discovered that a doctor he believed was involved in his torture was furthering his medical studies in Scotland.

Because of the expertise we had developed, we were one of the groups which intervened in the Pinochet case. We have also tried to extend remedies available to torture survivors in the UK by bringing an action against the state itself even where an individual does not enter the UK's jurisdiction. For instance, we have assisted lawyers acting for Suleiman Al-Adsani, a Kuwaiti pilot who was abducted and subjected to cruel torture in Kuwait in 1991. At the time of going to press judgment is awaited from the European Court of Human Rights, which on 1 March declared the case admissible. Al-Adsani argued that to enable a state to invoke the State Immunity Act in an action for personal injuries as a result of torture was a violation of Article 6 of the Convention. The final judgment in this case will have a profound influence on this area of the law.

Acting in these cases and others led us to look closely at the criminal and civil law remedies available in the UK for torture committed abroad. We hoped to make a contribution to the worldwide fight against impunity for this most terrible of crimes and to help make sure that Britain plays its part. We started to make contact with the relevant authorities and to build working relationships with practitioners. In doing so, we realised that these kinds of cases were only going to become more common, given the widespread practice of torture internationally, the movement of refugees often from both sides of a conflict and the

fact that it is not uncommon for those from ruling elites responsible for torture to travel to the UK. On the other hand, we realised that such cases tend to raise particular legal issues with which practitioners are largely unfamiliar.

REDRESS therefore decided to publish this Manual. Although this is a fast developing area and we cannot hope to predict and cover all the points of law that might become relevant in these cases, we have attempted to at least highlight those areas most likely to arise and which are most likely to be unfamiliar to the practitioner. While the Manual is directed primarily at UK-based legal practitioners and human rights activists, we would hope that it will also be of interest to those seeking to use the law to combat impunity for torture in other countries.

Alongside our attempt to inform the practitioner of the law as it stands we are engaged in assisting the process of law reform in this area. For example, we have drafted the Redress for Torture Bill in order to establish the principle that a state responsible for torture must be answerable in law under the domestic law of the United Kingdom. On the international plane REDRESS has taken the lead to incorporate the principle of redress for victims in the regime of the International Criminal Court.

Helping torture survivors to obtain a remedy is at the core of REDRESS' mission. In 1999, we published a Torture Survivors' Handbook, providing information about support available in the UK and the possibilities of obtaining reparation. This Manual follows and complements the Handbook.



Owen Davies QC
Chair of Trustees, REDRESS
June 2000

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Despite careful checking of the information in the Manual, errors of fact or law may remain for which the author takes sole responsibility.

Researched and written by Mitchell Woolf
Edited by Maggie Maloney



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"... torture is an affront to the civilised conduct of the affairs of nations."

– *Ward LJ, from the second Al-Adsani*

Court of Appeal decision [1996] 106 ILR 536, p. 545¹

INTRODUCTION

When the horrific details of acts of torture are relayed through the media, wherever they have taken place in the world, no one can fail to be sickened and appalled that human beings can treat other humans in such a way. However, the feelings of revulsion will usually be fleeting, becoming replaced by concern with other matters that affect us more directly. For the survivor of torture, the physical and mental suffering rarely ends when the infliction of torture has stopped.² Along with having to overcome and cope with any physical injuries, the mental anguish can result in depression and even take away a person's sense of self-esteem. This can severely affect their social and home life, work and aspirations as well as affecting those close to them. Torture is universally condemned and its prohibition lies at the heart of international human rights law;³ those who commit it are regarded as being "*hostis humani generis* – an enemy of all mankind".⁴

International human rights law imposes a duty on states to investigate and prosecute violations committed within their jurisdictions. Yet all too often violators are not brought to justice in their own countries and victims of torture and other abuses are left without a remedy. Human suffering on a massive scale during the

1 See below, n. 298 and accompanying text.

2 For information about support for torture survivors in the UK, see REDRESS, *The Torture Survivors' Handbook* (1999).

3 See Part I of this Manual.

4 *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980); see Appendix 8, Section 2.

twentieth century gave new impetus to international efforts to combat impunity. Accountability for the worst human rights violations is increasingly viewed as a matter of concern for the international community as a whole. The importance of the right not to be tortured is among those violations so highly valued that all states have a duty to ensure its protection.⁵ Accordingly, the United Nations (UN) established international criminal tribunals in response to the abuses in the context of the conflicts in the Former Yugoslavia and Rwanda. In 1998 a Statute for an International Criminal Court was adopted overwhelmingly by the international community, although it is still some time away from hearing its first cases.⁶

In addition to these international mechanisms, international law imposes a duty on states to do their part to combat impunity. National courts may, and increasingly do, hear cases against torturers who come within their jurisdiction on the basis of the principle of universal jurisdiction.⁷ Six trials have been completed in European national courts since 1993 for torture, killings and other acts amounting to war crimes and genocide committed outside their territory. The investigation of former Chadian dictator Hisssein Habré in Senegal for torture committed in Chad demonstrates that this is not only a European phenomenon. In the United States, civil suits have been pursued against dozens of individuals who have entered the jurisdiction of US courts for a wide range of human rights violations including torture.

The task of this Manual is to provide a practical analysis of the way in which a person, whatever their nationality, who has been subjected

5 See the decision of the International Court of Justice in the Barcelona Traction Case (1970), below, Section 1.1.4, n. 46.

6 The Statute has not yet entered into force (see below, n. 68). The UK has committed itself to being one of the earliest ratifying countries. However, the effectiveness of the Court has been limited by some of the provisions in the Statute. For instance, a state's consent is required before one of its nationals can be prosecuted.

7 The question of universal jurisdiction is a central and complex issue which will be dealt with in detail. See below, Section 4.

to torture abroad may proceed in the civil and criminal courts of England and Wales.⁸ Scotland and Northern Ireland are subject to the same international law obligations and the legislation described in the Manual generally applies in those areas too. However, there may be significant differences in the way in which the law might be applied due to the differences in the legal systems generally.

This is primarily a step-by-step guide for English lawyers who may find themselves asked to advise a torture survivor who seeks their assistance. However, it may also provide useful information for any organisations that may be considering pursuing cases on behalf of torture survivors, as well as highlighting potential problem areas in the legal system and serving as a point of comparison for lawyers and legislators in other jurisdictions.

Part I of the Manual outlines the international law relating to torture and its effect on UK law. Parts II and III deal respectively with criminal and civil proceedings in England and Wales for torture committed abroad. A number of appendices are included which present the relevant UK legislation, some information about the applicable international law and comparative experience from other jurisdictions.

The routes outlined in this Manual will be available in only certain limited circumstances and should be viewed as only one of a number of avenues that could be used to seek redress. Anyone advising a torture survivor should first review all the available alternatives. Appendix 4 gives a brief overview of some of the international complaints mechanisms. If none of those are available, the victim may still wish to place the violation on record with the UN, human rights organisations or other entities which document human rights abuses. If the victim is a British national, there may be other routes to try, such as asking the UK Government to espouse their claim against the state responsible for the violation.

⁸ For the sake of convenience, any reference to “England” or “the jurisdiction” should be taken to include both England and Wales.

Any lawyer who is contacted by a torture survivor or someone on their behalf should be aware of the physical and psychological problems that their prospective client may face and must take these into account when dealing with them. While the memory of the pain which was suffered may diminish over time, there are likely to be physical impairments resulting from torture, which are a permanent tangible reminder of the trauma suffered. It is the psychological effects however which may, in the long run, be most damaging to the survivor. These often manifest themselves in recurrent nightmares, the inability to sleep or the fear of sleep, flashbacks, chronic anxiety, feelings of betrayal, the inability to trust any other person, deliberate self-injury, violent behaviour, depression, paranoia or anxiety. These problems will also have consequences for the survivor's family. It is strongly advisable that the lawyer inquires if the client is receiving or has received counselling. Contact details for specialist organisations which can provide advice and support such as the Medical Foundation for the Care of Victims of Torture are available in *The Torture Survivors' Handbook* published by REDRESS.

The legal and procedural obstacles which will need to be overcome before the merits of the case can even be adjudicated in the English courts serve as a warning of the considerable problems that lie in bringing such actions. Despite these difficulties there are very good reasons for pursuing these cases, over and above the need to ensure that anyone involved in acts of torture is brought to account.

Firstly, the law in this area is developing. Because of this, any case brought is likely to have an impact on the developing law. Specialist organisations like REDRESS can provide invaluable experience and support. In addition, there are some solicitors and barristers who have experience in this area and from whom advice can be sought. REDRESS has perhaps a unique perspective on these developments, having been involved in most of the criminal and civil cases which have been attempted in the UK to date. High profile cases have provided the impetus for academics and practitioners to scrutinise the law and assess its effectiveness. The experience gained from these cases and the greater incidence of awareness and arrests highlight that these are issues which will not go away.

Secondly, the potential for the development of a greater understanding of human rights in this country has been significantly enhanced with the incorporation of the European Convention on Human Rights through the Human Rights Act 1998, which enters into force on 2 October 2000.

Further, the importance to survivors of taking legal action should never be underestimated. For many, it will play an important part in the healing process, providing a cathartic experience through confronting their torturers and expressing their feelings in the public arena. It may allow them to regain a sense of control over their lives which was stripped from them by the abuse. In addition a successful decision may help a person to draw a line under that period of their lives and move on.

PART I TORTURE IN INTERNATIONAL AND UK LAW

1. Torture in the Context of International Law

The right not to be tortured has featured prominently in international human rights instruments and in the strongest possible terms. Article 5 of the Universal Declaration of Human Rights 1948 states that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Under international law, declarations do not have binding effect on states unless they have become part of the body of customary international law.⁹ Conventions, on the other hand, are binding, but only on those states that choose to ratify them. As a result, the language of a right included in a declaration will almost invariably be stronger than the same right which has been negotiated in a convention. However, almost uniquely, the language of the Universal Declaration of Human Rights on this provision is repeated in the main international and regional human rights treaties without being subject to exceptions or limitations. It is found in:

- Article 7 of the International Covenant on Civil and Political Rights 1966;
- Article 3 of the European Convention on Human Rights 1951;
- Article 5(2) of the American Convention on Human Rights 1969; and
- Article 5 of the African Charter on Human and Peoples' Rights 1981.

In all of these international conventions, the right not to be tortured is absolute and non-derogable, meaning that even exceptional

⁹ Declarations are adopted by the UN General Assembly.

circumstances cannot be used to justify torture.¹⁰ In Chahal v. UK the European Court of Human Rights emphasised this point, stating that:¹¹

“the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct ... Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation ...”.

Following the passing of a number of United Nations General Assembly resolutions, the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted.¹² International law against torture was further strengthened in 1984 following the drafting of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),¹³ to which there are now 119 states parties.¹⁴

1.1 The effect on English courts of international law relating to torture

1.1.1 Treaties

The ratification of an international treaty places a state under a binding obligation, as a matter of international law, to act in accordance with its treaty obligations. The 1969 Vienna Convention on the Law

10 This is set out in Article 2(2) of the Torture Convention; Article 4(2) of the International Covenant on Civil and Political Rights, and Article 15(2) of the European Convention.

11 (1997) 23 EHRR 413, para. 79.

12 UN General Assembly Resolution 3452 (XXX).

13 Adopted by UN General Assembly Resolution 39/46 of 10 December 1984; it entered into force on 26 June 1987 in accordance with Article 27(1).

14 See Appendix 2.

of Treaties requires states to also act in good faith.¹⁵ The most effective way to carry this out is by incorporating the treaty into national law, either in whole or in part, in order that it can be enforced by domestic courts.

The European Convention has been incorporated into UK law by the Human Rights Act 1998, and part of the provisions of the Torture Convention have been incorporated by s.134 of the Criminal Justice Act 1988. The International Covenant on Civil and Political Rights has been ratified by the UK but not incorporated into English law.

The significance of the incorporation of international human rights provisions into domestic law was recognised by the Privy Council in Minister for Home Affairs v. Fisher. They stated that the protection of fundamental rights should not be construed narrowly. Lord Wilberforce stated that legislation should be given:¹⁶

“a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to”.

These principles similarly apply with the incorporation of the European Convention into UK law.

Under s.2(1) of the Human Rights Act, the English courts must have regard to the decisions of the European Commission and Court of Human Rights when determining any question involving a Convention right. When the Human Rights Bill was debated before Parliament, the Lord Chancellor stressed that the decisions made by the Strasbourg authorities represented the floor and not the ceiling for the protection of human rights.¹⁷ The significance of such a statement is twofold.

¹⁵ Articles 26 and 31.

¹⁶ [1979] 3 All ER 21, pp. 23-4 (a case relating to the Bermudan Constitution).

¹⁷ HL Debs Col. 510, 18 November 1997.

Firstly, it means that the provisions of other relevant international law treaties may also be relevant to the English courts. The European Court has occasionally referred to the provisions of other treaties in its decisions in order to assist in its interpretation of the European Convention. For example, the Court took the provisions of the UN Torture Convention into account in the case of Soering v. UK.¹⁸

Secondly, the European Court has highlighted that the European Convention is a “living instrument” and must be interpreted “in the light of present day conditions”.¹⁹ This was also the view of the Privy Council in Re Piracy Jure Gentium where it stated that “international law has not become a crystallised code at any time, but is a living and expanding branch of the law.”²⁰

International treaties which have been ratified by the UK but not incorporated into English law are not part of English law. It was established in R v. Secretary of State for the Home Department, Ex parte Brind that such instruments can only be relied upon to enable the court to interpret uncertain or ambiguous statutes or the common law.²¹ However, there is evidence that the English courts are prepared to refer to provisions in conventions which have not been incorporated into English law. In R v. Home Secretary, Ex parte Venables in the House of Lords, Lord Browne-Wilkinson referred to the provisions of the 1989 UN Convention on the Rights of the Child to reinforce his decision.²² He then made the point, *obiter dictum*, that:

“The Convention has not been incorporated into English law. But it is legitimate in considering the nature of detention during

¹⁸ (1989) 11 EHRR 439, para. 86.

¹⁹ Tyler v. UK (1979-80) 2 EHRR 1. The change in the perception of what amounted to torture was shown in Selmouni v. France, see n. 82 below.

²⁰ [1934] AC 586, p. 597.

²¹ [1991] 1 AC 696, per Lord Bridge pp. 747-8.

²² [1997] 3 WLR 23, pp. 49-50.

Her Majesty's pleasure ... to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country."

1.1.2 Customary international law

Customary international law has been defined as "a general practice accepted as law".²³ In other words, there must be evidence of state practice and evidence that states believe the practice to be obligatory ("*opinio juris*"). It can be difficult to find evidence of these factors. The International Court of Justice held in the Asylum Case that it is more significant to look at the consistency of state practice than its frequency.²⁴ The application of state practice is not expected to be perfect. In the Nicaragua Case, the Court held that customary international law can apply despite frequent violations where states justify the acts as exceptions rather than arguing that they are contesting the norm.²⁵

The combination of those international instruments which include provisions against torture, UN General Assembly resolutions and scholarly opinion clearly indicate that the absolute prohibition on torture has become a norm of customary international law.²⁶ States are under a duty to comply with customary international law irrespective of whether they are party to any conventions which include the norm. The fact that the absolute prohibition on torture is recognised as a norm of customary international law means that even states which are not party to the Torture Convention and other human rights treaties containing the prohibition on torture are under

23 Article 38(1) of the Statute of the International Court of Justice (ICJ), which sets out the sources of international law to be applied by the Court.

24 Colombia v. Peru (1950) ICJ Reports 266, p. 277.

25 Nicaragua v. United States (1986) ICJ Reports 14, p. 98.

26 For examples of scholarly opinion and UN General Assembly resolutions, see R. Garnett, "The Defence of State Immunity for Acts of Torture", (1997) Australian YBIL 97, pp. 101-2 (nn. 21 and 22).

a duty to prevent torture. No justifications they may raise for committing acts of torture will be acceptable.

In Alcom Ltd. v. Republic of Colombia, Lord Diplock made reference to the effect of customary international law on the interpretation of English legislation. He stated that:²⁷

“Accordingly [the 1978 State Immunity Act’s] provisions ought to be construed against the background of those principles of public international law as are generally recognised by the Family of Nations.”

He went on to comment that:²⁸

“It makes it highly unlikely that Parliament intended to require the United Kingdom courts to act contrary to International Law unless the clear language of the statute compels such a conclusion.”

The court established in Trendtex Trading Corporation v. Central Bank of Nigeria that customary international law is automatically part of English common law.²⁹ The manner in which customary international law may become part of English law was analysed in detail by Merkel J. in the Federal Court of Australia in the case of Nulyarimma v. Thompson.³⁰

However, the English courts are uncomfortable with the idea of applying norms of customary international law which have not been incorporated into domestic law. This is evidenced by the fact that the courts have never recognised a provision of the European Convention as being part of customary international law.³¹

27 [1984] 1 AC 580, p. 597.

28 Ibid, p. 600.

29 [1977] 2 WLR 356.

30 [1999] FCA 1192.

31 For a more detailed analysis, see M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997), Chapter 8, and particularly pp. 299-300.

Rather than referring to norms of customary international law, the courts have preferred to take the approach of developing the common law.³²

The recognition of the status of customary international law in English law was summed up by Lord Lloyd in Pinochet (No. 1). He stated that:³³

“We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law.”

The court in Nulyarimma expressed surprise that in Pinochet (No. 3)³⁴ it had not been suggested that Pinochet could have been tried for the international crime of torture directly under customary international law. Whitlam J. said:³⁵

“Notwithstanding that no one had suggested to their Lordships that before s.134 of the Criminal Justice Act 1988 (UK) came into effect, torture committed outside the United Kingdom was a crime under United Kingdom law, Lord Millett held that by 1973 English courts already possessed extraterritorial jurisdiction in respect of the crimes charged against Senator Pinochet and did not require the authority of statute to exercise it.”

32 This is not unique to customary international law. See the judgment of the now Lord Bingham on the concept of good faith and fair dealing in contractual performance in Interfoto Library v. Stiletto Ltd. [1989] QB 433, p. 439. See also Sir John Laws, “The Limitations of Human Rights”, [1998] Public Law 254.

33 R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (25 November 1998) [1998] 3 WLR 1456, p. 1495. Even though Pinochet (No. 1) was set aside in Pinochet (No. 2) [1999] 2 WLR 272, the judgments of their Lordships still have legal value; they were referred to in Pinochet (No. 3) (below, n. 42).

34 See below, n. 42.

35 Above, n. 30, para. 38. (For the comment by Lord Millett referred to here, see below, n. 53 and accompanying text.)

1.1.3 The status of *jus cogens*

Certain internationally recognised rights are regarded as so fundamental that they have achieved the status of *jus cogens*. The term is defined in the 1969 Vienna Convention on the Law of Treaties as:³⁶

“ ... a peremptory norm of general international law ... [that is] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Jus cogens has a higher status than customary international law. Where a right is accepted to be *jus cogens*, it is not necessary to provide evidence of state practice and *opinio juris*. The special status of *jus cogens* was recognised in the Furundzija case before the International Criminal Tribunal for the Former Yugoslavia. The Tribunal stated that:³⁷

“Because of the importance of the values it protects [the prohibition of torture] has evolved into ... a norm that enjoys a higher rank in the international hierarchy than treaty law or even customary rules.”

However, the concept of *jus cogens* has proved to be problematic. Firstly, it is not easy to establish what fundamental rights have attained the status of *jus cogens*; secondly, there is no clear understanding of the legal effect of a right which has been accorded this status.

With respect to the first area of difficulty, there is strong scholarly opinion that supports the view that the prohibition against torture has

³⁶ Article 53.

³⁷ Prosecutor v. Furundzija Case No. IT-95-17/1-T 10 (unreported), 10 December 1998.

attained the status of a *jus cogens* norm.³⁸ Torture is recognised as an absolute and non-derogable right. Article 4(2) of the International Covenant on Civil and Political Rights, Article 2(2) of the Torture Convention, and Article 15(2) of the European Convention allow no exceptions to the prohibition of torture.³⁹

However, it has also been argued that an isolated act of torture is not sufficient to amount to the violation of a *jus cogens* norm, and that only acts of torture which are crimes against humanity are sufficient. The term “crimes against humanity” was first used in the Nuremberg Charter.⁴⁰ The Statute of the International Criminal Court defines crimes against humanity as:⁴¹

“any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: ...
(f) Torture”.

In Pinochet (No. 3) Lord Millett distinguished individual acts of torture, which he regarded as being subject to customary international law, from crimes against humanity, which he believed had the status of *jus cogens*.⁴² However, in the same case Lord Browne-Wilkinson was of the opinion that:⁴³

“Ever since 1945, torture on a large scale has featured as one of the crimes against humanity ... The *jus cogens* nature of the

38 For examples see Garnett, n. 26 above, p. 103, n. 33.

39 In addition, see Chahal v. UK, n. 11 above.

40 Article 6(c), Charter of the International Military Tribunal, 8 UNTS 280, entered into force 8 August 1945.

41 Article 7(1), Rome Statute of the International Criminal Court (see below, n. 68).

42 R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (24 March 1999) [1999] 2 WLR 827, pp. 911-12.

43 *Ibid.*, p. 841.

international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.”⁴⁴

The second concern is over the effect of *jus cogens* and, more specifically, whether it places a duty on all states, that is, an obligation *erga omnes*, to ensure the protection of rights that attain that status.⁴⁵ The International Court of Justice referred to obligations *erga omnes* in the Barcelona Traction Case. The Court stated that:⁴⁶

“In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

Although all states are recognised as being under a duty to recognise and protect a right that has achieved the status of *jus cogens*, the term “obligation *erga omnes*” has not always been used in conjunction with *jus cogens*. On a number of occasions when courts around the world have recognised that torture amounted to a violation of a *jus cogens* right, they have gone on to consider that a specific provision⁴⁷ providing universal jurisdiction was required before the national courts of one country would be entitled to try a person who committed acts of torture in another country.⁴⁸

44 The question of universal jurisdiction is analysed below, Section 4.1 and Appendix 8.

45 For further discussion of this question, see M. Cherif Bassiouni, “International Crimes: Jus cogens and obligatio erga omnes”, (1996) *Law and Contemporary Problems* 63.

46 Belgium v. Spain (1970) ICJ Reports 3, para. 33, cited in D.J. Harris, *Cases and Materials on International Law*, 5th edn (Sweet & Maxwell, 1998).

47 Article 5 of the Torture Convention expressly provides that there shall be universal jurisdiction for acts of torture.

48 For details of universal jurisdiction, see below, Section 4.1 and Appendix 8.

The indication is that domestic courts wish to see an express provision obliging them to recognise that the crime is one for which there is universal jurisdiction, rather than just accepting that such jurisdiction exists under international law. This is evident in the decisions of the English courts which have made reference to *jus cogens* in the context of both civil and criminal cases.

In Pinochet (No. 3), while some of the Law Lords expressly recognised that the prohibition against torture had the status of *jus cogens*, they did not follow the dictum in the Barcelona Traction Case⁴⁹ with respect to obligations *erga omnes*. For example, in his decision over the effect of state immunity and universal jurisdiction prior to the incorporation of the Torture Convention into English law, Lord Browne-Wilkinson stated that:⁵⁰

“International law provides that offences *jus cogens* may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution’; *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571.”

However, he then went on to conclude that:⁵¹

“I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime.”

49 Above, n. 46.

50 Pinochet (No. 3), n. 42 above, p. 841.

51 *Ibid*, p. 847.

More confusingly, Lord Hope stated that the prohibition of torture has acquired the status of *jus cogens* under international law. He went on to explain:⁵²

“This compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct.”

However, he then reached the same conclusion as Lord Browne-Wilkinson.

The only dissent on this point came in the judgment of Lord Millett. He stated that:⁵³

“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 crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my 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.”

The majority view in Pinochet (No. 3) seems to echo the civil case of Al-Adsani v. Kuwait.⁵⁴ In that case, Ward LJ referred to the

⁵² Ibid, p. 881.

⁵³ Ibid, p. 912. Lord Millett’s opinion was that crimes prohibited under international law would attract universal jurisdiction if two criteria were satisfied: (i) “They must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*”; (ii) “They must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.”

⁵⁴ (1996) 106 ILR 536; also reported in *The Times*, 29 March 1996. See also below, n. 298 and accompanying text.

argument in the US case of *Siderman de Blake v. Republic of Argentina*,⁵⁵ that when the state violates *jus cogens* it loses its right to rely on state immunity, as being a “powerful one” but agreed that, as in the US case, the status of *jus cogens* was defeated by the plain words of domestic law.⁵⁶ It was not argued that *jus cogens* is accompanied by an obligation *erga omnes*.

1.2 Criminal jurisdiction under international law

A category of crimes has emerged for which international law imposes criminal responsibility on individuals and for which punishment may be imposed either by properly empowered international tribunals or by national courts.⁵⁷ The categories of crimes under international law have emerged from international tribunals starting with the Nuremberg Charter which referred to persons accused of crimes against peace, war crimes and crimes against humanity. The crimes over which the International Criminal Court will have jurisdiction – set out in the Statute of the Court agreed in Rome in July 1998 – include the crimes of genocide, war crimes and crimes against humanity, all of which include torture.⁵⁸

1.3 Civil jurisdiction under international law

Professor Brownlie has commented that a state must in normal circumstances maintain a system of courts empowered to decide civil cases, and, in doing so, be prepared to apply private

55 113 S.Ct. 1812 (1993).

56 Above, n. 54, p. 547 (the statute being the State Immunity Act 1978 – see below, Section 8 and Appendix 6).

57 I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Clarendon Press, 1998), pp. 565-8.

58 See Articles 5 to 9 of the Rome Statute of the International Criminal Court (n. 68 below). The concept of universal jurisdiction over international crimes is explained below in Section 4.1 and in Appendix 8.

International law where appropriate in cases containing a foreign element.⁵⁹ As a general rule, states follow the territorial principle. There is a reluctance by domestic courts to become involved in extraterritorial issues for fear that their decisions might not be accepted abroad. They may also be aware that their decisions may have diplomatic implications and ramifications.

It is arguable, and indeed logical, that the same circumstances that make torture a crime against international law should give rise to a civil obligation under international law. Brownlie referred to the distinct phenomenon of “the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal.”⁶⁰ This suggests that international law may accord an enhanced jurisdiction to national courts in respect of civil actions concerning violations of crimes against international law.

The Torture Convention is not limited to the consideration of criminal aspects of torture. Article 14 states that:⁶¹

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”

The right to an effective civil remedy is also provided for under Article 2(3) of the International Covenant on Civil and Political Rights. The UN Human Rights Committee⁶² has called on states

59 Brownlie, n. 57 above, p. 302.

60 Ibid, p. 308.

61 This provision has not been incorporated into English law.

62 The Human Rights Committee, established under Article 28 of the International Covenant on Civil and Political Rights, monitors states' compliance with the Covenant. This includes hearing individual complaints against those states which are also party to the first Optional Protocol to the Covenant.

parties to provide effective remedies to victims, including the provision of compensation for physical and mental injury and suffering caused by inhuman treatment.⁶³

Article 13 of the European Convention provides that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”. In *Askoy v. Turkey*, having stated that the “nature of the right safeguarded under Article 3 has implications for Article 13”, the European Court affirmed that:⁶⁴

“as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.”

Although this provision has not been incorporated into the Human Rights Act, the Lord Chancellor accepted during the reading of the Bill that the Act gives effect to Article 13.⁶⁵

1.4 The role of national courts in upholding international law

International tribunals have played a significant role in adjudicating crimes against international law, from the Nuremberg Tribunal to the International Criminal Tribunal for the Former Yugoslavia⁶⁶ and the

63 *Tshitenge Muteba v. Zaire* Case No. 124/1982 (1984). This was reiterated by the Human Rights Committee in their general comment on Article 7: General Comment No. 20, para. 14.

64 (1996) 23 EHRR 553, para. 98. The absence of such an investigation, notably by the Prosecutor, entailed a violation of Article 13.

65 See K. Starmer, *European Human Rights Law* (Legal Action Group, 1999) pp. 11-13 on Article 13, and Hansard, HL Debs (Committee Stage) Col. 475, 18 November 1997.

66 The Statute of the International Criminal Tribunal for the Former Yugoslavia was adopted by UN Security Council Resolution 827 of 25 May 1993.

International Criminal Tribunal for Rwanda.⁶⁷ Within a few years an International Criminal Court will be in existence.⁶⁸ However, there are occasions where cases have proceeded in national courts even though an international criminal tribunal exists which also has jurisdiction over the case. This is in accordance with Article 9 of the Statute of the Yugoslavia Tribunal which states that international and national jurisdictions shall have concurrent jurisdiction, although the International Tribunal has primacy over national courts. Despite the progression towards the creation of the International Criminal Court, there will continue to remain a role for national courts in prosecuting international crimes. Article 1 of the Statute of the International Criminal Court emphasises this by stating that the Court shall be complementary to national criminal jurisdictions. Moreover, until the Statute is universally ratified there will still be persons not subject to its jurisdiction.

National courts may still bring a prosecution where an international tribunal has decided not to proceed. In Belgium, it was argued that the case against Ntezimana for acts of genocide in Rwanda should be dismissed because the failure of the Rwanda Tribunal to request his transfer demonstrated that there was neither sufficient nor credible evidence to support the allegations. The Belgian court dismissed the motion finding that evidence discovered by the Belgian investigating magistrate explicitly pointed to his involvement in genocide and ordered that the action could continue.⁶⁹ In Germany, three suspected Serbian war criminals were arrested; one was transferred to the Yugoslavia Tribunal and the other two, who were not indicted by the Tribunal, were tried in Germany.⁷⁰

67 The Statute of the International Criminal Tribunal for Rwanda was adopted by UN Security Council Resolution 955 of 8 November 1994.

68 Rome Statute of the International Criminal Court, adopted 17 July 1998, UN Doc. A/CONF.183/9.

69 See Appendix 8 for a summary of comparative practice generally, and n. 21 of that appendix relating to this specific case.

70 See Appendix 8.

2. The Definition of Torture

The procedure for bringing a case in English law against a torturer is, at present, more clearly established for criminal prosecutions than for civil actions. There is a specific criminal offence of torture provided for under s.134 of the Criminal Justice Act 1988.⁷¹ By contrast, for the purposes of taking a civil action, an act of torture comes within the general heading of “trespass to the person” which incorporates assault, battery and false imprisonment.⁷² The torts make no distinction whether the injury is minor, serious or fatal, and do not include any specific provisions which would make procedures to sue torturers from abroad more simple.⁷³

The definition of “torture” under s.134 of the Criminal Justice Act is based on that contained in the Torture Convention, Article 1 of which states that:⁷⁴

“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

71 The provisions are based on relevant articles of the Torture Convention.

72 Article 14 of the Torture Convention, which includes the right to fair and adequate compensation, has not been incorporated into English law. However, see the Draft Redress for Torture Bill at Appendix 7.

73 The fact that the civil action involves an allegation of torture may be of significance, for example when the courts exercise discretion on matters of jurisdiction. See for example *forum non conveniens* below, Section 13.1.1 and state immunity, Section 14.2.

74 An examination of the content of this article follows below. For a detailed analysis see N. Rodley, *The Treatment of Prisoners under International Law*, 2nd edn (Oxford: Clarendon Press, 1999), Chapter 3. That chapter considers decisions not only from the European Court, but also from other international tribunals, including the UN Human Rights Committee (see above, n. 62), the Inter-American Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia.

suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The case law of Article 3 of the European Convention on Human Rights has been particularly useful in providing a clearer indication of the definition of torture. Article 3 is concerned with torture, inhuman and degrading treatment and punishment. The European Court has confirmed that these are distinct categories of prohibited treatment or punishment that are separated by degrees of severity.⁷⁵ Torture, which is the most severe, has been defined as “deliberate inhuman treatment causing very serious and cruel suffering”.⁷⁶ The European Court held that the threshold for each category is relative and will depend on:⁷⁷

“ ... all the circumstances of the case such as the duration of the treatment, its physical or mental effects and in some cases the sex, age and health of the victim, etc.”

The use of “etc.” in the judgment highlights that the list is not supposed to be exhaustive.

⁷⁵ The guidelines for separating the different categories were set out in *Ireland v. UK* (1979-80) 2 EHRR 25, para. 162. It should be noted that, in addition to the terms used in the European Convention, the UN Torture Convention includes also “cruel treatment or punishment”. However, this does not have any practical consequences for defining the provisions, since it would come beneath torture and above degrading treatment.

⁷⁶ *Ireland v. UK*, n. 75 above, para. 167; *Aydin v. Turkey* (1997) 25 EHRR 251, para. 82.

⁷⁷ *Ireland v. UK*, n. 75 above, para. 162; see also *Tyrer v. UK*, n. 19 above, para. 31.

2.1 “Severe pain or suffering”

The courts have recognised that “severe pain or suffering” is a vague term.⁷⁸ While it may be left to a jury to determine whether the particular treatment or punishment amounts to severe pain or suffering under s.134 of the Criminal Justice Act, clarification has been provided by international tribunals.⁷⁹

The European Court (unlike the European Commission)⁸⁰ was initially reluctant to recognise severe abuses as amounting to torture. However, it has, more recently, accepted that certain acts can be described as torture.⁸¹ Significantly, the recent case of Selmouni v. France has seen the Court highlight its new attitude to the definition of torture. It stated that:⁸²

“having regard to the fact that the Convention ‘is a living instrument which must be interpreted in the light of present-day conditions’ ... certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in the future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”

When considering whether the treatment to which an individual has been subjected amounts to torture, the European Court has grouped together incidents if they are part of a systematic assault on a person.

78 See Pinochet (No. 3), n. 42 above, p. 885.

79 For a detailed analysis see Rodley, n. 74 above.

80 See the decision of the Commission in the Greek Case (1969) 12 Yearbook 1.

81 See, for example, Askoy v. Turkey, n. 64 above; Aydin v. Turkey, n. 76 above.

82 28 July 1999 (Application No. 25803/94), para. 101; case comment in [1999] EHRLR 645.

In Ireland v. UK the Court held that:⁸³

“A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system.”

The European Court has preferred not to try and categorise each individual act of ill-treatment, although it has on occasion explicitly recognised that some specific acts amount to torture. For instance, it confirmed that the rape of a detainee by a state official involves a level of pain and suffering which would always be classified as torture.⁸⁴

It is the severity of the pain rather than the identification of resulting injuries that should be considered when deciding upon the category under which the abuse fits, although evidence of the injury may provide an indication of the extent of the pain inflicted. Some techniques can cause extreme pain without leaving visible marks on the victim. One example is the practice of *falaka*, which involves beatings on the soles of the feet of the victim. Victims are often told to walk on salt in order to reduce the swelling and the marks. When done “expertly”, it leaves no outwardly visible traces of violence, and the victim will often be able to move around after a few days. The use of this practice can often be proved by a medical process known as bone scintigraphy,⁸⁵ and neuro-physiological diagnostic tests such as electromyography (EMG).⁸⁶

⁸³ Ireland v. UK, n. 75 above, para. 159.

⁸⁴ Aydin v. Turkey, n. 76 above, paras 83 and 86.

⁸⁵ See Human Rights Watch, *Turkey: Techniques of Abuse*, www.hrw.org/hrw/reports/1997/turkey/Turkey-04.htm

⁸⁶ Further details may be obtained from the National Hospital for Neurology and Neurosurgery.

2.2 Physical and mental torture

It is clear from Article 1 of the Torture Convention, as well as s.134(3) of the Criminal Justice Act, that torture does not just involve physical suffering. The European Court was of the opinion that the interrogation methods highlighted in Ireland v. UK caused:⁸⁷

“... if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation”.

In Estrella v. Uruguay the UN Human Rights Committee was of the view that the applicant, a well-known guitarist, who was put through a mock amputation of his hands with an electric saw in an effort to force him to admit subversive activities, was subjected to psychological torture.⁸⁸

Torture may result not only from the acts of public officials but also from their omissions.⁸⁹ These omissions which may cause torture or result in torturous acts being committed must be deliberate. This is explicitly stated in s.134(3) of the Criminal Justice Act. Liability for omissions was recognised in the case of Velásquez Rodríguez v. Honduras. The Inter-American Court of Human Rights referred to a state's:⁹⁰

“legal duty ... to carry out a serious investigation ..., to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.”

87 Above, n. 75, para. 167; see also Aydin v. Turkey, above, n. 76, para. 86.

88 Estrella v. Uruguay Case No. 74/1980 (1983), Report of the Human Rights Committee, GAOR 38th Session, Supplement No. 40 (1983) Annex XII, para. 1.6.

89 For the sake of convenience, any reference to acts of torture in the present text should be taken to include acts or omissions.

90 July 1988, Series C No. 4, para. 174.

It went on to state that:⁹¹

“If the State apparatus acts in such a way that the violation goes unpunished ... the State has failed to comply with its duty to guarantee the full and free exercise of those rights to persons within its jurisdiction.”

2.3 Public officials or persons acting in an official capacity

The offence of torture is focused on those people in positions of public authority who abuse their power. However, Article 1 of the Torture Convention provides that the role of public authorities should not be considered narrowly when acts of torture have been committed. It states that the act must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity”. This provision is reflected in s.134(1) and (2) of the Criminal Justice Act 1988.⁹² Although there is no definition of either “public officials” or “official capacity” it clearly includes heads of state, ministers of the state, members of the armed forces, the police and security services and prison officers.

One further issue was raised before the Committee against Torture⁹³ in the case of Elmi v. Australia.⁹⁴ It was noted that Somalia had been without a central government for a number of years, with control resting in the hands of a number of warring

91 Ibid, para. 176.

92 See below, Section 6.2.

93 The Committee against Torture, established under Article 17 of the Torture Convention, monitors states' compliance with the Convention and *inter alia* hears individual complaints submitted under Article 22 of the Convention.

94 Communication 120/1998, 6 BHRC 433. The case was brought on the basis of Article 3 of the Convention which states that “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

factions. Australia argued that a Somali asylum seeker's fear of torture did not fall within the definition of Article 1 as it required acts to be committed by public officials. However, the Committee decided that:⁹⁵

“ ... the international community negotiates with the warring factions and ... some of the factions ... have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase ‘public officials or other persons acting in an official capacity’.”

2.4 Intention and purpose

Treatment will only constitute torture if the perpetrators deliberately intended to cause it.⁹⁶ It was asserted by the European Commission in the Greek Case that “‘torture’ is often used to describe treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment”.⁹⁷ Article 1 of the Torture Convention expands the list. It refers to acts against the victim which are carried out for such purposes as:

“obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ...”.

95 Ibid, p. 446.

96 See Ireland v. UK, n. 75 above, para. 167.

97 Above, n. 80, p. 186; see also Askoy v. Turkey, n. 64 above, para. 64; Ireland v. UK, n. 75 above, para. 167.

2.5 The burden and standard of proof

2.5.1 The criminal burden and standard of proof

Article 6(2) of the European Convention states that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. Accordingly, the general rule is that the burden of criminal proof rests with the prosecution.⁹⁸ The European Court has emphasised that:⁹⁹

“It requires States to confine [presumptions of fact or of law] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”

However, where the case concerns torture which is denied by the defendant, the Court refused to state that the burden had to rest with the prosecution, choosing instead to examine all the material before it.¹⁰⁰ Therefore, in the case of Selmouni v. France, the Court decided that:¹⁰¹

“where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention.”

Even if the burden of proof has transferred to the defendant, the standard of proof for the prosecution in cases concerning torture is still to prove their case “beyond reasonable doubt”.¹⁰²

98 Barbera, Messegue and Jabardo v. Spain (1989) 11 EHRR 390, para. 77.

99 Salabiaku v. France (1991) 13 EHRR 379, para. 28.

100 Ireland v. UK, n. 75 above, para. 160.

101 Above, n. 82, para. 87. See also Askoy v. Turkey, n. 64 above, para. 61; Tomasi v. France (1992) 15 EHRR 1, paras 108-11; Ribitsch v. Austria (1995) 21 EHRR 573, para. 34.

102 Above, n. 82, para. 90.

The Court in Ireland v. UK stated that the standard of proof might be satisfied:¹⁰³

“ ... from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account.”

2.5.2 The civil burden and standard of proof

In Al-Adsani, the Court of Appeal stated, following a claim of intimidation made by the claimant, that:¹⁰⁴

“It is common ground that the onus is on the plaintiff to satisfy the Court on the balance of probabilities.”

Article 6(1) of the European Convention does not govern the burden and standard of proof in civil proceedings, although the legal process must fulfil the requirement of overall fairness. The case law has indicated that the burden and standard of proof must not be at a level where they will create an imbalance between the parties.¹⁰⁵

103 Above, n. 75, para. 161.

104 Above, n. 54, p. 545.

105 G. v. France (1988) 57 DR 106 (Commission).

PART II CRIMINAL CASES

3. Involvement in Criminal Action – General Points to Consider

It may be questioned why we are considering legal involvement on behalf of torture survivors in criminal prosecutions when, unless proceeding with a private prosecution, the case will be handled by the Crown Prosecution Service (CPS). In the case of crimes committed abroad, the UK prosecuting authorities will not normally have available in a timely way all the necessary information to pursue a prosecution. The pursuit of such actions therefore requires the active involvement of other parties with a legitimate interest in bringing the individuals concerned to justice.

In July 1996, the Home Office published a report of a Steering Committee which had been asked to carry out a review of extraterritorial jurisdiction with a view to considering whether the UK should extend extraterritorial jurisdiction over serious offences such as “sex tourism” offences committed by British nationals abroad.¹⁰⁶ One of the matters the Committee considered was the role played by non-governmental organisations in providing evidence, particularly those which work with victims in the countries where the crimes are committed and are in a position to obtain first-hand information which is not available to the police and other authorities. The Committee acknowledged the important role that is often played by such organisations in compiling information, ensuring that offences are quickly brought to the attention of the appropriate authorities, and assisting the gathering of evidence by the police.¹⁰⁷ A concern that was expressed was whether such organisations would always be able to produce evidence in a form which would be

106 Home Office Review of Extra-Territorial Jurisdiction, Steering Committee Report (July 1996).

107 Ibid, paras 3.32 to 3.35, pp. 28-9.

admissible in the UK courts. While the Committee were looking specifically at the context of “sex tourism” cases, the same principles apply in cases of torture.

3.1 The importance of involving torture survivors

Experience has shown that the intervention of torture survivors, as well as organisations like REDRESS, can often provide the momentum without which a criminal prosecution would not be commenced. The pursuit of those involved in their torture often provides an incentive for torture survivors to try to obtain justice which may then help them proceed with their lives. The knowledge that their torturer is close by is likely to put the memories of the events and their effects at the forefront of the mind of any survivor. Survivors will often take a close interest in the progress of a criminal prosecution, and may have useful information to impart over and above their role as a witness to the crime. There are, in particular, three occasions during a criminal investigation when information provided by torture survivors may be vital if the prosecution is to proceed.

The first such occasion is at the point when the identity of a person suspected of being involved in acts of torture is brought to the attention of the authorities. It is almost invariably either the survivors of torture or organisations concerned with torture who bring the torturer’s presence in the jurisdiction to the attention of the police. The person’s presence may be uncovered through a tip that they have entered or are about to enter the jurisdiction. Their identity may have been revealed by word of mouth, often among expatriates living in England who are from the same country as the torturer. Torturers have also been recognised through a chance sighting. The police, on the other hand, are less likely to become aware of the existence of such a person residing either temporarily or permanently within the jurisdiction, since they are unlikely to have made any investigations into a crime committed in another country. They are also unlikely to have many details available about the activities of a person involved in torture abroad. The information which survivors can provide may be essential if investigations are to

take place quickly and discreetly so as not to alert the suspect that they are under investigation, giving them an opportunity to flee the jurisdiction.¹⁰⁸

Secondly, once an arrest has been made, torture survivors and relevant organisations are often able to provide valuable information which the CPS may find of great assistance when deciding whether to proceed with a prosecution. The CPS will otherwise not usually be in possession of this information, particularly if the witnesses are located in other countries.¹⁰⁹

Thirdly, the evidence that torture survivors provide is likely to be crucial at the point when the case is placed before the Attorney-General, whose consent is required if the prosecution is to proceed.¹¹⁰

3.2 The role of victims in criminal prosecutions

The English criminal justice system essentially excludes the victims of crime from its process. This is contrary to international and regional instruments which recognise the importance of including them in the justice process. In 1985, the Committee of Ministers of the Council of Europe recommended that the needs of the victim should be taken into account to a greater degree throughout all stages of the criminal justice process.¹¹¹ The UN Declaration of Basic Principles of Justice for Victims of Crime

108 There are occasions where the perpetrator might reside in England, for example, having sought asylum here, and may be less likely to be able to flee the jurisdiction.

109 See below, Section 7.3 on the role of the CPS. A special unit was established within the CPS under the 1991 War Crimes Act; this could be a useful model for a similar special unit to deal with those suspected of having committed crimes under international law such as torture.

110 For more detailed information, see below, Section 7.4.

111 Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Protection of the Victim in the Framework of Criminal Law and Procedure (adopted 28 June 1985).

and Abuse of Power 1985¹¹² also calls for judicial and administrative processes to be responsive to the needs of victims by, among other things, keeping them informed and allowing their views and concerns to be presented and considered at appropriate stages of legal proceedings.

In several European states, including France, Belgium, Italy and Germany, the system of *partie civile* allows victims a greater level of participation. It enables them, as a full party to the case, to attach civil proceedings to the criminal case, and to seek reparation through the proceedings. *Partie civile* provides victims with a quicker and cheaper way to obtain compensation than recourse to the civil courts, and gives them greater involvement in the criminal investigation.¹¹³ In the UK, although the 1996 Criminal Injuries Compensation Scheme is available to any person who is the victim of violent crime, the injury must have been committed within the UK and so this scheme is not available for acts of torture committed abroad.¹¹⁴

3.3 The importance of preparation, speed and discretion

Speed and discretion are sometimes essential if a suspected torturer from abroad is to be arrested within the jurisdiction.

It may be the case that a period of time has elapsed between a solicitor or organisation being approached by a torture survivor and the appearance of the torturer within the jurisdiction. Since the statements and contacts which solicitors have may be required at an early stage in the investigations, those persons who have provided or may have useful information should be asked to ensure that they make solicitors and organisations aware of any change in their

112 Adopted by UN General Assembly Resolution 40/34 on 29 November 1985.

113 For further information on *partie civile*, including the advantages and disadvantages, see Appendix 8, Section 1.2.3.

114 See D. Foster, *Claiming Compensation for Injuries*, 2nd edn (Butterworths Tolley, 1997) p. 8.

contact details, as they may need to be traced in order to swear affidavits and/or give testimony.

Should a solicitor be informed of the presence of a torturer within the jurisdiction they should immediately contact the police. In addition, organisations concerned with torture survivors and expatriate communities from the country where the torture took place should be contacted, as they may be in a position to provide information which the authorities will require.

4. The Scope of Extraterritorial Jurisdiction in International and UK Law

4.1 Universal jurisdiction in international law

It is often the case that violators are not brought to justice in their own countries, usually because there is a lack of political will to do so. The universal principle provides states with the jurisdiction to prosecute certain crimes even though they are committed in a foreign territory and do not involve their own subjects. The origins of the concept of universal jurisdiction lie in the crime of piracy which was usually committed on the high seas, beyond the jurisdiction of any country. States were seen as having an obligation *erga omnes* to arrest and try pirates wherever they were found. Since that time, certain other crimes, including torture, have come to be regarded as so abhorrent that those who commit them should face trial in whatever jurisdiction they are found.¹¹⁵

Article 5(2) of the Torture Convention expressly provides for universal jurisdiction:

“Each State Party shall ... take such measures as may be necessary to establish its jurisdiction over [the offences referred to in article 4] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 ...”.

This is supported by Article 7(1) which highlights the obligations on states parties. It provides that:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

¹¹⁵ For more about obligations *erga omnes*, see above, Section 1.1.3.

The obligation on states to “extradite or prosecute” was confirmed by Lord Browne-Wilkinson in Pinochet (No. 3) who stated that:¹¹⁶

“if the states with the most obvious jurisdiction ... do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country”.

These obligations interact with the UK’s other international law obligations such as those relating to refugees. The 1951 UN Convention relating to the Status of Refugees specifically provides that the Convention will not apply to any person with respect to whom there are serious reasons for considering that, *inter alia*:

“He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes”.¹¹⁷

In other words, the UK will not be obliged to afford the rights and privileges given by the Refugee Convention, including the prohibition on expulsion or *refoulement* (forcible return), to such persons. However, the UK remains bound by its obligations under other international instruments as regards such persons and would be in danger of breaching them if it were to turn away a suspected torturer who was seeking asylum. For example, it is bound by the European Convention on Human Rights not to return a person to another state “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.¹¹⁸ Similar obligations are set out in the UN Torture Convention, Article 3 of which provides that “No State Party shall expel, return (*refouler*) or extradite a person

¹¹⁶ Above, n. 42, p. 841.

¹¹⁷ 1951 Convention relating to the Status of Refugees, Article 1.F(a).

¹¹⁸ Soering v. UK, n. 18 above, para. 91.

to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". But the Torture Convention, in Articles 5 and 7(1), also provides that states parties should, if they do not extradite, put on trial individuals alleged to have committed or participated in acts of torture. This obligation is given effect by s.134 of the Criminal Justice Act 1988 and other relevant provisions such as the Geneva Conventions Act 1957.¹¹⁹

4.2 Territorial jurisdiction of the courts in England and Wales

The courts in England and Wales work under the general rule that they will only exercise criminal jurisdiction in respect of acts done or omissions made by any person within the territorial jurisdiction.¹²⁰ This rule applies regardless of whether or not the perpetrator or the victim is a British subject.¹²¹ For example, if a person was struck by someone while in another country and later came to England and died as a result of the blow, no territorial jurisdiction would normally arise in England and Wales.¹²²

However, the general rule that the courts are not concerned with conduct abroad is subject to certain statutory exceptions.¹²³ It is well established that statutes are not intended to apply to conduct taking place outside the territorial jurisdiction of the Crown unless it

119 See below, Section 4.3.

120 See *Board of Trade v. Owen* [1957] AC 602 (HL). Lord Tucker stated at p. 625 that criminal law is alone concerned with "the preservation of the Queen's peace and the maintenance of law and order within the realm".

121 For the meaning of "British subject" see the British Nationality Act 1981 s.51(1),(2). For the meaning of non-British subjects, often referred to as "aliens", see the British Nationality Act 1981 ss.50(1) and 51(4). Citizens of the Republic of Ireland are not regarded as aliens; see the Ireland Act 1949 s.2(1) and the British Nationality Act 1981 ss.31 and 50(1).

122 See *R v. Lewis* (1857) Dears & B 182; *R v. Jameson* [1896] 2 QB 425.

123 *Cox v. Army Council* [1963] AC 48 (HL), per Viscount Simmonds p. 67.

is clearly stated that the offence should be triable in an English court.¹²⁴ Most of the statutory exceptions are concerned with British subjects who commit crimes overseas.¹²⁵ For example, under s.9 of the Offences Against the Person Act 1861, murder or manslaughter committed by a British subject abroad may be tried in the UK regardless of whether the person killed was a British subject or not. However, there are some statutes which are relevant to acts of torture perpetrated out of the jurisdiction by foreign nationals.

4.3 Relevant UK legislation providing extraterritorial jurisdiction

The following Acts include provisions against torture or have been implemented in a manner which may be used effectively when prosecuting those involved in perpetrating torture.

4.3.1 Section 134 of the Criminal Justice Act 1988¹²⁶

Certain provisions of the Torture Convention¹²⁷ are incorporated into English law by s.134 of the Criminal Justice Act 1988, which is the most relevant and potentially effective statute with respect to torture.

Section 134(1) provides that a person commits the offence of torture if they commit certain acts in the United Kingdom *or elsewhere*.

124 *Air India v. Wiggins* 71 Cr App R 213 (HL), per Lord Diplock p. 217. See also Archbold: *Criminal Pleading Evidence and Practice* (2000), para. 8-33 et seq.

125 *Halsbury's Laws of England* Vol. 11(1), para. 634.

126 For a description of other aspects of s.134 of the Act see below, Section 6.

127 See above, Section 2.

4.3.2 Geneva Conventions Act 1957 as amended by the Geneva Conventions (Amendment) Act 1995

The four Geneva Red Cross Conventions of 1949¹²⁸ were incorporated, in part, into English law by the Geneva Conventions Act 1957.¹²⁹ Section 1(1) states that:

“Any person, whatever their nationality, who, whether in or outside of the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach ... shall be guilty of an offence.”

The definition of “grave breaches” includes “torture or inhuman treatment” and “wilfully causing great suffering or serious injury to body or health”.¹³⁰ However, the Geneva Conventions require that universal jurisdiction be exercised only for offences committed in international armed conflict and not internal armed conflict; they do not spell out any legal consequences for the violation of Common Article 3, which applies solely to situations of “armed conflict not of an international character”. The Geneva Conventions (Amendment) Act 1995 extended universal jurisdiction to grave breaches of the first Additional Protocol 1977, which concerns international armed conflict.¹³¹ However, it does not apply to the second Additional Protocol, relating to the protection of victims of non-international armed conflicts. Since most present day conflicts are of an internal

128 The four Geneva Conventions of 1949 are:

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Geneva Convention relative to the Treatment of Prisoners of War;
- Geneva Convention relative to the Protection of Civilian Persons in Time of War.

129 Geneva Conventions Act, s.1(1A)(a)(i-iv).

130 Schedules 1-4.

131 Section 1(1A)(b).

rather than an international character, this considerably diminishes the possibility of prosecutions being brought under the Act.

However, international tribunals have offered an indication that the attitude to internal armed conflict may be starting to change. The Statute of the International Criminal Tribunal for Rwanda, being concerned with atrocities arising out of internal armed conflict, includes a specific provision giving the Tribunal jurisdiction over such violations.¹³² Notably, a similar provision is included in Article 8(2)(c) of the Statute of the International Criminal Court. In addition, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that customary international law does impose criminal liability for violations of Common Article 3.¹³³ Such developments in international law would allow or even require the UK to amend its law accordingly, so as to provide a specific legislative basis for exercising universal jurisdiction for serious violations of the Geneva Conventions committed in internal armed conflict.

4.3.3 Genocide Act 1969

Under the Genocide Act 1969, a person will be guilty of the offence of genocide if they commit any of the acts set out in Article II of the Genocide Convention 1948 with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”.¹³⁴ Such acts include “causing serious bodily injury or mental harm to members of the group”.¹³⁵ Article VI of the Genocide Convention provides that a person may be tried by:

“a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction”.

¹³² Statute of the Rwanda Tribunal, n. 67 above, Article 4.

¹³³ *Tadic* case, Case No. IT-94-1-T 7/5/97, 2 October 1995, 35 ILM (1996) 32, para. 137.

¹³⁴ Genocide Convention Article II, as set out in the Schedule to the Genocide Act.

¹³⁵ Genocide Convention Article II(b), as set out in the Schedule to the Genocide Act.

The silence of the Genocide Convention on the question of the exercise of universal jurisdiction by national courts has not been taken as an indication that as a matter of international law states may not establish universal jurisdiction for genocide. Some states have already recognised genocide as imposing an obligation *erga omnes* on states to exercise jurisdiction. This position was put in the Third Restatement of the Foreign Relations Law of the United States.¹³⁶ In addition, courts in Austria, Germany and Spain have accepted the exercise of jurisdiction over cases of genocide committed abroad even in the absence of an explicit provision in the Genocide Convention, while Belgium recently added genocide to the list of international crimes over which its courts may exercise universal jurisdiction.

As with war crimes committed in internal armed conflicts¹³⁷ it would appear that the UK could, as a matter of international law, introduce universal jurisdiction for genocide if it chose to do so.

4.3.4 War Crimes Act 1991

The War Crimes Act 1991 is not concerned with prosecuting those who have committed torture. It only gives the English courts jurisdiction over offences of homicide constituting a violation of the laws and customs of war committed in Germany or German-occupied territory between 1939 and 1945. The act in question must have been committed by a person who is now a British citizen or resident in the UK.

Recently, Anthony Sawoniuk was convicted under the Act, and although the chance of further prosecutions diminishes with time, there are useful lessons which may be learnt from the effective manner in which the Act has been implemented. In particular, the Act is notable for statutory provisions which saw the setting up of special units by the police and the CPS for investigating those suspected of war crimes.

¹³⁶ Restatement (Third) of the Foreign Relations Law of the United States (1987).

¹³⁷ See above, Section 4.3.2.

5. Issues related to Universal Jurisdiction for Torture

In addition to questions relating to extraterritorial jurisdiction, consideration needs to be given to issues such as when the act of torture took place (retrospectivity); whether, in an extradition case, it is criminal under both of the relevant jurisdictions (double criminality); and whether issues of double jeopardy may arise.

5.1 Retrospectivity

The question as to whether universal jurisdiction applies retrospectively is of great significance where the torturous acts were committed prior to the date when the UK had incorporated the Torture Convention or the other relevant conventions into UK law.¹³⁸ If, as in the case of Augusto Pinochet, the case involves extradition¹³⁹ or a claim of state immunity¹⁴⁰ it may also be relevant to consider when the acts took place relative to the date when the state seeking extradition and/or the country where the torture took place ratified or incorporated the Convention.

The general rule on retrospective laws is that, in the absence of express words to the contrary, no person may be held guilty of any criminal offence which did not constitute such an offence under national or international law at the time when it was committed.¹⁴¹

However, in the Parliamentary debate on the issue of retrospectivity held during the passage of the War Crimes Bill, it was concluded that if the acts of an individual were contrary to international law, and the law of most countries, the principle of non-retrospectivity should not prevent them from being prosecuted.

138 Section 134 of the Criminal Justice Act came into force on 29 September 1988.

139 See below, Sections 5.2 and 5.3.

140 See below, Section 8.2.1.

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

This seems to be in accordance with Article 7(2) of the European Convention, which qualifies Article 7(1) with respect to retrospectivity. It states that:

“This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

The *travaux preparatoires* to Article 7(2) clarify the intention of the provision, stating that:¹⁴²

“Article 7 does not affect laws which, under the very exceptional circumstances at the end of the Second World War, were passed to punish war crimes, treason and collaboration with the enemy, and does not aim at any legal or moral condemnation of those laws.”

Although reference is made only to the crimes of World War II, international human rights law is a living instrument,¹⁴³ and it may well follow that acts of torture should be interpreted as giving rise to an exception under Article 7(2). This argument is supported by Article 15(2) of the International Covenant on Civil and Political Rights, which states that non-retrospectivity is subject to a proviso that it should not prejudice the trial and punishment of any person for an act which was recognised as criminal according to international law at the time it was committed.

In Pinochet (No. 3) the House of Lords decided that the rule of non-retrospectivity meant that Augusto Pinochet could not be extradited to Spain for acts of torture committed before the UK had incorporated the Torture Convention in 1988.

¹⁴² D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995), p. 282.

¹⁴³ See above, nn. 19 and 20 and accompanying text.

But Lord Millett, who put forward the only dissenting judgment on this point, challenged the rule of non-retrospectivity on the basis that it was outweighed by the need for universal jurisdiction because of the nature of the crimes.¹⁴⁴ In general, however, it can be expected that universal jurisdiction provisions in UK law such as that under s.134 of the Criminal Justice Act 1988 for torture will not be applied retrospectively, and that a person could not be prosecuted for acts committed prior to the date the relevant provisions came into force.¹⁴⁵

5.2 Double criminality¹⁴⁶

Issues relating to double criminality arose during the extradition hearing in Pinochet (No. 3). The double criminality principle, which applies in extradition cases, holds that nobody can be extradited to a foreign country unless the conduct alleged constitutes a crime under both the law of the foreign country and the law of the UK. Where the country requesting extradition is itself prosecuting someone for crimes committed in another country, the Extradition Act requires that, in order to constitute an “extradition crime”, the crime concerned be one which can be prosecuted extraterritorially both in the requesting state and in the UK.¹⁴⁷

In Pinochet (No. 3), the House of Lords had to decide whether the double criminality rule required the conduct to have been an extraterritorial crime at the date when the extradition was requested

144 See above, n. 53 and accompanying text.

145 Letter from the Attorney-General’s Chambers to REDRESS dated 22 July 1992, on file at REDRESS.

146 Strictly speaking, the term “double actionability” is a more precise description of the requirement that a person can be prosecuted for a particular act in both countries, whereas “double criminality” refers to the requirement for an action to be categorised as a crime in both countries. In practice, in any particular case, the two are almost always coterminous, so this Manual usually uses the more familiar term “double criminality”.

147 Extradition Act 1989, s.2.

(as was accepted by the Divisional Court), or at the date of the actual conduct. Six of the seven judges in *Pinochet (No. 3)* held that the relevant date was the date on which the conduct took place. Therefore, since it was only after the coming into force of s.134 of the Criminal Justice Act 1988 that torture was a crime which could be prosecuted extraterritorially under UK law, Augusto Pinochet could only be extradited to face charges in relation to acts of torture committed after that date.

Lord Browne-Wilkinson, who gave the leading judgment on this point, rejected the contrary finding in the case by the Divisional Court.¹⁴⁸ Although he accepted that the acts of torture amounted to a violation of *jus cogens*, Lord Browne-Wilkinson stated that the 1870 Extradition Act made it clear that the double criminality rule required the conduct to be criminal under English law at the date of conduct and not the date when the extradition was requested. He also found that there had been no discussion about changing the date on which double criminality applied during the drafting of the 1989 Extradition Act or in the period when the European Extradition Convention was being negotiated.¹⁴⁹

Whether or not the other country has ratified the Torture Convention, it should be established whether, and to what extent, torture is prohibited and what defences might exist under the national law of that country. It might also be possible to argue that torture is prohibited in that country on the basis of customary international law.¹⁵⁰

5.3 Extradition

The Extradition Act 1989 applies to all of the UK's extradition arrangements other than with the Republic of Ireland, and deals with

¹⁴⁸ *Pinochet (No. 3)*, n. 42 above, pp. 837-9.

¹⁴⁹ *Ibid*, p. 839.

¹⁵⁰ See above, Section 1.1.2, and in particular the point raised in the Australian case of *Nulyarimma* at n. 35.

extradition both to and from the UK.¹⁵¹ However, different procedures will apply depending on whether the country concerned is a party to the European Convention on Extradition 1957, is a designated Commonwealth country or UK colony, or has a special bilateral extradition treaty with the UK. In addition, where no extradition arrangements exist between the UK and a country which is party to the Torture Convention, an Order in Council may be made directing that the provisions of the Extradition Act would apply in cases of extradition for torture.¹⁵²

Some of the issues that may arise in cases where the UK is requested to extradite a person to face charges of torture arose in the Pinochet case, such as the requirement of double actionability.¹⁵³ A central question is whether torture is a crime for which a person can be extradited from the UK, referred to in the Extradition Act as an “extradition crime”. Under s.2 of the Act, an extradition crime is defined as follows:

- “(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law;
- (b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies –
 - (i) the condition specified in subsection (2) below; or
 - (ii) all the conditions specified in subsection (3) below.”

151 See generally A. Jones QC, *Jones on Extradition* (Sweet & Maxwell, 1995).

152 Extradition Act 1989, Part V, s.22, Extension of purposes of extradition for offences under Acts giving effect to international Conventions.

153 See above, Section 5.2 and n. 146.

Subsection (2) requires that “in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.”

The conditions specified in subsection (3) are:

- “(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;
- (b) that the conduct constituting the offence occurred outside the United Kingdom; and
- (c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.”

It is clear that torture and related offences such as conspiracy to torture or aiding and abetting torture would fulfil the above requirements, whether the crime was committed in the state requesting extradition or in another state in circumstances in which the requesting state is exercising extraterritorial jurisdiction. Torture is a crime for which UK law affords extraterritorial jurisdiction, and it is one for which the penalty is life imprisonment.

The Extradition Act sets out, in s.6, a number of exceptional situations in which a person’s extradition from the UK will be refused. One of these is that “the offence of which that person is accused or was convicted is an offence of a political character”.¹⁵⁴ It is extremely unlikely that torture would be considered to be such an offence. The Extradition Act specifically provides that genocide and terrorism will not be considered to be offences of a political character¹⁵⁵ and Home Secretary Jack Straw, when announcing his decision

154 Extradition Act 1989, s.6(1)(a).

155 Sections 23(1) and 24(1) respectively.

to sign an authority to proceed in the extradition of Augusto Pinochet on 9 December 1998, specifically said that it did not appear to him that the offences charged, which included torture and conspiracy to torture, were of a political character.¹⁵⁶

5.4 Double jeopardy

The concept of double jeopardy is recognised in Article 4 of Protocol 7 of the European Convention. Although the UK has not yet ratified Protocol 7, the Government has indicated its intention to do so. This intention has been supported in a recent study by the Law Commission.¹⁵⁷ While Article 4(1) of Protocol 7 prevents a person being tried for the same offence twice, it would be possible to re-open the case if there were new evidence or if there were discovered to be a fundamental defect in the previous proceedings which affected the outcome of the case.¹⁵⁸

It may be the case that a prosecution against a person involved in torture has already taken place and failed in the country where the act took place. Under the doctrine of *autrefois convict or acquit*, the position under English common law is that a person who has been tried by a court of competent jurisdiction in a foreign country may not be tried again in England in respect of the same offence.¹⁵⁹ However, the European Commission on Human Rights, in *S. v. FRG*, was of the opinion that double jeopardy is confined to prosecutions in the same jurisdiction.¹⁶⁰ Therefore, it might be possible to bring criminal proceedings in respect of the same allegations in different jurisdictions.

156 Hansard 9 December 1998.

157 "Double Jeopardy", Law Commission Consultation Paper No. 156 (1999), p. 3.

158 Article 4(2) of Protocol 7.

159 *Halsbury's Laws* Vol. 11(1), para. 635.

160 39 DR 43, p. 48. This was argued under Article 6(2) since Protocol 7 had not been ratified by Germany at the time.

The Statute of the International Criminal Court deals with this issue in Article 20(3) as follows:

“No person who has been tried by another court for [genocide, war crimes or crimes against humanity] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

6. Criminal Justice Act 1988 Section 134¹⁶¹

6.1 Section 134 – definition of torture¹⁶²

The definition of torture under s.134 should be considered in accordance with the earlier section of this Manual on the definition of torture.¹⁶³

6.2 Section 134(1) and (2) – scope of liability

6.2.1 Liability of public and private actors

Section 134(1) states that a public official or person acting in an official capacity, whatever their nationality, is guilty of an offence if they intentionally inflict severe pain or suffering on another person in the performance or purported performance of their official duties.¹⁶⁴

The phrase “purported performance” is an indication that the offence of torture may be committed even though such acts were disapproved of or forbidden by their superiors, or might have been had they known of them. The perpetrator must appear to all intents and purposes to be acting in their official capacity, as opposed to acting as a private individual.

Section 134(2) states that where a person, whatever their nationality, who does not come within subsection (1), that is, a private individual, intentionally inflicts pain at the instigation of or with the consent

161 Sections 136 and 137 of the Criminal Justice Act, dealing with torture in relation to extradition, were repealed by the Extradition Act 1989 s.37(1) as set out in Schedule 2. The Extradition Act is referred to above, Section 5.3.

162 It should be noted that a Home Office consultation paper “Violence, Reforming the Offences Against the Person Act 1861” (February 1998) has proposed to restate the provisions of s.134. See Clause 12 of the Draft Offences Against the Person Bill.

163 See above, Section 2.

164 For a definition of severe pain or suffering see above, Section 2.1.

or acquiescence of a public official or a person acting in an official capacity, they will also be guilty of an offence. This provision reflects Article 4(1) of the Torture Convention which requires states parties to ensure that “an act by any person which constitutes complicity or participation in torture” is an offence under domestic criminal law.

A similar point is made by the UN Human Rights Committee in its General Comment on Article 7 of the International Covenant on Civil and Political Rights:¹⁶⁵

“It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”

6.2.2 Complicity or participation in torture

The Torture Convention, under Article 1, deals with acts of torture “inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity”. Government officials at all levels may be held responsible if they fail to act to stop torture where it occurs. Failure of the authorities to act to prevent torture being inflicted could well be interpreted as, at the least, acquiescence. Indeed, as if to ensure that the Torture Convention extends beyond the actual committing of acts of torture, Article 4(1) of the Torture Convention provides that both “an attempt to commit torture” and an “act ... which constitutes complicity or participation in torture” are required to be considered criminal offences.

UK law recognises that a person who assists in the carrying out of torture at the time when the crime is committed, or assists or

¹⁶⁵ Human Rights Committee, General Comment No. 20, para. 2.

encourages the act prior to its commission, may be convicted as a party to the crime.¹⁶⁶

The fact that s.134(2) requires an element of knowledge by a public official means that it could be argued that any official who instigated, consented or acquiesced to acts of torture would be involved in a joint enterprise and would be considered to have been aiding, abetting counselling or procuring an offence.¹⁶⁷ However, the difficulty in obtaining the evidence to prove beyond reasonable doubt that a person who was not directly involved in an act of torture was involved in or responsible for ordering the act is not to be underestimated.

It was confirmed in Pinochet (No. 3) that a public official who ordered but did not commit any of the acts of torture alleged could be tried for torture and conspiracy to torture.¹⁶⁸ In addition, an official may be held responsible if they fail to take reasonable steps to prevent subordinates from committing torturous acts. This was the view of the US Supreme Court in Yamashita,¹⁶⁹ which approved the decision adopted at a previous hearing by the International Military Tribunal for the Far East (Tokyo Tribunal), stating that:

“a person in a position of superior authority should be held individually responsible for failure to deter the unlawful behaviour of subordinates if he knew they had committed or were about to commit crimes yet failed to take the necessary and reasonable steps to prevent their commission or to punish those who had commanded them.”

The precise scope of the responsibility of those who participate

166 R v. Millar [1970] 2 QB 54; see also *Halsbury's Laws* Vol. 11(1), para. 43 et seq.

167 For more details on joint enterprise, see Archbold (2000), paras 18-15 to 18-23.

168 Lord Hope in Pinochet (No. 3), n. 42 above, pp. 887-8.

169 Yamashita v. Styer (1946) 327 US 1, pp. 50-1.

indirectly in torture, and the extent to which the concept of command responsibility is relevant in UK law, requires further consideration by the courts.

6.3 Section 134(6) – the penalty

The offence is triable on indictment only. On conviction, the maximum penalty is life imprisonment.

6.4 Section 134(4) and (5) – defences

It is a defence to a prosecution under s.134 to prove that the officials had lawful authority, justification or excuse for their conduct. These defences are wider than those referred to in the Torture Convention, which simply states that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions” and specifies that superior orders may not be invoked as a justification for torture.¹⁷⁰ However, the case law of the European Commission and Court supports the view that freedom from torture is an absolute, non-derogable right. It is questionable, having regard to the case law of the European Convention, whether the defences raised in s.134(4) and (5) have any practical effect.¹⁷¹

The Commission’s inclusion of the concept of justifiability in its definition of torture in the Greek Case¹⁷² gave rise to considerable controversy. The Commission, therefore, in the Ireland Case found it necessary to state clearly that it did not have in mind the possibility that there could be a justification for any treatment in breach of Article 3 of the European Convention.

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

171 On justifiability see Rodley, n. 74 above, pp. 79-84.

172 Above, n. 80.

The Commission concluded that the prohibition of torture:¹⁷³

“... is an absolute one and ... there can never be, under the Convention or under international law, a justification for acts in breach of the provision prohibiting torture or other ill-treatment.”

The European Court stated that:

“the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”¹⁷⁴

This issue was considered further in the case of Chahal v. UK, where the European Court refused to allow deportation of the applicant to his country of origin, which lay outside the Council of Europe, because it was likely that he would face a violation of his Article 3 right.¹⁷⁵

There is no provision in English law for the defence that the torturer was acting under the orders of a superior. International law has made it clear that torturers cannot rely on the defence of superior orders any more than commanders can rely on privileges and immunities of the state they serve. Article 8 of the Nuremberg Charter states:

“The fact that the Defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment”.

It is possible that the defence of duress may be available, although it is only likely to be applied in exceptional circumstances, if at all.

173 (1976) 19 Yearbook 512, p. 750.

174 Tomasi v. France, n. 101 above, para. 115.

175 Chahal v. UK, n. 11 above, paras 76-80.

7. Bringing a Prosecution

7.1 Who can make an arrest

An offence under s.134 is a serious arrestable offence. This means that, providing the offence has been committed, the perpetrator can be arrested without a warrant by any person, not just a police officer. A police officer can also arrest someone whom they have reasonable grounds to suspect is guilty of the offence.¹⁷⁶

A citizen's arrest should not be undertaken lightly because the person making the arrest will be at risk of legal proceedings for false imprisonment, assault or malicious prosecution if the arrest does not result in a conviction.

7.2 The role of the police

The police should be contacted as soon as it is known that a suspected torturer is within the jurisdiction. At present there is no nationwide specialist unit of the police responsible for investigating crimes of torture committed abroad. Although a special unit was set up within the Metropolitan Police to deal with cases under the War Crimes Act,¹⁷⁷ this was disbanded once the investigations of World War II suspects were completed. No such unit has been designated to deal with other international crimes for which the UK is obligated to exercise universal jurisdiction, including torture.

The police will not arrest someone without good evidence since they can hold them under arrest for only a limited period prior to a charge being made. This will make it particularly difficult to successfully commence a prosecution against someone who is within the jurisdiction for only a short period because there may be insufficient

176 See Police and Criminal Evidence Act (PACE) 1984, ss.116 and 117.

177 See above, Section 4.3.4. The War Crimes Act 1991 was enacted to enable the investigation and prosecution of suspected Nazi war criminals from World War II believed to be living in the UK.

time in which to carry out an investigation. This is particularly the case where collecting sufficient evidence on which to base charges involves interviewing witnesses abroad or collecting other evidence outside the UK. It will therefore be important to be able to supply the police with as much information as possible concerning the whereabouts of witnesses and other evidence at the time the crime and the presence of the suspect is reported to the police.

7.3 The role of the Crown Prosecution Service (CPS)

Under s.3(2)(a) of the Prosecution of Offences Act 1985 it is the duty of the Director of Public Prosecutions (DPP) to take over the conduct of all criminal cases which have been “instituted on behalf of a police force”.

The main duty of the Crown Prosecution Service (CPS), under the direction of the DPP, is to take over and conduct all criminal proceedings commenced by the police. The CPS also has the power to discontinue proceedings or to change or amend any charges originally preferred.

Although a special unit was set up within the CPS under the 1991 War Crimes Act, this has been disbanded and no such unit has been set up with respect to cases concerning torture.

The CPS will need the Attorney-General's consent before a prosecution can take place.¹⁷⁸ The point at which this consent should be sought was considered in the case of *R v. Bull*. The court held that under s.25(2) of the Prosecution of Offences Act 1985:¹⁷⁹

“ ... certain procedural steps can take place prior to the time when the required consent is obtained. These comprise ‘the arrest without warrant, or the issue or execution of a warrant for the

178 Criminal Justice Act 1988, s.135(a); see below, Section 7.4.

179 (1994) 99 Cr App R 193, p. 207.

arrest of any person for any offence, or the remand in custody or on bail of a person charged with any offence' .”

7.4 Attorney-General consent

Under s.135 of the Criminal Justice Act, proceedings under s.134 in England and Wales may only be brought with the consent of the Attorney-General. The consent of the Attorney-General is usually required in cases where public policy, national security or relations with other countries may affect the decision whether to prosecute. Proceedings instituted without the necessary consent will be a nullity.¹⁸⁰

The Attorney-General's consent is usually signified in writing although there would appear to be no bar to its being given orally.¹⁸¹ Lord Widgery set out the Attorney-General's role with respect to consent. He stated that:¹⁸²

“First, the purpose of requiring the Attorney-General's consent to prosecutions under the [Explosive Substances Act 1883] is to protect potential defendants from prosecutions under an Act whose language is necessarily vague and general ... His duty is to consider the general circumstances of the case, and to decide whether any, and, if he thinks fit, which, of the provisions of the Act can properly be pursued against the defendant.”

More recently, the Attorney-General stated in Hansard on 19 July 1993 that the criteria for considering applications for consent in cases where it is required are, first, is there sufficient admissible and reliable evidence to afford a realistic prospect of a conviction; second, is it in the public interest to bring a prosecution. These are the normal criteria for prosecution adopted by the CPS.

180 *R v. Pearce* 72 Cr App R 295.

181 *R v. Cain* [1976] QB 496, p. 502C.

182 *Ibid*, pp. 502G-503A.

As a consequence, it is essential that as much evidence as possible, preferably in affidavit form, be submitted together with sufficient background information.

The refusal of the Attorney-General to provide consent could be subject to challenge by judicial review. A notice of application for judicial review is made in Form 86A, together with a supporting affidavit setting out the relevant facts and evidence.¹⁸³ However, there are a number of substantial obstacles to success of such an action.

Firstly, it is possible that the courts do not have the power to intervene against the decision of the Attorney-General. The House of Lords specifically rejected the dictum of Lord Denning in the Court of Appeal below who was of the opinion that refusal to give consent would allow the Court to intervene.¹⁸⁴ Viscount Dilhorne stated:¹⁸⁵

“The Attorney-General has many powers and duties He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts. If the court can review his refusal to consent to a relator action, it is an exception to the general rule. ... If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. This is appropriate because his error would not be an error of law but one of political judgment ...”.

In the case of R v. Solicitor General, Ex parte Taylor, the court

183 For full details of the procedural requirements in bringing a judicial review, see Civil Procedure Rules 1998, Schedule 1, Order 53.

184 Gouriet v. Union of Post Workers [1977] QB 729.

185 Gouriet v. Union of Post Workers [1978] AC 435, p. 487.

refused to review the decision of the Solicitor General on behalf of the Attorney-General not to give his consent to contempt proceedings.¹⁸⁶

It will, in addition, be very difficult to contest the Attorney-General's decision if there is no or very bare indication of the reasons for reaching that conclusion. This makes it very hard to make a specific challenge.

However, the refusal of the Attorney-General to provide consent might be subject to challenge under the European Convention on Human Rights. The prohibition on torture in Article 3 of the European Convention is an absolute and non-derogable right, and it would be difficult for the Attorney-General to refuse consent on the basis that the prosecution was not in the public interest. Additionally, under Article 6(1) of the European Convention, the fair trial provision, the Attorney-General must give some reason for any refusal, otherwise there is no way of questioning the validity of the decision. This may be especially necessary in cases concerning torture since, under the Torture Convention, as Lord Browne-Wilkinson confirmed in Pinochet (No. 3), if a state does not extradite it must prosecute.¹⁸⁷

7.5 Private prosecutions

The right of an individual to institute and conduct criminal proceedings is expressly preserved by the Prosecution of Offences Act 1985. In R v. Croydon Justices, Ex parte Holmberg, it was held that seeking police assistance did not turn proceedings brought by a local authority into proceedings brought on behalf of the police.¹⁸⁸

However, private prosecutions are also subject to the requirement in s.135 that proceedings for torture under s.134 can only be brought with the consent of the Attorney-General. In practice, it would be

186 [1996] Administrative Law Reports 206 (31 July 1995).

187 See above, Section 4.1 and n. 116.

188 (1993) 157 JP 277.

unlikely, if the Attorney-General's consent was provided, that the DPP would not take over the conduct of the case and pursue the matter. Under s.6(2) of the Prosecution of Offences Act the DPP has an unfettered discretion to intervene in any proceedings, and conduct them on their own behalf or serve a notice of discontinuance.

Since legal aid would not be available for bringing a private prosecution, the financial costs of bringing a prosecution would be considerable. A further disadvantage with bringing a private prosecution is that, where proceedings have not yet begun, neither the CPS nor the police are obliged to disclose any relevant material in their possession.¹⁸⁹ They will only be compelled to disclose material they intend to rely on at trial. When the accused is committed for trial, an application for witness summons can be made under the Criminal Procedure (Attendance of Witnesses) Act 1965 to produce all statements and exhibits in their possession relevant to the case.¹⁹⁰

Therefore, the only practical benefit of bringing a private prosecution would be in an effort to have the matter taken over by the DPP and continued by the CPS.

7.6 Costs

If a case is commenced as a private prosecution it might be possible to recover any costs incurred under the Prosecution of Offences Act ss.16-21.¹⁹¹ The court finally disposing of the case would have the power to make various orders as to costs. Where the offence is indictable, under s.17, a private prosecutor (but not the CPS or other prosecuting authority) may be awarded, out of central funds, an amount which the court thinks reasonably sufficient to compensate

189 *R v. DPP, Ex parte Hallas* (1987) 87 Cr App R 340.

190 *R v. Pawsey* [1989] Crim LR 152.

191 See Practice Direction (Costs in Criminal Proceedings), 93 Cr App R 89.

him or her for expenses properly incurred. This need not be the full amount. The prosecution does not have to be successful for such an order to be made.

If the prosecution did not proceed or failed, there is, of course, the strong possibility that a defendant would ask that those who conducted the private prosecution be responsible for the legal costs of the defence.¹⁹²

If a challenge for judicial review, such as of a decision not to prosecute, were brought and were unsuccessful, the applicant could be responsible for the costs incurred by the Treasury in contesting the case.¹⁹³ However, whether a costs order is made against the applicant is in the discretion of the courts, and one factor that they will consider is whether the action brought was in the public interest.¹⁹⁴

192 If the action is funded by third parties, the donors may be liable for the defendant's costs – see champerty in Section 11.4 below.

193 Ibid. See also *Halsbury's Laws* Vol. 10, para. 64.

194 For more detailed information on this issue with regard to civil applications, see below, Section 11.4, and n. 343.

8. Immunities, Acts of State and Amnesties

8.1 State immunity

The concept of immunity is derived from the rules of public international law and the legal maxim *par in parem non habet imperium*, one of two equals cannot render judgment on the other. In the nineteenth and much of the twentieth centuries the absolute doctrine of immunity was recognised by states. This meant that those who were entitled to immunity could not be held accountable for any misconduct, whether criminal or civil, or arising out of governmental or commercial activities. It was accepted as a general principle of public international law that had attained the status of a norm of customary international law. However, the absolute doctrine of immunity has more recently been challenged by the restrictive doctrine of immunity. The restrictive doctrine focuses on the nature of a particular act rather than its purpose and recognises immunity for public but not for private acts. It was recognised in the European Convention on State Immunity 1972,¹⁹⁵ and most scholars accept that the restrictive approach is now the standard. This shift was consolidated with the entry into force of the State Immunity Act 1978 which attempted to clarify the changing position of immunity under international law.¹⁹⁶

There are, however, two important points to note about the current understanding of the position of state immunity. Firstly, the State Immunity Act 1978 does not necessarily reflect the position of state immunity in international law. This is because the present position of state immunity is still very unclear.¹⁹⁷ Secondly, it must be emphasised that there is a considerable difference between criminal and civil immunity. The restrictive doctrine essentially arose out of civil issues.¹⁹⁸

195 The UK ratified the Convention on 3 July 1979.

196 See Appendix 6.

197 Brownlie, n. 57 above, p. 333.

198 See below, Section 14.

The question of immunity came under close scrutiny by the House of Lords in *Pinochet (No. 3)*. In particular, the Court was concerned with distinguishing between immunity *ratione personae* and immunity *ratione materiae*. *Ratione personae* immunity is available only to a small number of people on the basis of the position they hold; it is a status immunity attaching to a person. Such a person will have absolute immunity for all their acts, whether official or private, which are performed while they are in office. Immunity *ratione personae* will be available only for as long as they hold the particular position which affords them absolute immunity.

By contrast, immunity *ratione materiae* attaches not to a person but to official acts. Rather than being immunity based on the status of the person, this immunity depends on the subject matter of the act carried out. Once a person ceases to hold the position which affords them immunity, they will continue to receive immunity in respect of their official actions performed while they were in office, but not for private acts committed during that time. Immunity *ratione materiae* continues to be available in respect of the official acts of those persons who were formerly entitled to immunity *ratione personae*.¹⁹⁹

8.2 The different holders of immunity under criminal law

8.2.1 Head of state immunity

The major part of the State Immunity Act, Part I, does not apply to criminal proceedings.²⁰⁰ Part III of the Act is applicable to criminal matters. Section 20(1) states:

“Subject to the provisions of this section and to any necessary modification, the Diplomatic Privileges Act 1964 shall apply to –

- (a) a sovereign or other head of State;

¹⁹⁹ Immunity *ratione personae* and immunity *ratione materiae* were summed up by Lord Millett in *Pinochet (No. 3)*, n. 42 above, pp. 905-6.

²⁰⁰ State Immunity Act 1978, s.16(4).

- (b) members of his family forming part of his household; and
- (c) his private servants,

as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.”

It was established by the House of Lords in the Pinochet case that one of the “necessary modifications” was that s.20 conferred immunity on former heads of state in respect of official functions carried out when head of state wherever these took place, and not just acts performed in the UK.²⁰¹

The position of the law on the immunity of heads of state was described by Arthur Watts as:

“a body of rules which is in many respects still unsettled, and on which limited State practice casts an uneven light.”²⁰²

He concluded that:²⁰³

“A Head of State’s immunity is enjoyed in recognition of his very special status as holder of his State’s highest office ... his position as head of state is one which he has *erga omnes*, at all times and wherever he is.”

The view that a current head of state would be able to rely on immunity *ratione personae*, even for crimes under international law, so long as they remain in office was endorsed by the House of Lords in Pinochet. None of the judges questioned that a serving head of state has anything other than absolute protection from civil and

201 Pinochet (No. 3), n. 42 above, Lord Browne-Wilkinson pp. 845-6, Lord Hope p. 880, and Lord Hutton p. 889.

202 A. Watts, “The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers”, (1994) 247 Hague Recueil 9, p. 52.

203 *Ibid*, p. 53.

criminal proceedings while they hold such a status. However, this view might be subject to closer scrutiny following developments in international law. On 27 May 1999 President Milosevic was indicted by the International Criminal Tribunal for the Former Yugoslavia. The Statute of the Tribunal contains an express provision that heads of state or government and government officials can be held criminally responsible.²⁰⁴ The Statute of the International Criminal Tribunal for Rwanda, and that of the International Criminal Court which the UK is committed to ratifying, each contains a similar provision.²⁰⁵ All of these provisions expressly waive head of state immunity.

Immunity *ratione personae* will be lost as soon as the person is deposed or leaves office.²⁰⁶ At that point, a former head of state will only be able to enjoy continuing immunity in respect of acts done as part of their official function as head of state, that is, immunity *ratione materiae*.²⁰⁷

8.2.2 Diplomatic and consular immunity

In the Diplomatic and Consular Staff (US v. Iran) cases,²⁰⁸ the International Court of Justice confirmed that the principles of diplomatic and consular immunity were deep-rooted in international law. Every state which maintained diplomatic or consular relations was under an obligation to recognise the imperative obligations, which are now codified in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.²⁰⁹

204 Statute of the International Criminal Tribunal for the Former Yugoslavia, n. 66 above, Article 7(2).

205 Statute of the International Criminal Tribunal for Rwanda, n. 67 above, Article 6.2; Rome Statute of the International Criminal Court, n. 68 above, Article 27.

206 R v. Mary Queen of Scots (1586) 1 St.Tr. 1161.

207 For further discussion of this point see below, Section 8.2.3.

208 US v. Iran (1979) ICJ Reports 7; (1980) ICJ Reports 3.

209 *Ibid.*, (1979) ICJ Reports 7, pp. 19-20; (1980) ICJ Reports 3, p. 42.

These privileges have been recognised at common law for centuries.²¹⁰

It is possible for diplomatic and consular immunity to be waived by the sending state, but only if it is expressly done.²¹¹

Therefore, in the case of torture, unless the sending state agrees to waive immunity,²¹² diplomats and others with immunity *ratione personae* will maintain that immunity until they leave office. After that they will have immunity *ratione materiae* for their official acts.²¹³

8.2.2 (a) diplomats

The Diplomatic Privileges Act 1964 incorporated significant aspects of the 1961 Vienna Convention on Diplomatic Relations. It abolished the doctrine of absolute immunity for diplomats. Immunities apply only to permanent and not to “ad hoc” missions.²¹⁴ Diplomats have been divided into three main categories for the purposes of immunity:²¹⁵

- The first group are diplomatic agents.²¹⁶ Provided they are not nationals of or permanently resident in the receiving state, diplomatic agents enjoy complete immunity from

210 Engelke v. Musmann [1928] AC 433, p. 459.

211 Diplomatic Privileges Act 1964, Schedule 1, Article 32(1); Consular Relations Act 1968, Schedule 1, Article 45(1).

212 Or unless the person is to be transferred to one of the international tribunals; see above, Section 8.2.1.

213 However, they will not be able to rely on immunity for crimes against international law which they committed while they had immunity *ratione personae*; see below, Section 8.2.3.

214 R v. Governor of Pentonville Prison, Ex parte Teja [1971] 2 QB 274.

215 Diplomatic Privileges Act 1964, Schedule 1, Article 1.

216 Schedule 1, Article 1(d) and (e), namely heads of mission and members of their diplomatic staff.

criminal jurisdiction.²¹⁷ Therefore they have immunity *ratione personae* while in office. Once they leave office they will have immunity *ratione materiae* for acts carried out in their official capacity while in office.

- The second group are members of administrative and technical staff.²¹⁸ They also enjoy complete immunity from criminal jurisdiction.²¹⁹ Therefore they have immunity *ratione personae* while in office. Once they leave office they will have immunity *ratione materiae* for acts carried out in their official capacity while in office.
- Thirdly, members of the service staff²²⁰ enjoy immunity from criminal jurisdiction only in respect of acts performed in the course of their duties.²²¹ Therefore they have immunity *ratione materiae*.

Orders in Council provide that a person who is a member of the mission of specified independent countries of the Commonwealth, or the Republic of Ireland, or who is a private servant of such a member, and is a citizen of that country and also a British citizen shall be entitled to the same privileges and immunities as they would have been entitled to if they were not a British citizen.²²²

The immunities of members of the family and of the household and private servants are dealt with in Articles 37 and 38 of the 1961 Vienna Convention on Diplomatic Relations, as well as s.2(6) of the Diplomatic Privileges Act.

²¹⁷ Schedule 1, Article 37(1).

²¹⁸ Schedule 1, Article 1(f). They include those employed in secretarial, clerical and communications duties, such as typists, translators, and coding clerks.

²¹⁹ Schedule 1, Article 37(2).

²²⁰ Schedule 1, Article 1(g). They include those in domestic service such as cooks, cleaners, porters and chauffeurs.

²²¹ Schedule 1, Article 37(3).

²²² SI 1999 No. 670.

A person is entitled to enjoy diplomatic immunity from the moment they enter the receiving state.²²³ Immunity can be enjoyed even if the person becomes entitled to it only at the end of the proceedings to which they are a party.²²⁴ However, in cases of serious offences such as torture this should be unlikely to arise in practice because immunity can be granted only if the Foreign and Commonwealth Office have been notified by the sending state of the appointment of the person as a member of its diplomatic mission and the appointment has been accepted in the UK. Therefore, diplomatic immunity cannot be conferred by the unilateral action of the sending state.²²⁵

When the person's functions come to an end, immunity normally ceases at the moment when they leave the country, or on the expiry of a reasonable period in which to do so. With respect to acts performed by such a person in the exercise of their functions as a member of a mission, they will continue to receive immunity *ratione materiae*.²²⁶ If a person entitled to immunity dies, the members of their family continue to enjoy immunity until the expiry of a reasonable period in which to leave the country.²²⁷

8.2.2 (b) foreign consuls

The Consular Relations Act 1968, which enacts part of the 1963 Vienna Convention on Consular Relations, appears to recognise that consuls are entitled to immunity in respect of their official acts,²²⁸

223 1961 Vienna Convention on Diplomatic Relations, Article 39.

224 *Ghosh v. D'Rozario* [1963] 1 QB 106.

225 This is the case even though the relevant articles of the 1961 Vienna Convention (Articles 2, 4 and 10) are not included in Schedule 1 to the 1964 Act. See *R v. Governor of Pentonville Prison, Ex parte Osman (No. 2)* [1989] COD 446.

226 1961 Vienna Convention, Article 39(2).

227 Diplomatic Privileges Act, Schedule 1, Article 39(3).

228 For the definition of consular officers and consular employees, see Consular Relations Act 1968, Schedule 1, Article 1(d) and (e).

but not in respect of their private acts.²²⁹ Therefore they are entitled to immunity *ratione materiae*. The periods marking the beginning and end of consular immunities are set out in Schedule 1, Article 53 of the Consular Relations Act.

8.2.2 (c) international organisations

The International Organisations Act 1968²³⁰ empowers the Crown by Order in Council to confer immunity from suit and legal process in the UK upon any international organisation of which the UK is a member.²³¹

- Representatives, members of subordinate bodies, high officers, experts, persons on missions, and members of the official staff of a representative receive immunity *ratione personae*.²³² Members of their families forming part of their household are entitled to the same immunity.²³³
- Official staff in administrative and technical service are also entitled to immunity *ratione personae*.²³⁴ Members of their families and households are entitled to the same immunity.²³⁵
- Officers and servants, and members of official staff employed in domestic service of the representative, are entitled to immunity in respect of things done or omitted

229 Consular Relations Act Schedule 1, Articles 41 and 43, reflecting Engelke v. Musmann, n. 210 above, pp. 437-8.

230 The International Organisations Act 1968 repealed and replaced the International Organisations (Immunities and Privileges) Act 1950.

231 Section 1(1) as amended by the International Organisations Act 1981, s.1.

232 International Organisations Act 1968, s.1(2)(c) and s.1(3); Schedule 1 Part II, para. 9; Schedule 1 Part IV, para. 20.

233 Schedule 1 Part IV, paras 23(1) to 23(3).

234 Schedule 1 Part IV, para. 21.

235 Schedule 1 Part IV, para. 23(4).

in the course of the performance of their official duties, that is, immunity *ratione materiae*.²³⁶

Under the Commonwealth Secretariat Act 1966, the Commonwealth Secretariat is accorded immunity similar to that of diplomatic missions and international organisations.²³⁷

- Senior officers of the Commonwealth Secretariat, who are citizens of an independent country of the Commonwealth, and any member of their family forming part of their household, so long as they are not British citizens and are permanently resident outside the UK, have the same immunity accorded to diplomatic agents, that is, immunity *ratione personae*.²³⁸
- All other officers and servants of the Secretariat have immunity for acts or omissions carried out in the course of their official duties except in respect of motor traffic offences.²³⁹

The immunity of officers and servants and members of their families may be waived by the Commonwealth Secretary-General or any person exercising those functions.²⁴⁰

8.2.2 (d) temporary visits by official representatives – special missions, conferences etc.

The international law position of ministers, senior officials and

236 Section 1(2)(d); Schedule 1 Part III, para. 14; Schedule 1 Part IV, para. 22.

237 Commonwealth Secretariat Act 1966, Schedule Part I, para. 1 accords immunity from suit and legal process except in respect of motor traffic offences involving vehicles belonging to or operated on behalf of the Secretariat.

238 Schedule Part II, para. 5.

239 Schedule Part II, para. 6.

240 Schedule Part III, para. 8.

others travelling on behalf of their government on official business is less clear than that of permanent appointments of diplomats or consuls. There is a category known as “special missions” but an international Convention on Special Missions agreed in 1969 has still not entered into force so the matter remains subject to customary international law.²⁴¹ It remains unclear what is the precise state of customary international law on this matter and what its status would be in the UK, particularly in a case where serious violations of human rights were being alleged.

UK law does not specifically recognise a category of immunity for those on special missions, but under s.6 of the International Organisations Act 1968, a person attending a conference which is to be held in the UK and will be attended by representatives of the UK or of the British Government and by representatives of any other sovereign power or of the Government of any sovereign power, will be conferred privileges and immunities by Order in Council. The representative will be accorded the same immunity as would be accorded to the head of a diplomatic mission.²⁴²

8.2.3 The extent of immunity

The House of Lords in the Pinochet cases had to consider a particular problem arising out of the provisions of the Torture Convention and immunity *ratione materiae*. Under Article 1 of the Torture Convention, persons must be acting as public officials or in an official capacity in order to be subject to the provisions of that Convention.²⁴³ However, a person has immunity *ratione materiae* for official acts carried out while in office. If torture were accepted as “official business”, all state officials, the only possible defendants under the terms of the Torture Convention, could claim immunity.

241 Brownlie, n. 57 above, p. 367.

242 International Organisations Act 1968, Schedule 1 Part II, para. 8.

243 This is also, broadly speaking, the case under s.134 of the Criminal Justice Act; see above, Section 6.2.

Although the majority of their Lordships concluded that Augusto Pinochet could not rely on state immunity, the reasons for their decisions differed.²⁴⁴

Lord Browne-Wilkinson stated that state immunity is not available because a crime such as torture cannot constitute a legitimate state function. He made the point:²⁴⁵

“How can it be for international purposes an official function to do something which international law itself prohibits and criminalises?”

The view was shared by three other judges. Lord Hutton stated that:²⁴⁶

“The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime.”

Lord Millett stated:²⁴⁷

“The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.”

244 See J. Craig Barker, “The Future of Former Head of State Immunity After Ex Parte Pinochet”, (1999) 48 ICLQ 937.

245 Lord Browne-Wilkinson in *Pinochet (No. 3)*, n. 42 above, p. 846; see also Lord Steyn in *Pinochet (No. 1)*, n. 33 above, p. 1506.

246 *Pinochet (No. 3)*, p. 899.

247 *Ibid*, p. 913.

Lord Phillips said:²⁴⁸

“... in respect of the performance of [a former head of state’s] official functions I do not believe that those functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law.”

In contrast, Lord Saville and Lord Hope were of the opinion that Augusto Pinochet lost his immunity only at the point when Chile, Spain and the UK had all ratified the Torture Convention.²⁴⁹

The conclusion of the majority of the judges appears to be that crimes against international law cannot amount to acts performed in the exercise of the functions of a head of state.

Lord Browne-Wilkinson stressed that acts which did not amount to international crimes would be subject to immunity *ratione materiae*. When referring to the charges of murder and conspiracy to murder, he stated:²⁵⁰

“No one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.”

Of those who made up the majority in Pinochet (No. 3), only Lord Hope was of the opinion that, for immunity to be lifted, torture has to be widespread and systematic and that immunity would not be lifted for a single act of torture. The more common view was that since a single act of torture is punishable under the Torture Convention, torture does not have to be widespread and systematic before state immunity is lifted.

248 Ibid, p. 927.

249 Ibid, pp. 903-4 and pp. 886-7 respectively.

250 Ibid, p. 848.

The judges discussed whether there was an express or implied waiver of sovereign immunity in the Torture Convention.²⁵¹ The more common view was that there was no express or implied waiver of immunity; only Lord Saville was of the opinion that the Torture Convention constituted an express waiver of state immunity. In contrast to the Torture Convention, the Genocide Convention and the statutes of the ad hoc international criminal tribunals and that of the International Criminal Court all contain express provisions that heads of state or government officials can be held responsible.²⁵²

8.3 Act of State

The Act of State doctrine is rooted in domestic constitutional law and not in international law and deals with the extraterritorial effects of governmental acts. The expression “Act of State” may be used to describe executive acts which are authorised by the state in the exercise of sovereign power.²⁵³ The victim may be denied any redress because the act, once it has been identified as an Act of State, is one which the court has no jurisdiction to examine.²⁵⁴

At its widest, Act of State has been taken to mean that:²⁵⁵

“Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”

251 The 1961 Vienna Convention on Diplomatic Relations Article 32(2) states that waiver of immunity has to be express.

252 Above, nn. 204 and 205.

253 AG v. Nissan [1970] AC 179, pp. 218 and 238.

254 Buron v. Denman (1848) Exch 167.

255 Underhill v. Hernandez (1897) 168 US 250, p. 252.

However, the modern, and more accepted, view was put forward in Buttes Gas & Oil Co. v. Hammer. Lord Denning stated that:²⁵⁶

“If a person is sued for an alleged wrong, a defence may in proper circumstances be available to him on the ground that he acted under the orders of the British Government or a foreign government, or that he was authorised by it or subsequently ratified by it.”

He continued:

“the circumstances in which this defence is available are very ill-defined.”

In Oppenheimer v. Cattermole,²⁵⁷ the House of Lords stated that a foreign legislative act may be disregarded if it is contrary to public policy in England. In Kuwait Airways Corporation v. Iraqi Airways Co.²⁵⁸ the court reached the decision that an Act of State may also be disregarded if it is contrary to public international law. In that case, Iraqi legislation which would otherwise have been applicable could be disregarded on the ground that it arose out of the illegal occupation of Kuwait contrary to international law, including the resolutions of the UN Security Council.

In Pinochet (No. 3) the House of Lords did not consider the effect of the doctrine of Act of State in detail, focusing instead on the question of immunity. However their Lordships did not view it as an obstacle. Lord Phillips said: “The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another.”²⁵⁹ In Pinochet (No. 1), their Lordships were satisfied that the Act

256 [1975] 1 QB 557, p. 573.

257 [1976] AC 249.

258 [1995] 3 All ER 694.

259 Pinochet (No. 3), n. 42 above, pp. 118-19.

of State doctrine yielded to the contrary intention shown by Parliament when enacting s.134 of the Criminal Justice Act 1988, as well as for reasons of public policy.²⁶⁰

8.4 Amnesties

The question may arise before the English courts whether, or to what extent, they have to take the amnesty legislation of another jurisdiction into account. For instance, if a person being prosecuted in the UK for crimes committed in another country had been granted an amnesty in that country covering the crimes in question, would the English courts recognise that amnesty? In *Pinochet (No. 1)* Lord Lloyd found it difficult to accept that an English court could investigate and pronounce upon another country's amnesty legislation.²⁶¹

Although there are as yet no internationally agreed criteria for determining in what circumstances, if any, an amnesty is valid as a matter of international law, an examination of international jurisprudence on the question could provide assistance to the English courts when determining their attitude towards an amnesty in a particular case.

The UN Human Rights Committee²⁶² stated in its general comment on Article 7 of the International Covenant on Civil and Political Rights that, with regard to torture:²⁶³

“Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to

260 Above, n. 33, for instance Lord Nicholls p. 1498, and Lord Steyn p. 1507.

261 *Pinochet (No. 1)*, n. 33 above, p. 1495. Their Lordships in *Pinochet (No. 3)*, n. 42 above, did not consider the question specifically.

262 See above, n. 62.

263 Human Rights Committee, General Comment No. 20, para. 15.

an effective remedy, including compensation and such full rehabilitation as may be possible.”

In the case of Rodriguez v. Uruguay, the Committee held the Uruguayan amnesty to be incompatible with the state’s obligations under the International Covenant on Civil and Political Rights. It held that the applicant, a victim of torture, was entitled to an effective remedy.²⁶⁴

The Inter-American Commission on Human Rights also reached the conclusion in country reports on El Salvador, Uruguay and Argentina that blanket amnesties which preclude prosecution and civil redress constitute a violation of the obligations of states.²⁶⁵

It is clear from the use of the word “generally” in the UN Human Rights Committee’s general comment cited above that an amnesty may possibly be acceptable under international law. Some states have argued that Article 6(5) of Additional Protocol II to the Geneva Conventions calls for broad amnesties to be granted following the ending of internal armed conflicts. The provision states:

“At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the [internal] armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

However, the *travaux préparatoires* make clear that amnesties are not supposed to be available for those who have violated

264 Case No. 487/1992 (1994), Report of the Human Rights Committee Vol. II GAOR 49th Session, Supplement 40 No. 40 (1994) Annex X B.

265 See N. Roht-Arriaza and L. Gibson, “The Developing Jurisprudence on Amnesty”, (1998) 20 HRQ 843, p. 844 n. 5.

international law. It was stated that:²⁶⁶

“the provision aims at encouraging amnesty, i.e a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.”

The International Committee of the Red Cross (ICRC) has also interpreted this provision of Additional Protocol II in a narrow manner. It stated:²⁶⁷

“Article 6(5) is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law.”

Therefore, the conclusion that may be drawn from international law is that while amnesties may be a legitimate step forward in the move for peace following bloody internal armed conflicts, they cannot be used to protect those who have perpetrated crimes against international law, such as torture.

266 Ibid, p. 865.

267 Ibid.

9. Criminal Procedure

9.1 Remand/bail

In situations where an alleged torturer, particularly if temporarily within the jurisdiction, is arrested, it is clearly vital that the person is not afforded the opportunity to escape the jurisdiction. While remand in custody would be the most satisfactory situation in this respect, the English system is moving away from detaining people for long periods when alternative conditions can be set. Under Article 5(3) of the European Convention, there are four grounds upon which pre-trial detention may be justified:²⁶⁸

- (i) fear of absconding;
- (ii) interference with the course of justice, for instance, threats to witnesses;
- (iii) the prevention of crime; and
- (iv) the preservation of public order.

The authorities have accepted that measures such as sureties for large sums of money together with the handing over of the arrested person's passport have been sufficient conditions for the person to be released on bail. If evidence can be brought to show that a defendant is planning to escape the jurisdiction, bail conditions can be varied and the person can be remanded in custody. Following a Law Commission review, there are plans to make changes to the law on bail.²⁶⁹

When Dr Mohammed Ahmed Mahgoub was charged in Scotland in September 1997 under s.134 of the Criminal Justice Act 1988 in connection with acts of torture in Sudan, he was released on condition that he not leave the country without the permission of the court, and that he surrender his passport and report to the police station on a regular basis.

²⁶⁸ For further details, see Starmer, n. 65 above, paras 7.13 to 7.27.

²⁶⁹ "Bail and the Human Rights Act", Law Commission Consultation Paper No. 157 (1999).

9.2 Witness protection

Witnesses should be asked whether they are prepared to testify if the prosecution proceeds to trial. It is sometimes the case that witnesses are reluctant to testify, possibly because they fear repercussions, especially if they still reside or have family living in the country where the torture took place.

It is important to be aware of the possibility of certain measures for the protection of witnesses at the trial. Such measures could include screening of witnesses in the court and the closure of public galleries.²⁷⁰ Other measures of witness protection such as safe houses and change of identity might possibly be provided.

Witnesses who wish their identity to be withheld from the defence may be accommodated by the court but should be informed that they cannot rely on total anonymity being available and that this will be permitted only in extremely limited circumstances. Ordinarily a witness at the beginning of their testimony must state their full name. In rare and exceptional circumstances, the trial judge may permit a witness to conceal their identity entirely from the accused. It is in the discretion of the judge as to whether the circumstances exist to take such a step. In *R v. Taylor*,²⁷¹ the court considered the following factors to be relevant.

- (a) There must be real grounds for fear of the consequences if the identity of the witness were revealed. The consequences feared need not be limited to those affecting the witness alone.
- (b) The evidence must be sufficiently important to make it unfair to make the Crown proceed without it.

²⁷⁰ See Youth Justice and Criminal Evidence Act 1999, s.17 (witness eligible for assistance on grounds of fear or distress about testifying). See also Archbold (2000), paras 8-67 (witness screening) and 8-67a (closure of public galleries).

²⁷¹ *The Times*, 17 August 1994.

- (c) The Crown must satisfy the court that the creditworthiness of the witness has been fully investigated and disclosed.
- (d) The court must be satisfied that there would be no undue prejudice to the accused.
- (e) The court should balance the need for the protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness.

The European Commission of Human Rights reached the decision that the screening of witnesses was not in violation of Article 6(1) or 6(3)(d).²⁷² The European Court of Human Rights has developed jurisprudence on the issue of witnesses who are not prepared to attend court to give their evidence. It has attempted to balance the right of the defendant to cross-examine witnesses under Article 6(3)(d) with the protection of victims and witnesses. It is recognised that fair trial issues cannot be determined in the abstract.²⁷³

Comparison can be made between the decision in Kostovoski v. Netherlands²⁷⁴ and that in Asch v. Austria.²⁷⁵ In Kostovoski the European Court decided that, while anonymous evidence could be relied on at the investigative stage, such reliance on the evidence at trial in order to found the conviction was irreconcilable with Article 6.²⁷⁶ In the case of Asch, the co-habitee of the applicant refused to give evidence in court about his assault upon her. As a result her statement to the police was read to the court. The European Court did not find that there had been a violation because the co-habitee's statement "did not constitute the only item of evidence on which the first instance court based its decision."²⁷⁷

272 X v. UK (1993) 15 EHRR CD 113.

273 See C. Chinkin, "Due Process and Witness Anonymity", (1997) 91 AJIL 75.

274 (1989) 12 EHRR 434.

275 (1993) 15 EHRR 597.

276 Above, n. 274, paras 43 and 44.

277 Above, n. 275, para. 30.

The distinction between the two cases was the fact that in Kostovoski, the domestic court relied totally on the evidence supplied by the anonymous witness to secure conviction. In Asch, the evidence of the witness was only a part of the evidence which formed the basis for the conviction.

In Doorson v. Netherlands²⁷⁸ the European Court concluded that, in hiding the identity of a witness, the domestic courts had taken sufficient procedural precautions to assure the defendant a fair trial. It did conclude, however, that the testimony of anonymous witnesses must not be the sole or decisive reason for the conviction, and substantial independent corroborative evidence must be supplied.

Therefore, the approach of the European Court of Human Rights seems to be that, while it is not enough on its own to secure a conviction, anonymous evidence may be used, in conjunction with other evidence, to establish a person's guilt.

The issue of witness anonymity was raised more recently in the Tadic case heard at the Yugoslavia Tribunal.²⁷⁹ Article 21(4)(e) of the Statute of the Yugoslavia Tribunal entitles a defendant to examine witnesses. However, Article 22 provides for the protection of witnesses. In their decision, the Chamber recognised the often neglected rights of victims, as well as the harm and retraumatisation often caused by trials within an adversarial format. The Tribunal stated that the individual right to a fair trial was not absolute and should be weighed against the rights of the victims. The Chamber did not allow blanket anonymity to all those who claimed it, but recognised the need to balance competing interests.²⁸⁰

During the hearing, the testimony of unidentified witnesses was used as corroborative evidence. While not being able to secure their

278 (1996) 24 EHRR 327, para. 70.

279 Above, n. 133.

280 See Chinkin, above, n. 273, p. 77 n. 16.

protection once the trial had concluded, the Chamber introduced a number of methods to overcome the reluctance of witnesses to testify. This included video conferencing, closed sessions and special steps being taken to conceal the witnesses' identity.

In coming to this decision the Chamber in *Tadic* stated that there must be a real fear for the safety of witnesses.²⁸¹ The onus was on the prosecution to demonstrate the importance of the witness in proving the charges. In addition, the Chamber stated that there must be no evidence to suggest that the witness is untrustworthy. The judges were to be made aware of the identity of the witness and to be able to observe their demeanour to assess the reliability of the evidence. Finally, the defence was to be given ample opportunity to question the witness on issues unrelated to identity and current whereabouts.

9.3 Time limits

English law starts from the proposition that there is no restriction on the time which may elapse between the commission of an offence and the commencement of a prosecution for it. Therefore a criminal prosecution against a perpetrator of torture may be commenced at any time after the commission of the offence. This applies even if the prosecutor has prima facie evidence available to them establishing the guilt of the accused for a lengthy period of time before choosing to initiate proceedings. A prolonged delay in starting or conducting criminal proceedings may be an abuse of process when, for example, substantial delay has been caused by some improper use of procedure or has resulted from inefficiency by the prosecution and the defendant has been prejudiced by it. However, it has been asserted that the jurisdiction to decline to allow criminal proceedings to continue should be used sparingly.²⁸²

²⁸¹ Above n. 133, para. 77.

²⁸² *Halsbury's Laws* Vol. 11(1), para. 786.

9.4. Evidence

The normal rules regarding admissibility of evidence will apply. Particular issues may arise regarding obtaining evidence situated abroad. Witnesses and other evidence will often be outside the UK. Sometimes, evidence will already have been collected by agencies in other countries. However evidence taken in another state is not normally admissible in UK courts. Police forces must therefore rely on formal judicial co-operation in order to obtain evidence in a form that will be admissible.

An international system of judicial co-operation through mutual legal assistance operates to facilitate cross-border investigations of crime.²⁸³ Within Europe there is a European Convention on Mutual Assistance in Criminal Matters agreed in 1959 with an Additional Protocol agreed in 1978. As a Council of Europe instrument its membership is not limited to EU states and there are currently 39 members.²⁸⁴ These entered into effect in the UK on 27 November 1991 with the coming into force of the Criminal Justice (International Co-operation) Act 1990. There is currently a draft of a new Convention under discussion within the EU which will be limited to the 15 EU member states, and a draft of a Second Additional Protocol to the Council of Europe Convention. There is also a Commonwealth Scheme of 1990 relating to mutual assistance in criminal matters within the Commonwealth, although this does not have binding force.²⁸⁵

In addition, Interpol can facilitate investigation by the police force of one member state in the country of another. For instance, if a police

283 See generally, C. Murray and L. Harris, *Mutual Assistance in Criminal Matters* (Sweet & Maxwell, 2000).

284 As of 4 April 2000: 38 member states of the Council of Europe, plus Israel.

285 The Harare Scheme; see Murray and Harris n. 283 above, p. 15 and Appendix H of that book, where the text is reproduced with a commentary.

officer wishes to make an official visit to another country to interview a potential witness, arrangements can be made via Interpol and a liaison officer is appointed in the receiving country.²⁸⁶

The Criminal Justice (International Co-operation) Act 1990, in s.3, sets out the procedure for prosecuting authorities in the UK (which include the Attorney-General, the DPP or a Crown Prosecutor) to issue, or for a court to issue, a letter of request addressed to an authority or court in another country requesting assistance in obtaining certain evidence in that country. Such requests may be made either before or after proceedings have been instituted. They must normally be transmitted by the Home Secretary although in some circumstances may be transmitted directly to the addressee.²⁸⁷

A Home Office report on extraterritorial jurisdiction issued in July 1996 highlighted the difficulties involved in obtaining evidence abroad. It concluded that extraterritorial cases would be simplified if the rules of evidence were to be relaxed in order to allow the acceptance of evidence in the form in which it is often given in other countries, and if co-operation with other countries were to be improved.²⁸⁸

In February 1999, in the trial of Antony Sawoniuk under the War Crimes Act 1991, the court itself travelled to Belarus to hear evidence and visit the site of the alleged crimes in February 1999, an unprecedented step for an English court.

286 Home Office Review, n. 106 above, p. 23.

287 Murray and Harris, n. 283 above, p. 42.

288 Home Office Review, n. 106 above, p. 24.

PART III CIVIL ACTIONS

10. Actions in Tort

This section is concerned with civil proceedings for torture in the courts of England and Wales. Such an action will most likely be brought in tort.²⁸⁹

International human rights law provides for a right to an effective remedy for those whose rights are violated.²⁹⁰ Article 14(1) of the Torture Convention, which has not been specifically incorporated into English law, goes further and provides that:

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

International law on this issue is undergoing development, and the UN has in recent years highlighted the importance of the right of victims of grave violations of human rights to receive reparation.²⁹¹ The UN Commission on Human Rights is currently considering a set of draft UN Basic Principles and Guidelines on the right to a remedy

289 Judicial review is briefly considered in the criminal section above, Section 7.4, where it is of greater relevance. It is also conceivable that torture inflicted upon an individual may be the subject of a claim under breach of contract: for example, in the US case of *Saudi Arabia v. Nelson* 507 US 349 (1993), the victim's action seeking redress for torture was based on the commercial activities for which he was hired.

290 For further details on the requirement of effective remedies in international law, see above, Section 1.3.

291 See, for example, UN Commission on Human Rights Resolution 1995/34 of 3 March 1995 and Resolution 1996/35 of 19 April 1996.

and reparation for victims of violations of international human rights and humanitarian law.²⁹²

In addition, there is a duty on the English legal system to ensure that claimants who seek to pursue legitimate civil actions within the jurisdiction have access to a court and receive a fair trial under Articles 6 and 13 of the European Convention.²⁹³ In the case of Al-Adsani v. UK, it was argued that this is the case even if the act of torture was not committed within the jurisdiction.²⁹⁴

In the United States, the Alien Tort Claims Act 1789 and the Torture Victim Protection Act 1991 provide a legislative basis for victims who have suffered torture in another country to sue their torturers in US courts.²⁹⁵ By contrast, there is no specific tort of torture, nor any special basis for extraterritorial jurisdiction under English civil law.²⁹⁶ A person wishing to bring a civil action against a foreign torturer in the English courts will face a number of complex and challenging legal questions. It will need to be established whether a cause of action arises in England. There will also be important

292 UN Doc. E/CN.4/2000/62, 18 January 2000. The draft affirms the duty on states to provide access to justice, afford appropriate remedies and provide for or facilitate reparation to victims (Draft Principle II). The forms of reparation outlined in the document are restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition (Draft Principle X). The UN Commission on Human Rights in April 2000 (Resolution 2000/41) requested the Secretary-General to circulate the draft to all UN member states for their comments, and requested the UN High Commissioner for Human Rights to hold a consultative meeting of governments, intergovernmental organisations and NGOs with a view to finalising the principles and guidelines. The Commission resolved to consider the matter further, in the light of the outcome of the consultative meeting, at its next session in 2001.

293 Osman v. UK (1999) 1 FLR 198.

294 Al-Adsani v. UK, Application No. 35763/97, which on 1 March 2000 was found admissible by a Grand Chamber of the European Court of Human Rights. A decision on the merits will follow.

295 See Appendix 8, Section 2.

296 The proposed Redress for Torture Bill, initiated and drafted by REDRESS, is concerned with civil redress for torture and seeks to give effect to the provisions of the Torture Convention. See Appendix 7.

jurisdictional issues, matters of service and questions of state immunity to be examined.

Unlike most other tortious claims, the most difficult stage in an action concerning torture abroad will be ensuring that the proceedings get off the ground in the first place. This is why the largest portion of this section on civil proceedings is devoted to commencing proceedings. There has been only one claim for civil redress for torture which has gone before the English courts: the case of Al-Adsani v. Kuwait which is now before the European Court of Human Rights. The case twice went to the Court of Appeal at different stages of the commencement of proceedings. The first occasion was an ex parte hearing to decide whether the State of Kuwait could be served with proceedings (hereinafter referred to as “the first Al-Adsani decision”).²⁹⁷ The second occasion was contested by both parties in order to decide whether Kuwait had state immunity (referred to in this Manual as “the second Al-Adsani decision”).²⁹⁸

It is most likely that actions will be brought for acts committed by state officials.²⁹⁹ However, where torture is perpetrated by private individuals, state authorities will not necessarily be able to absolve themselves of their positive obligations to prevent and punish acts of torture.³⁰⁰ Where the encouragement, consent or acquiescence of state officials results in the violation of the fundamental right not to be tortured, those officials should also be the subject of civil proceedings.³⁰¹ Moreover, it is arguable that the state itself should

297 (1994) 100 ILR 465.

298 (1996) 106 ILR 536; *The Times*, 29 March 1996.

299 See the definition of torture above, Section 2.

300 For further information on positive obligations, see Starmer, n. 65 above, Chapter 5.

301 Velásquez Rodríguez v. Honduras, n. 90 above. It is less likely that negligence by the state officials in the investigation of an act of torture will leave them liable under the Torture Convention. However, by not making proper investigations into acts of torture there could be accusations of complicity or acquiescence, particularly if the torture was suffered by political opponents of the state or by oppressed minorities.

be vicariously liable for acts committed by state officials except where the act in question is clearly carried out in a private capacity.

Tortious acts which are committed in a foreign country can be capable of being determined by the English courts.³⁰² Where a tort has taken place abroad but may legitimately be tried in England, questions will arise as to which country's laws should be properly followed by the English courts. The general rule that has been adopted is that the English courts will apply their own rules of procedure to cases brought before their forum, that is, *lex fori*. Therefore, they will refuse to apply any foreign law which is in their view procedural.³⁰³ Alternatively, matters of substance will be governed by whichever country's laws the court must apply in accordance with the choice of law rules, which will be examined in detail below.³⁰⁴ It is not always easy to distinguish between rules of procedure and substance.³⁰⁵

10.1 The cause of action

In order for a civil action to be brought, a claimant must show that there is a cause of action. Lord Diplock pointed out in Letang v. Cooper that:³⁰⁶

“a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”.

The phrase “cause of action” has been held to include every fact which must be proved in order for the claimant to succeed, and

302 See below, Sections 10.2, 10.3, 12.2, 12.3 and 12.4.

303 Hansen v. Dixon (1906) 23 TLR 56.

304 The choice of law for torts is considered below, Section 13.3.

305 The most comprehensive text on the conflict of laws is L. Collins (ed.), *Dicey & Morris on The Conflict of Laws*, 13th edn (Sweet & Maxwell, 2000). See paras 7-002 to 7-004 on distinguishing between rules of procedure and substance.

306 [1965] 1 QB 232, p. 243.

every fact which the defendant would have a right to traverse.³⁰⁷ It may arise in whole or in part within a certain jurisdiction where all or some of the material facts which the claimant has to prove in order to succeed have occurred within that jurisdiction.³⁰⁸

In the absence of a tort of torture, claims relating to acts of torture will usually be made under the torts of assault, battery and false imprisonment.

In addition, there may be situations where a cause of action may arise in England as an indirect consequence of the act of torture. In the case of *Al-Adsani*, the claimant sued for the tort of intimidation as a result of threats which he claimed to have received in the UK following his revelations about the torture which he had suffered in Kuwait.³⁰⁹

10.2 Who may bring a civil action?

10.2.1 The general position

Any person may bring a claim in tort before the English courts. The claimant must have a vested interest in the subject matter of the action,³¹⁰ and the English courts must have jurisdiction to hear the case.³¹¹ The claimant need not be a national, domiciled or resident in England. Therefore, it would be possible for an asylum seeker to bring an action while awaiting a decision on their application for asylum.³¹² It is also possible for a person who resides in another country to bring an action against an alleged torturer who is now living in England.

307 *Cooke v. Gill* (1873) LR 8 CP 107, p. 116, per Brett J.

308 *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] AC 458.

309 An illustration of the tort of intimidation can be found in the case of *Godwin v. Uzoigwe* (1993) Fam Law 65.

310 *Clowes v. Hillard* (1876) 4 Ch.D 413.

311 See jurisdiction below, Sections 12.1.2, 12.2, 12.3.2 to 12.3.5, and 12.4.2.

312 See below, Section 10.2.3.

10.2.2 Pursuing a claim following the death of a victim of torture

A person who has been subjected to torture, and is entitled to bring an action within the jurisdiction, may subsequently die before the claim has been determined by the courts or settled,³¹³ or before the claim has been issued in the courts.³¹⁴ Regardless of whether the death is as a result of the injuries sustained, the Personal Representatives of the deceased are entitled to claim damages on behalf of the estate for the loss suffered by the victim, under s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. If the death occurs from injuries resulting from acts of torture,³¹⁵ and the victim would have been able to recover damages in respect of them in England, an action may be brought on behalf of the dependants of the deceased,³¹⁶ under s.1(1) of the Fatal Accidents Act 1976.³¹⁷

10.2.3 Asylum seekers

Although it is possible for asylum seekers to commence proceedings against those involved in their torture, the decision to do so should be taken carefully. Those who are not “ordinarily resident” in the UK, including, most crucially, asylum seekers, will almost certainly be subject to a security for costs order.³¹⁸ If this cannot be met, the

313 Read v. Great Eastern Railway Co. (1868) LR 3 QB 555.

314 Williams v. Mersey Docks & Harbour Board (1905) 1 KB 804. See limitation periods below, Section 11.5.

315 Under s.1(5) of the Fatal Accidents Act 1976 “injury” includes any impairment of a person’s physical or mental condition.

316 The definition of dependants is set out in the Fatal Accidents Act 1976 s.1(2) subject to s.1A(2).

317 See also limitation periods, below, Section 11.5.

318 See below, Section 11.2.

case will not continue. Therefore it may be considered more appropriate to bring an action once asylum has been granted.³¹⁹

10.3 Who may be the subject of a civil action?

The proper defendant to an action in tort is the wrongdoer or the person or body who is liable for the acts of the wrongdoer. Allegations of torture may generally be made against:

- individuals who carry out torture;
- those in authority who acquiesced to or ordered the committal of the acts; and
- possibly the state, where it oversees, allows or sponsors torturous acts.³²⁰

The defendant need not be resident or domiciled within the jurisdiction in order to be served with proceedings, although the question of jurisdiction and service of proceedings may be an issue needing to be resolved by the courts.³²¹

While it might also be possible to bring an action against those who manufacture and sell implements that are used for torture, and possibly a state that grants the export licence for those products, such actions are beyond the scope of this Manual.

319 In addition, any information which the state may put forward to counter the asylum seeker's claim for redress may be placed before the immigration tribunal, even though this information would not have been requested by the tribunal in the ordinary course of events.

320 See state immunity below, Section 14.2, and the second *Al-Adsani* case, n.298 above.

321 See below, Sections 12.2, 12.3 and 12.4, and in particular the sections on service outside the jurisdiction.

11. Preliminary Considerations

11.1 Collection of information

It will be important to collect detailed information from claimants, witnesses or other sources about the identification and involvement of perpetrators of torture. The fact that the acts were committed abroad presents obvious difficulties in collection of evidence. Co-ordination with non-governmental organisations such as those providing legal, medical or other services for torture victims, with human rights organisations, and with expatriate communities in the UK originating from the country where the torture took place, may provide useful sources of information.

11.2 Security for costs

There are limited situations where the defendant may be able to apply for an order that the claimant should provide security for the defendant's costs of the action in the event that the claim is unsuccessful.³²² A defendant cannot be ordered to provide security for costs.³²³ The reasoning behind this rule is that every person should be afforded the right to defend themselves against a claim.

If the court believes it is just, having regard to all the circumstances of the case, it may order the claimant to provide security for the defendant's costs so long as one or more of the conditions set out in Civil Procedure Rule 25.13 apply.³²⁴ The amount of security awarded will be in the discretion of the court.³²⁵

322 Following the Civil Procedure (Amendment) Rules 2000 (SI 2000 No. 221) which came into effect on 2 May 2000, Order 23 Rule 1(1) has been repealed and replaced by CPR 25.12 to 25.15.

323 *Re Barber, Burgess v. Vinicombe (No. 2)* (1886) 55 LJ Ch 624.

324 Civil Procedure Rule (CPR) 25.13(1).

325 See CPR 25.12.7.

Under Civil Procedure Rule 25.12(3)(b) the court must direct the manner and time within which security must be given.³²⁶

An individual claimant's lack of financial resources is not of itself a ground for granting security for costs. However, one occasion where a defendant may make an application for a security for costs order is where the claimant is ordinarily resident outside the jurisdiction.³²⁷ The question of whether the claimant is "ordinarily resident" is one of fact and degree, and does not depend on the duration of the residence but on the way in which a person's life is actually ordered. It can be contrasted with permanent residence and also occasional or temporary residence.³²⁸ The justification behind the security for costs is that:³²⁹

"if a verdict is given against the plaintiff he is not within reach of our law so as to have process served upon him for costs."

The European Commission of Human Rights rejected as "manifestly ill-founded" an application which argued that the dismissal of an appeal on the failure of the appellants, who were resident abroad, to lodge security for costs amounted to a denial of access to court contrary to Article 6(1) of the Convention.³³⁰

11.3 Freezing or Mareva injunctions

A claimant will need to take all possible measures to ensure that, if successful, they will be able to recover the costs of the action and any damages awarded. This is particularly important as

³²⁶ See CPR 25.12.8. For the procedure on payment of security into court see CPR 25.12.9, and for the return of security see CPR 25.12.12.

³²⁷ CPR 25.13(2)(a).

³²⁸ See CPR 25.13.2; see also *Levene v. IRC* [1928] AC 217, p. 232 per Lord Warrington, and *IRC v. Lysaght* [1928] AC 234, p. 243.

³²⁹ *Pray v. Edie* (1786) 1 TR 267.

³³⁰ *Raper and Allen v. UK* Application No. 14551/89.

the enforcement of damages for torture abroad is one of the most unsatisfying areas of the law.³³¹

If the defendant has assets, whether in the form of money or property, capable of being moved from the jurisdiction in order to avoid payment of an award for damages and costs to the claimant, the court has the power to restrain the defendant from removing those assets.³³² This is known as a freezing injunction (formerly referred to as a Mareva injunction).³³³

The power to grant a freezing injunction is conferred under s.37(1) of the Supreme Court Act 1981.³³⁴ It is exercisable whether or not one of the defendants is domiciled, resident or present in England.³³⁵ In general, the assets must be located within England if the court is to have jurisdiction to grant such an injunction.³³⁶ However, in very rare cases prior to trial, it may be appropriate to grant a freezing injunction over assets worldwide.³³⁷ Worldwide freezing injunctions may be exercised more readily after final judgment has been obtained against the defendant.³³⁸ This does not necessarily mean that the injunction will be recognised by the courts of the country where the assets are situated.

331 See below, Section 16.2.

332 *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1980] 1 All ER 213, p. 215; *Z Ltd. v. A-Z and AA-LL* [1982] QB 558.

333 For a detailed examination of freezing injunctions, see S. Gee, *Mareva Injunctions and Anton Piller Relief*, 4th edn (Sweet & Maxwell, 1998). See also Dicey & Morris, n. 305 above, paras 8-003 to 8-017.

334 The guidelines which the court may consider in using their discretion are set out in *Halsbury's Laws* Vol. 24, para. 869.

335 Supreme Court Act 1981, s.37(3); *Prince Abdul Rahman bin Turki al Sudiary v. Abu-Taha* [1980] 3 All ER 409, p. 412.

336 Supreme Court Act 1981, s.37(3).

337 *Republic of Haiti v. Duvalier* [1990] 1 QB 202.

338 *Ibid.*, p. 213-14.

The application for a freezing injunction can be made by summons. But, since it might defeat the purpose of the application if the defendant were to be warned, it can be made without notice to the defendant. The applicant will need to issue an application notice setting out the nature of the order sought, supported by affidavit evidence.³³⁹ In order to obtain a freezing injunction the claimant must show that there is a good arguable case on the merits,³⁴⁰ and that there is a real risk that a judgment would be unsatisfied if the injunction were not granted.³⁴¹

11.4 Costs

Any person who is looking to pursue a civil claim will need to be fully aware of the difficulties in proceeding, as well as the possible consequences in terms of costs if the action is unsuccessful. It is no longer possible to obtain legal aid for proceedings based on personal injury. Legal representation may be agreed on the basis of a conditional fee agreement. If the action is unsuccessful, the court will normally order the claimant to pay the other side's legal costs of defending the action. These may be considerable, especially given the complexity of the law and the fact that this may involve evidence being sought in the country where the act of torture took place. Although it may be possible to obtain insurance to cover the costs of the other party, the insurance premium could be significant.

Questions relating to costs are in the discretion of the court, which has the full power to determine which of the parties should bear the costs and to what extent.³⁴² While in judicial review proceedings there is scope for asking the court to exercise its discretion not to

339 For details on applying for injunctions, see Gee, n. 333 above, and *Halsbury's Laws* Vol. 37, para. 363.

340 *Rasu Maritima v. Perusahaan* [1978] QB 644.

341 *Third Chandris Shipping Corp. v. Unimarine* [1979] QB 654.

342 Supreme Court Act 1981, s.51(1).

order the unsuccessful party to pay costs if the action is a public interest challenge,³⁴³ this may be quite difficult to establish in a private action for civil redress, particularly where the parties are individuals.

A further costs issue may arise where a litigant sets up a fighting fund or receives financial support from a third party in order to meet the costs of bringing an action. This is known as champerty. Donors who fund an action may not be immune from having to pay the costs of the other side if the case is lost. In Symphony Group v. Hodgson, Balcombe LJ produced a non-exhaustive list of when it is appropriate to make an order against a third party.³⁴⁴

In Trendtex v. Credit Suisse Lord Denning stated that:³⁴⁵

“It is perfectly legitimate today for one person to support another in bringing or resisting an action (as by paying the costs of it) provided he has a legitimate interest in the result of it and the circumstances are such as reasonably to warrant his giving his support ... provided always that the one who supports the litigation, if it fails, pays the costs of the other side.”

In Singh v. Observer, the court concluded that the question for the court’s discretion was whether it would be unjust not to make an

343 In R v. Lord Chancellor, Ex parte Child Poverty Action Group [1999] 1 WLR 347 and R v. Director of Public Prosecutions, Ex parte Bull [1998] All ER 755, the Court set out the principles to be applied in the exercise of the court’s discretion to make a pre-emptive order, at the beginning of the proceedings, that no adverse costs order would be made in a public interest challenge. In a number of judicial review challenges the court has decided to make no order for costs after the proceedings. See for example R v. Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants [1997] 1 WLR 275.

344 [1994] QB 179, pp. 193-4.

345 Trendtex Trading Corp. v. Credit Suisse [1980] 3 All ER 721, p. 741.

order that the third party pay the successful party's costs.³⁴⁶ The courts have suggested that they would be unwilling to make an order against a disinterested relative who has funded the case out of natural affection.³⁴⁷ The court would be likely to take into account the reasons why the third party had provided the funding and whether the funding was in the public interest.

11.5 Limitation periods

The time period by which a claim must be brought against an intentional trespass to the person is six years.³⁴⁸ Time will not start running for a child until they reach the age of 18.

The Limitation Act 1980 provides for certain exceptions to the prescribed limitation periods. In cases of intentional torts time will start to run from the date when the injury occurs. Section 11 of the Act provides that in personal injury cases time will start to run from:

- "a) the date on which the cause of action accrued; or
- b) the date of knowledge (if later) of the person injured".

"Knowledge" is defined in s.14 as referring to knowledge of, *inter alia*, the fact that the injury was significant, the fact that the injury was attributable to the act or omission in question, and the identity of the defendant.

However s.11 applies only to actions for personal injuries arising from negligence, nuisance or breach of duty. In Stubbings v. Webb³⁴⁹ the court held that s.11 of the Limitation Act 1980 does not

346 [1989] 2 All ER 751.

347 Murphy v. Young [1997] 1 All ER 518, p. 530.

348 Limitation Act 1980, s.2.

349 [1993] 2 WLR 120.

apply to intentional trespass to the person. It will therefore not be applicable in actions for torture, the definition of which, according to the Torture Convention, is the intentional infliction of severe pain or suffering.³⁵⁰

The Limitation Act also confers on the court, in s.33, a discretion to exclude the time limit in actions for personal injury or death where it considers that it would be equitable to do so. Again, however, this provision does not apply in the case of intentional trespass to the person; the court has no discretion to disapply the limitation period in such cases.

A further possibility to extend the limitation period might appear to lie in s.28 of the Act, which allows for an action to be brought up to six years from the date a person dies or ceases to be under a disability. Under the Act, a person is treated as being under a disability where they are either an infant or of unsound mind.³⁵¹ In addition the Act specifies that the person must have been under a disability “on the date when the right of action accrued”. Therefore s.28 is very unlikely to be applicable.

In cases where action is taken on behalf of a deceased person’s estate under the Law Reform (Miscellaneous Provisions) Act 1934,³⁵² the limitation period is three years from the date of death or the Personal Representative’s knowledge, whichever is the later.

Alternatively, an action may be brought on behalf of dependants of the deceased under the Fatal Accidents Act 1976.³⁵³ However, this cannot be done if the tortured person, prior to their death, had failed to bring an action within the six-year limitation period specified in

350 Article 1, UN Torture Convention, followed in the definition of torture in s.134 Criminal Justice Act 1988.

351 Limitation Act 1980, s.38(2) to 38(4).

352 See above, Section 10.2.2.

353 See above, Section 10.2.2.

the Limitation Act 1980.³⁵⁴ The action may not be brought after the expiry of three years from the date of death.

The result of the provisions described above is that, as the law currently stands, a person must bring an action for torture within six years from the date of the injury, and the Limitation Act 1980 does not provide the court with any discretion to extend the time limit.

The Law Commission has recognised that there is a need to change the anomalous situation where the limitation period applying to negligently caused personal injury is potentially longer and more flexible than that applying to deliberately caused injury.³⁵⁵ It has proposed that the law be reformed in order to make it simpler and fairer.

In response to a request for comments on the Law Commission's proposals for a new regime, REDRESS highlighted the need for flexible limitation periods in cases of torture and asserted that the current situation fails to adequately take into account the problems which survivors may have to overcome before bringing an action.³⁵⁶ One of the effects of mental conditions arising out of suffering acts of torture can be that the survivor avoids talking about the events surrounding the torture and sometimes experiences an inability to recall important aspects.³⁵⁷ People may also be afraid to speak freely and to give a full and accurate account of the treatment they suffered or may be too ill to contemplate bringing an action for

354 Above, n. 348.

355 "Limitation of Actions", Law Commission Consultation Paper No. 151 (5 January 1998), p. 2.

356 Response to the Law Commission's request for comments, submitted by REDRESS on 28 April 1998.

357 Moreover, as methods of torture become more sophisticated, allegations have been made of the use of short-acting amnesia drugs which have the effect of temporarily or permanently blurring and distorting the memory of the torture victim.

months or even years. Another factor is that it may be a long time before a potential claimant becomes aware of the identity or whereabouts of a potential defendant. Torturers usually conceal their identities from their victims, so at the time a victim is unlikely to know their name, official position or other details. Nor will a victim, at the time, usually be aware of the identity of the particular person responsible for issuing orders to carry out the torture.

Following the Law Commission's consultation, no draft legislation has yet been submitted to Parliament.

Whether the Limitation Act 1980 applies to an act of torture which occurred in another country depends on the choice of law rules.³⁵⁸

358 This is discussed below, Section 13.4, time limitations and choice of law.

12. Commencing Civil Proceedings

12.1 The basic terms

If a survivor of torture wishes to bring an action in the English courts for violations committed in another country, the issues concerning commencement of the action, particularly service and jurisdiction, will require detailed consideration. This area of the law is complex, not least because case law on civil remedies for victims of torture, or even personal injury, is scarce and far from developed. Cross-border civil litigation has complex rules, and the country where the torture was committed or where the potential defendant resides will determine which rules apply. Private international law agreements between states, such as the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,³⁵⁹ will come into play and may have a profound effect. The terms used are not complicated in themselves but will need to be clearly understood when going on to consider the jurisdictional issues surrounding service of proceedings.

This section maps out the legal issues that may arise when attempting to launch a civil action for acts committed abroad. Section 12.1 introduces a number of basic terms and fundamental issues. Section 12.2 describes the procedure for service of proceedings on individuals who come within the jurisdiction of the UK courts. Sections 12.3 and 12.4 deal with cases where a claimant seeks to serve proceedings on a defendant who is outside the jurisdiction, firstly where the case involves a state which is not party to the Brussels or Lugano Conventions, and secondly where a contracting state is involved. The process of effecting service of the proceedings is summarised in the flowchart on pages 134 and 135. Finally, the question of whether a defendant submits to the jurisdiction of the court is considered in Section 12.5.

359 See below, Section 12.1.3.

The questions of service and jurisdiction, although distinct, are often dealt with side by side in this Manual because the two are often dependent on one another. The way in which this interaction works also highlights differences between the English common law system and that operating under the Brussels and Lugano Conventions, to which the UK is party.

The common law gives the possibility of opportunistic service of proceedings on a foreign individual within the jurisdiction. Permission of the court will be required to serve out of the jurisdiction. In both cases the court will have the discretion to decide whether the English court is the most appropriate forum to hear the case.³⁶⁰

The Brussels and Lugano regime comes from a different legal culture. Negotiated by European states with the aim of introducing a unifying process in cross-border civil litigation, it reduces the discretion of national courts.³⁶¹ It has more fixed rules for determining where jurisdiction lies. Lord Goff made it clear that the purpose of the Brussels Convention was to parcel out jurisdiction according to clear rules. He stated:³⁶²

“The primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member states of the Community.”

The system would not recognise the validity of opportunistic service within the jurisdiction on an individual if it did not comply with the jurisdictional rules under the Conventions.

360 See *forum conveniens* below, Section 12.3.4(c) and *forum non conveniens* below, Section 13.1.1.

361 See below, Section 12.1.3(b).

362 *Airbus Industrie G.I.E. v. Patel* [1999] 1 AC 119, p. 132.

Similarly for service out of the jurisdiction, the only important factor is whether or not the jurisdictional rules have been met; the permission of the court to serve out of the jurisdiction is not required. Therefore where a contracting state is involved the English courts would only be able to determine whether the rules have been complied with.³⁶³

12.1.1 The service of a claim form

Service of the claim form is a procedural mechanism which starts the proceedings.³⁶⁴ It is normally only when the claimant takes the step of serving a claim form (after having it issued by a court) that the question of whether or not the English courts have jurisdiction will be examined. The fact that a claim form has been served within the UK on a defendant for acts committed abroad does not mean that England will be considered the appropriate jurisdiction for the trial.³⁶⁵ In other words service is a necessary, but not a sufficient, step in starting the action.

The courts have jurisdiction to entertain a claim that has taken place abroad only if the defendant is served with process, either in England or abroad, in the proper manner.³⁶⁶

363 The doctrines of *forum conveniens* and *forum non conveniens* would not be applicable here.

364 Previously called a writ, summons or originating application. When a claim form is served the defendant will also receive what is known as a Response Pack. This includes an Acknowledgement of Service form, an Admission form, and a Defence and Counterclaim form. This is referred to in this Manual as service of process or service of the claim form.

365 See below, Section 13.1.1.

366 See below, Sections 12.2.2, 12.3.6, and 12.4.3 for what constitutes proper service within and outside the jurisdiction.

Although it is an obvious point, it is important to know where to find the defendant on whom you will be seeking to serve proceedings. A person responsible for torture may not necessarily still reside in the country where the torture was inflicted. It may be necessary to make inquiries establishing where the person resides or is domiciled.³⁶⁷

The best opportunity for serving proceedings on a defendant is likely to occur if they enter or reside within the jurisdiction.³⁶⁸ Accordingly, it may be useful to have contact with organisations and expatriate communities who might be able to obtain advance notification that an alleged perpetrator is travelling to or lives in England.

12.1.2 Jurisdiction

English civil law, like criminal law, is based on the territorial principle, the general rule being that it is not possible to bring a claim for an act that has taken place outside the jurisdiction.³⁶⁹ Where the torts of assault, battery and false imprisonment have been committed abroad, it is generally considered that a cause of action will not arise within the jurisdiction. Unlike in the criminal sphere, there is at present no specific statutory basis for exercising extraterritorial jurisdiction for torture.³⁷⁰

367 Contact with organisations and groups which have connections around the world may prove crucial when tracing a person who was involved in or responsible for acts of torture.

368 See below, Section 12.2.

369 The territorial jurisdiction of the High Court covers the whole of England and Wales, but does not extend to Scotland, Northern Ireland, the Isle of Man or the Channel Islands. It includes territorial waters up to the three-mile limit (see the Territorial Sea Act 1987).

370 REDRESS is campaigning for such a statutory basis to be established. See the Draft Redress for Torture Bill, Appendix 7.

The question of in what circumstances the English courts may accept jurisdiction to try an action is examined in detail later.³⁷¹

12.1.3 Non-contracting and contracting states

The country where the torture occurred or where the torturer is living will be very significant when it comes to effecting service of proceedings.³⁷² Countries can be divided into contracting and non-contracting states, depending on whether or not they have ratified the 1968 Brussels Convention or the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The UK is party to both Conventions, and they have been incorporated into domestic law by the Civil Jurisdiction and Judgments Act 1982, as amended by the Civil Jurisdiction and Judgments Act 1991 which followed the ratification of the Lugano Convention.³⁷³

There are other conventions to which the UK is a party which are relevant to claims for civil redress for torture. The 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters³⁷⁴ and the 1970 Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters³⁷⁵ are referred to later.

371 See below, Sections 12.2, 12.3, 12.4, and 13.1.

372 See below, Sections 12.2, 12.3.1, 12.4.1, and 13.1.

373 The countries which are party to these Conventions are essentially members of the European Union or EFTA (see Appendix 3).

374 See below, Sections 12.3.6 and 12.4.3.

375 See below, Section 15.2.

A new international Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is presently being negotiated by members of the Hague Conference on Private International Law.³⁷⁶ Article 3 of the current draft provides that the jurisdictional forum will be the state where the defendant is habitually resident, and draft Article 10 provides that a claimant may bring an action in tort in the courts of the state in which the act or omission occurred or in which the injury arose. Draft Article 18(2) actually prohibits member states from exercising jurisdiction on other grounds including, specifically, the following: the presence of property belonging to the defendant; the nationality of the claimant or of the defendant; the domicile, habitual or temporary residence or presence of the claimant in that state; the service of a claim form upon the defendant in that state, or the temporary residence or presence of the defendant in that state. That provision in the draft Convention, as it stands, would clearly have an adverse effect on the ability of states to exercise jurisdiction in civil actions to redress grave violations of human rights, and in many cases would eliminate that possibility. After a coalition of international human rights organisations raised these concerns with states during the negotiations, a draft Article 18(3) was inserted, albeit still in square brackets,³⁷⁷ which creates an exemption to the limitations contained in Article 18(1) and (2) in the case of serious human rights abuses such as torture. While the precise formulation of such an exception has still not been agreed, the idea of including an exemption for cases concerning the most serious violations of international human rights and humanitarian law has the support of many states.³⁷⁸

376 This can be found on the internet at www.hcch.net/e/conventions/draft36e.html.

377 In drafting terms, this means that the provision is still under discussion.

378 REDRESS is an active member of the Coalition on Jurisdiction and Enforcement of Judgments, a coalition of human rights organisations from around the world which have campaigned for the new Convention to leave open the possibility of states exercising jurisdiction over serious violations committed in other states.

12.1.3 (a) non-contracting states

Where service of UK proceedings is sought in a non-contracting state or on a person domiciled in a non-contracting state, principles of common law, as modified by the Civil Procedure Rules, will apply.³⁷⁹

12.1.3 (b) contracting states

Jurisdiction in civil proceedings will be governed by the Brussels and Lugano Conventions where it is sought to sue in one member state for a cause of action arising in another member state. While the present contracting states are not generally recognised as having particularly bad records for committing or encouraging torture, they have on occasion been found to have violated the prohibition on torture and other ill-treatment in Article 3 of the European Convention on Human Rights.³⁸⁰ The argument that if allegations of torture do arise they can be dealt with by the local courts and that it will, therefore, not be necessary to consider seeking civil redress through the English courts should therefore be treated with caution. It is also not uncommon for those who have committed or authorised acts of torture in a non-contracting state to be found in a contracting state having sought or received asylum there.

379 The rules of civil procedure were reformed by the Civil Procedure Rules 1998 (CPR). They can be found in *Civil Procedure: The White Book Service 2000* (Sweet & Maxwell, 2000).

380 For example, *Selmouni v. France*, n. 82 above and *Ireland v. UK*, n. 75 above.

The law developed by the UK courts and the European Court of Justice under the Brussels and Lugano Conventions will also influence jurisprudence relating to non-contracting states.³⁸¹ For instance, the common law rule that entitles actions to be brought for a tort committed outside the jurisdiction has its origins in the case law arising from the Brussels Convention.³⁸² Therefore, the English courts will almost certainly look at decisions made under the Civil Jurisdiction and Judgments Act as a point of comparison.

Torture would fall within the definition of “civil and commercial matters” in Article 1 of both the Brussels and the Lugano Conventions, thus bringing it within the scope of the Conventions.³⁸³ The general rule set out in Article 2 of both Conventions provides that defendants domiciled in a contracting state must, whatever their nationality, be sued in the courts of that state.³⁸⁴ If a person is domiciled in another contracting state, the English courts must apply the law of the other contracting state to determine whether a party is domiciled in that state.³⁸⁵

381 The European Court of Justice does not have jurisdiction to hear cases under the Lugano Convention.

382 See the effect of *Bier* on CPR 6.20(8), formerly Order 11 Rule 1(1)(f), below, Section 12.3.1.

383 Civil Jurisdiction and Judgments Act 1982, as amended by the Civil Jurisdiction and Judgments Act 1991, Schedule 1 Article 1.

384 Civil Jurisdiction and Judgments Act, Schedule 1 Article 2. But see Schedule 1 Article 5(3) below, Section 12.4.2(b).

385 Schedule 1 Article 53.

Under English law, the question of domicile is determined as follows:³⁸⁶

- (i) An individual is domiciled in the UK if he is resident in, and the nature and circumstances of his residence indicate that he has a substantial connection with, the UK.³⁸⁷
- (ii) An individual is domiciled in a state other than a contracting state if he is resident in, and the nature and circumstances of his residence indicate that he has a substantial connection with, that state.³⁸⁸
- (iii) An individual who is not domiciled in the UK in accordance with (i) is domiciled in another contracting state if by the law of that state he is domiciled in that state.³⁸⁹

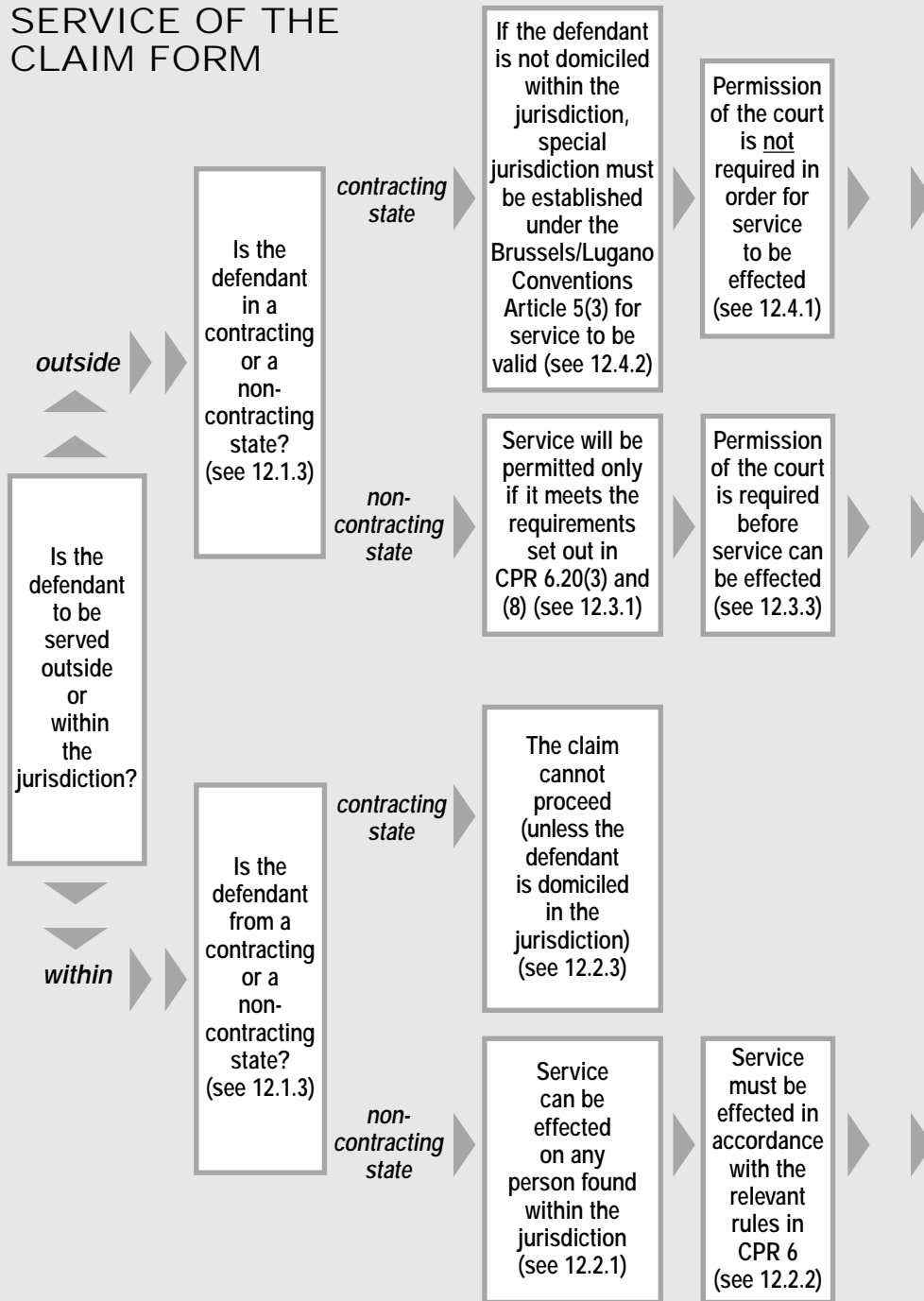
386 See CPR 6.19.5.

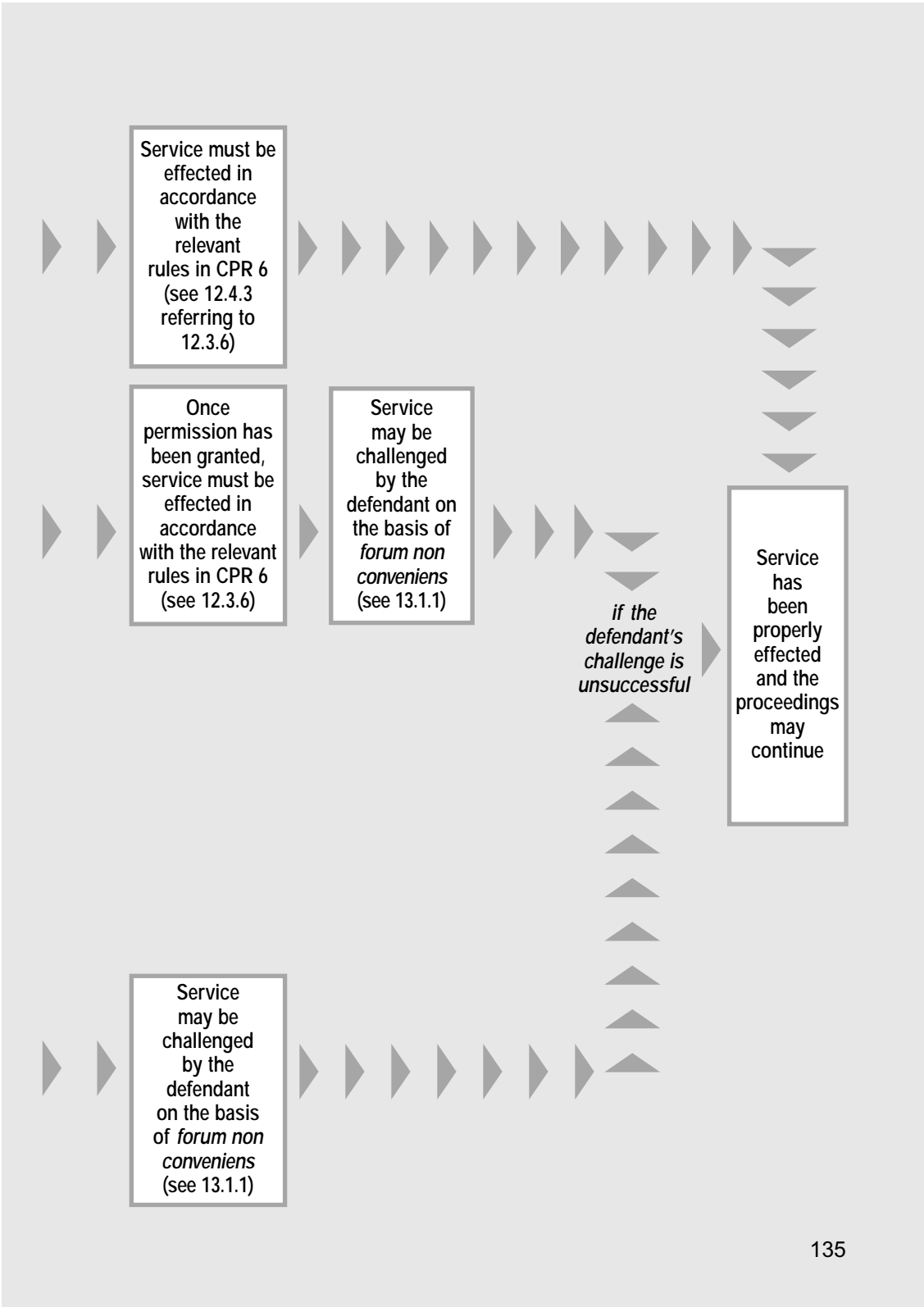
387 Civil Jurisdiction and Judgments Act, s.41(2)(3).

388 Section 41(7).

389 Schedule 1 Article 52(2) and 3C.

SERVICE OF THE CLAIM FORM





Service must be effected in accordance with the relevant rules in CPR 6 (see 12.4.3 referring to 12.3.6)

Once permission has been granted, service must be effected in accordance with the relevant rules in CPR 6 (see 12.3.6)

Service may be challenged by the defendant on the basis of *forum non conveniens* (see 13.1.1)

if the defendant's challenge is unsuccessful

Service may be challenged by the defendant on the basis of *forum non conveniens* (see 13.1.1)

Service has been properly effected and the proceedings may continue

12.2 Service on a defendant within the jurisdiction

It is not possible within the UK to serve proceedings on a foreign state, only on individuals. Where a claimant wishes to serve proceedings on a state, the rules regarding service outside the jurisdiction will apply.

12.2.1 Where the defendant is from a non-contracting state

The common law rules state that if a defendant is properly served with a claim form within England or Wales they will automatically be subject to the jurisdiction of the courts of England and Wales. The defendant does not need to be a British national or domiciled in England in order for the claim form to be served. Nor does it matter whether the defendant is only in the jurisdiction for a very short time,³⁹⁰ mere transient presence being a sufficient basis for service of the claim form even if the dispute in question has no real or substantial connection with England.³⁹¹

However, as previously mentioned, the fact that process is served does not necessarily mean that the English courts will subsequently be considered the appropriate forum to adjudicate the case. The court has a discretion to refuse to entertain or to stay proceedings if it believes that continuation might be contrary to justice.³⁹² A claim may also be set aside if the defendant is tricked into coming to England or was kidnapped and brought here.³⁹³

12.2.2 Methods of service within the jurisdiction

The general rules for the method of service within the jurisdiction are established under Part 6 of the Civil Procedure Rules 1998.

³⁹⁰ Colt Industries Inc. v. Sarlie [1966] 1 All ER 673, following the dicta of Lord Russell of Killowen in Carrick v. Hancock (1895) 12 TLR 59, p. 60.

³⁹¹ HRH Maharanee of Baroda v. Wildenstein [1972] 2 QB 283.

³⁹² See *forum non conveniens* below, Section 13.1.1.

³⁹³ Watkins v. North American Timber Co. (1904) 20 TLR 534.

Where a person from a non-contracting state is found within the jurisdiction it would be advisable to serve the claim form personally. The defendant does not have to be in England when the claim is issued, but must be in England when the process is served.

Where the court is satisfied that there is good reason why service cannot take place personally or by post, the court may order service by an alternative method.³⁹⁴ The general rule on the alternative method of service was summed up by Lord Reading in Porter v. Freudenberg.³⁹⁵ One of his criteria was that:

“If the defendant went out of the jurisdiction after the issue of the writ, although not for the purpose of evading service, substituted service may be allowed if the court is satisfied that the issue of the writ came to his knowledge before he went outside the jurisdiction and special circumstances show that such substituted service would be just.”

It has been argued that the court has no jurisdiction to order service by an alternative method of process for service within the jurisdiction on a defendant who was outside the jurisdiction at the time of service.³⁹⁶

12.2.3 Where the defendant is from a contracting state

Under the Civil Jurisdiction and Judgments Act, opportunistic service on a person temporarily in England, but domiciled in another contracting state, is referred to as “exorbitant jurisdiction”. Article 3(2) of both Conventions provides that the mere presence of the defendant in England is not a sufficient basis of jurisdiction, and so service cannot be properly effected within the jurisdiction.

394 Until recently this was referred to as substituted service.

395 [1915] KB 857, pp. 887-8.

396 This is the preferred view stated in Dicey & Morris, n. 305 above, paras 11-086 to 11-087, and is contrary to another of Lord Reading’s propositions.

12.3 Service on an individual or state outside the jurisdiction – non-contracting state

Where a defendant is a foreign state or is an individual who cannot be served within the jurisdiction, a claimant may wish to explore the possibility of serving them with proceedings outside the jurisdiction. The service of proceedings out of the jurisdiction will vary according to whether it is to be effected in (or on) a contracting or a non-contracting state.³⁹⁷ In the case of non-contracting states leave of the court is required. The two issues to be considered are firstly, whether the courts have the jurisdiction and then, whether they are the appropriate forum to hear the matter.

12.3.1 Service with the leave of the court

Under common law, a claimant will be allowed to serve proceedings only if permission is obtained from the court. The situations in which service out of the jurisdiction are permitted were previously set out in the sub-rules to Order 11 of the Supreme Court Rules. Following the introduction of the Civil Procedure Rules 1998 (CPR), Order 11 was slightly amended and placed in Schedule 1 to the Civil Procedure Rules. However, following the Civil Procedure (Amendment) Rules 2000³⁹⁸ provisions concerning service out of the jurisdiction are now contained within a third section to Part 6 of the Civil Procedure Rules.

Although Order 11 has been repealed, its provisions have been largely incorporated into the third section to Part 6 of the Civil Procedure Rules. It is recognised that service out of the jurisdiction will remain heavily dependent on the earlier legal authorities relating to Order 11.³⁹⁹ Of greatest relevance for victims of torture

397 Contracting states are dealt with below, Section 12.4.

398 SI 2000 No. 221. This came into effect on 2 May 2000.

399 See CPR 6.17.2.

is CPR 6.20(8), formerly Order 11 Rule 1(1)(f), which states that if a claim is made in tort leave can be granted where:⁴⁰⁰

- “(a) damage was sustained within the jurisdiction; or
- (b) the damage sustained resulted from an act committed within the jurisdiction”.

Order 11 Rule 1(1)(f) had been amended in 1987 to give effect to the Brussels Convention as adopted by the Civil Jurisdiction and Judgments Act and the decision in Bier v. Mines de Potasse d’Alsace SA which granted jurisdiction to the courts of “the place where the harmful event occurred”.⁴⁰¹

12.3.2 Establishing the jurisdiction of the court

Prior to that amendment to Order 11 Rule 1(1)(f), now CPR 6.20(8), jurisdiction could only be assumed if the action was founded on a tort committed within England. The question of where the damage occurred was considered in Distillers v. Thompson.⁴⁰² The Privy Council in that case adopted the test that the place where in substance the act or omission occurred gave the claimant a cause of action.⁴⁰³

The case of Bier established that jurisdiction applies to the courts where (a) the claim is founded on a tort and either (b) the damage was sustained within the jurisdiction or (c) the damage resulted from

400 CPR 6.20(3) is also relevant; see joining parties to the action below, Section 13.2.1.

401 [1978] QB 708.

402 Above, n. 308. See also the Canadian case of Moran v. Pyle National (Canada) Ltd. (1973) 43 DLR (3d) 239.

403 In that case concerning liability for a product manufactured in one country but consumed in another, the cause of action was held to have arisen at the place where the failure to warn occurred.

an act committed within the jurisdiction.⁴⁰⁴ But the English courts have not examined the important question of whether action can be brought in England in respect of consequential damage. This is discussed directly below.

12.3.2 (a) direct injury

It is commonly (but not necessarily exclusively) the case that the direct physical injury resulting from an act of torture will be sustained at the place in which the act is carried out. Therefore, the place where the tortious act is committed will also be the place where the damage is suffered.

However, subjection to torture may result in the victim suffering psychological trauma, one example of which is Post-Traumatic Stress Disorder.⁴⁰⁵ The symptoms of Post-Traumatic Stress Disorder might not manifest themselves until months after the immediate physical and mental suffering caused by the acts. Statistics indicate that 90 per cent of torture survivors will start to experience symptoms up to six months after the event, and 10 per cent may find that the effects may be delayed by up to two years.⁴⁰⁶ Therefore, it is possible that a victim may have left the country where the torture took place prior to the onset of Post-Traumatic Stress Disorder.

404 Above, n. 401.

405 For a definition see N. Mullany and P. Handford, *Tort Liability for the Law of "Nervous Shock"* (Sweet & Maxwell, 1993). Psychological injuries like Post-Traumatic Stress Disorder are not a cause of action but a head of damages. They arise in torts such as negligence and intentional trespass to the person in the form of, for example, nervous shock.

406 See REDRESS, submission to the Law Commission, n. 356 above.

This was the case in Al-Adsani. In the first Al-Adsani decision, the court stated that:⁴⁰⁷

“There is clear evidence from medical experts that due to the severe physical injuries suffered in Kuwait the plaintiff has suffered serious injuries to his mental health during his time in the UK and there is an express opinion to the effect that this should be properly regarded as a separate form of injury even if it is consequent upon the process which began ... in Kuwait.”

12.3.2 (b) consequential damage

It is significant that CPR 6.20(8), as did Order 11 Rule 1(1)(f) before it, refers to the “damage” and not just the “injury” suffered by a victim of torture. It has been argued in some Commonwealth cases that damage applies to recoverable consequential damage that was sustained in the forum and flows from physical or psychological injury that occurred outside the forum.⁴⁰⁸

The distinction between damage and injury was drawn by Viscount Simon in Crofter Hand Woven Harris Tweed Co. Ltd. v. Leitch. He stated that:⁴⁰⁹

“‘injury’ is limited to actionable wrong, while ‘damage’, in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not”.

407 Above, n. 297, p. 469. For a description of the first and second Al-Adsani decisions see above, Section 10, nn. 297 and 298 and accompanying text.

408 In the Canadian case of Vile v. Von Wendt (1980) 103 DLR 3d 356, Rule 25(1)(h) of the Ontario Rules applies “in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere”. In the Australian case of Challenor v. Douglas (1983) 2 NSWLR 405, Part 10, Rule 1(1)(e) of the Supreme Court Rules applies “where the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring”.

409 [1942] AC 435, p. 442.

Following this dictum, the Australian Court of Appeal in the case of Flaherty v. Girglis concluded that:⁴¹⁰

“Damage, therefore, is to be contrasted with the element necessary to complete a cause of action; it includes all the detriment, physical, financial and social which the plaintiff suffers as the result of the tortious conduct of the defendant.”

This is in line with the decision in the Canadian case of Vile v. Von Wendt where the court (disagreeing with the conclusion of the court in Mar v. Block)⁴¹¹ observed that:⁴¹²

“Damage certainly includes injury but it also includes more than that. It includes all of the different heads of damage and various expenses that may be suffered as a result of tortious conduct.”

In the Australian case of Challenor v. Douglas, the defendants argued that the cause of action and the damage (a broken bone and shock) were all completed in Queensland, and that the damage in New South Wales was not damage but the consequence of damage. However, the court was of the view that:⁴¹³

“damage is damage.... It may be direct or it may be indirect; it may be consequential. It is still damage.”

In Poirier v. Williston the claimant was injured in New Brunswick, but was resident in Ontario. The court held that:⁴¹⁴

“the damages include pain and suffering, disability, loss of ability to earn an income. Thus, it was quite right, proper and just to bring the action [in Ontario].”

410 (1985) 4 NSWLR 248, p. 266.

411 (1976) 13 OR (2d) 422 1 CPC 206 (overruled).

412 Vile v. Von Wendt, n. 408 above, p. 362.

413 Challenor v. Douglas, n. 408 above, pp. 408-9.

414 (1982) 113 DLR (3d) 252, p. 253.

In Flaherty v. Girglis, the Australian court concluded that consequential damage included medical costs, continuing loss of enjoyment of life, and employment opportunities denied to a claimant in another jurisdiction following injury abroad.⁴¹⁵ As well as damage sustained within the jurisdiction which flows from a physical injury caused in another country, the damage sustained within the jurisdiction may include recoverable economic loss.⁴¹⁶

The courts have not examined whether there is a certain amount of injury or damage that would need to be suffered before an action could be brought in England rather than in the state where the torture was committed. Some sort of minimum threshold was indicated in Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc. where the court stated that “it is enough that some significant damage has been sustained in England”.⁴¹⁷ With respect to consequential damage it was held in the Canadian case of Vile v. Von Wendt that, although the accident took place in another state and although some damage was sustained there, the bulk of the damage that flowed from the injury was sustained in Ontario.⁴¹⁸ It is also arguable that the intentional infliction of an act of torture is so significant, being a violation of an absolute non-derogable human right, that public policy should presume that any damage suffered following such treatment is significant.

12.3.3 The application for leave to serve out of the jurisdiction

The application for leave to serve out of the jurisdiction under CPR 6.20, as under Order 11 Rule 1(1) previously, is made by the claimant without notice to the other side.⁴¹⁹ It will be put before a Master if the claim form is issued in the High Court,

415 Above, n. 410, p. 266.

416 Skyrotors Ltd. v. Carriere Technical Industries (1979) 102 DLR (3d) 323 (Ont).

417 [1990] 1 QB 391, p. 437.

418 Above, n. 408, p. 360.

419 Using Form N244.

or a District Judge if it is issued in the County Court. Personal injury cases where the claim amounts to less than £50,000 will usually be started in the County Court, although the complexity of the issues may mean that it will be more appropriate to commence proceedings in the High Court.⁴²⁰

Applications for permission to serve out of the jurisdiction are made under Part 23 of the Civil Procedure Rules. Where appropriate, permission may be granted retrospectively.⁴²¹

The application must be supported by affidavit evidence setting out:⁴²²

- the grounds on which the application is made and the paragraph in CPR 6.20 which is relied upon;
- that in the deponent's belief the claimant has a reasonable prospect of success;
- the place or country where the defendant is, or probably may be found. If the defendant turns out to be in a country other than that named in the order, the application to amend the order and if necessary the claim form should be made *ex parte* to the Practice Master on affidavit;
- where the application is made under CPR 6.20(3), the written evidence must also state the grounds for the deponent's belief that there is, between the claimant and the person on whom a claim has been served or will be served, a real issue which it is reasonable for the court to try.⁴²³

420 For guidance as to whether a case should be commenced in the High Court or the County Court, see Part 7.1 of the Civil Procedure Rules. For further details see Practice Direction 7.

421 See CPR 6.21.4.

422 CPR 6.21(1)(a)-(c) and (2).

423 See joining parties to the action below, Section 13.2.1.

The affidavit should be sufficiently full to show that the court has the jurisdiction to hear the case and to make the order claimed, and must set out sufficient facts to show that England is the appropriate forum, that is, the *forum conveniens*.⁴²⁴ Copies of the Statement of Claim and the Particulars of Claim should be exhibited as well as copies of documents pleaded.

Since the application is made without notice, the claimant must make full disclosure of any relevant information.⁴²⁵ While the claimant must disclose anything that casts doubt on the case there is no expectation that they must anticipate all the arguments which the defendant might raise.⁴²⁶ If any material fact is omitted this in itself would justify the court in discharging the order, even though the party might later be in a position to apply again.⁴²⁷ The court will refuse permission if the case is within the letter but outside the spirit of the law.⁴²⁸

The written evidence should be given by any person with knowledge of the facts. It is commonly made by solicitors who must state the evidence is given to the best of their knowledge, information and belief.

The application is usually put before the Master or the District Judge to be decided on the written evidence and collected when the Master's decision is placed upon it.⁴²⁹ If the court does not agree that the application is suitable for consideration without a hearing, the court will inform the applicant.⁴³⁰

424 See below, 12.3.4(c).

425 Ellinger v. Guinness Mahon [1939] 4 All ER 16.

426 Electric Furnace v. Selas Corp. of America [1987] RPC 23.

427 The Hagan [1908] P. 189, p. 201.

428 Johnson v. Taylor Bros [1920] AC 144, p. 153.

429 In the High Court documents should be left in the Masters' Secretary's Department (Room E214) of the Royal Courts of Justice, The Strand, London (tel: 020 7947 6000).

430 Practice Direction 23A.

12.3.4 Relevant factors when applying for leave

Lord Goff stated in Seaconsar v. Bank Markazi that it is a serious question whether jurisdiction under Order 11, now CPR 6.20, ought to be invoked, to put a person outside the jurisdiction to the “inconvenience and annoyance of being brought to contest his rights in this country”.⁴³¹

When process can be served on a defendant while they are within the jurisdiction, the claimant has a right to demand that service is exercised through the court.⁴³² However, when leave is required to serve out of the jurisdiction, it is within the discretion of the court as to whether it provides such leave. Therefore, the court may, if it sees fit, decline to allow the service of process and thus decline to exercise its jurisdiction.

Although the wording of CPR 6.20 and 6.21 differs from Order 11 Rules 1(1) and 4, the principle remains the same. CPR 6.21.16(1) follows Order 11 Rule 4(2), which provided that permission to serve out of the jurisdiction shall not be granted “unless it shall be made sufficiently to appear to the Court that the case is a proper one for [such service]”. The burden is on the claimant to show good reason why service should in the circumstances be permitted on a foreign defendant.⁴³³

A judge faced with the question of whether to give leave to serve out of the jurisdiction will have to consider three issues:

12.3.4 (a) does the claimant have a “good arguable case”?

As was the case under Order 11, the first question for the courts to consider is whether jurisdiction under one of the paragraphs of

⁴³¹ [1994] 1 AC 438, p. 455, citing the Dreyfus case.

⁴³² Although the court has a discretion to stay the action to prevent injustice; see below, Section 13.1.1.

⁴³³ Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1984] AC 50, p. 72.

CPR 6.20 has been established.⁴³⁴ The standard of proof to be met is whether there is a good arguable case that the action falls within CPR 6.20(3) or (8).⁴³⁵ This was confirmed in the first Al-Adsani decision. Evans LJ stated:⁴³⁶

“The correct approach for the court to adopt is to ask whether the plaintiff shows a good arguable case as regards jurisdiction under Order 11 Rule 1.”

The court will also consider whether there is a good arguable case that state immunity, if relevant to the case, will not apply.⁴³⁷

The practice of the court where questions of fact are concerned is to look primarily at the claimant’s case and not to try disputes of fact. Lord Kerr stated in Hutton & Co. v. Mofarrij that:⁴³⁸

“the test at the stage of Order 11 is whether or not it appears to the court that the plaintiffs have a good arguable case on the limited affidavit material which is then available.”

This was again confirmed in the first Al-Adsani decision where the only evidence before the court had come from the claimant and his witnesses. The court stated that:⁴³⁹

“No evidence or submissions from any of the defendants are available to us nor should they be on this ex parte hearing.”

However, on questions of law the court may look at the issues in full and may refuse leave if it considers that the claimant’s case is bound to fail.

434 CPR 6.21.16(1).

435 See Lord Goff’s comments in Seaconsar v. Bank Markazi, n. 431 above, p. 453.

436 Above, n. 297, p. 467.

437 Ibid, p. 468.

438 [1989] 2 All ER 633.

439 Above, n. 297, p. 466.

12.3.4 (b) is there a serious issue to be tried?

The question before the court is, has the existence of the relevant cause of action been sufficiently established, that is, is there a serious issue to be tried?⁴⁴⁰

The courts have adapted the general guidance of Lord Davey in Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks. He stated that:⁴⁴¹

“If the court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff bona fide desires to try, I think that the court should, as a rule, allow the service of the writ.”

The House of Lords in Seaconsar v. Bank Markazi, in following this approach, concluded that:⁴⁴²

“ ... if in support of the plaintiff’s ex parte application an affidavit is sworn in proper form deposing to facts which, if proved, provide a sufficient foundation for the alleged cause of action, that should generally be enough for the present purposes.”

The court went on to decide that the standard of proof in respect of the cause of action, is whether, on the affidavit evidence, there is a serious issue to be tried, that is, a substantial question of fact or law, or both, which the claimant desired to have tried. The court also made it clear that when considering facts which are disputed:⁴⁴³

“the court ... is not called upon to try the action or to express a premature opinion on the merits”.

440 CPR 6.21.16(2).

441 (1904) 90 LT 733, p. 735.

442 Above, n. 431, p. 452.

443 Ibid.

If the court is satisfied that the claimant's case meets those two questions it may then exercise its discretion in order to decide whether the English courts provide the most appropriate forum, the *forum conveniens*, to hear the case.⁴⁴⁴

12.3.4 (c) *forum conveniens*⁴⁴⁵

The rationale behind the principle of *forum conveniens* was conveyed by Lord Kinnear in Sim v. Robinow. He stated that where a defendant is served with proceedings within the jurisdiction the case will proceed:⁴⁴⁶

“ ... unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”.

This issue has become increasingly important as the courts fear that claimants will indulge in “forum shopping”.⁴⁴⁷ This means that as there is a greater knowledge of foreign laws and procedures, and more capacity for travel, claimants may try to pick the most favourable jurisdiction to hear their case.

The term *forum conveniens* is very similar to, but not to be confused with, the separate issue of *forum non conveniens*. At the point when the court is asked by the claimant to exercise its discretion to grant leave to serve a claim form out of the jurisdiction, the correct term is *forum conveniens*. When the court is asked by a defendant to exercise its discretion to stay proceedings following the service of the claim form, on the basis that England is not the most

444 Ibid, p. 457.

445 CPR 6.21.16(3).

446 (1892) 19 R 665, p. 668.

447 This phrase was quoted by the Canadian Supreme Court in Anchem Products Inc. v. Workers Compensation Board [1993] 1 SCR 897, p. 904.

appropriate jurisdiction to hear the claim, the correct term is *forum non conveniens*. The only significant difference between the two is that, whereas the burden of proof is on the claimant requesting that the court exercise its discretion to allow service, the burden will be on a defendant when a stay of proceedings is sought.

When considering the issues of *forum conveniens* and *forum non conveniens*, the courts will adopt the same approach when deciding whether to grant leave or to stay proceedings.⁴⁴⁸ Therefore, to avoid repetition, the approach of the courts will be considered in the section concerning *forum non conveniens*.⁴⁴⁹ This is because the issue will at that stage be contested by both parties when the defendant seeks to stay proceedings after service, so may be more fully argued and considered, whereas the claimant's request for leave to serve out of the jurisdiction is made without notice to the other side.

When making its decision whether to grant leave to serve out of the jurisdiction, the court will not go into a detailed examination of the merits of the case. Lord Goff approved the approach of Stuart-Smith LJ when he stated:⁴⁵⁰

“It seems to me to be wholly inappropriate once the question[s] of jurisdiction and forum [conveniens] are established for there to be prolonged debate and consideration of the merits of the plaintiff's claim at an interlocutory stage.”

In addition, the House of Lords decided that the relationship between the standard of proof on the existence of the cause of action and the principle of *forum conveniens* should be looked at separately.⁴⁵¹ It disapproved of the view that if the standard of proof

448 See above, Section 12.2.1 for the circumstances in which a stay may be granted by a court after service has been effected within the jurisdiction on an individual from a non-contracting state.

449 See below, Section 13.1.1.

450 *Seaconsar v. Bank Markazi*, n. 431 above, p. 455.

451 *Ibid.*, pp. 455-6.

was more difficult to achieve on one of the elements, the court's decision would not be affected by the fact that it was easily met in the other element.⁴⁵²

12.3.5 The decision of the court to grant leave

An appeal against the refusal of the Master to give leave to serve out of the jurisdiction lies from the Master to a Judge in Chambers, and from the Judge in Chambers, with leave, to the Court of Appeal.⁴⁵³ The discretion of the judge is not lightly interfered with by the Court of Appeal.⁴⁵⁴ The House of Lords in the case of Berezovsky v. Michaels⁴⁵⁵ agreed with the Court of Appeal below which had stated that:

“...the Court of Appeal should only interfere if the judge erred in principle, or seriously misapprehended relevant matters, or took into account irrelevant ones”.

Under CPR 6.21(4) an order granting leave must specify the period within which the defendant must acknowledge service, file or serve an admission and file a defence.⁴⁵⁶

12.3.6 Methods of service⁴⁵⁷

There are a number of steps that must be taken to ensure that the service of proceedings out of the jurisdiction is effected properly.

452 Cf. Société Commerciale de Réassurance v. Eras International Ltd. [1992] 1 Lloyd's Rep. 570, p. 588.

453 See CPR 6.21.15; CPR 52.3.

454 Reynolds v. Coleman (1887) 36 Ch.D 453.

455 11 May 2000, as yet unreported.

456 See Practice Direction 6B paras 7.3 and 7.4.

457 For further details, see Practice Direction 6B, and/or contact the Foreign Process Office (Room E202) of the Royal Courts of Justice (tel: 020 7947 6691).

A claim form which is to be served out of the jurisdiction need not be served personally on the defendant so long as it is served in accordance with the law of the country in which service is effected or it is served in accordance with the methods set out in CPR 6.24 to 6.27.

Service by post to another country is not authorised except in pursuance of a convention or an order for an alternative method of service.⁴⁵⁸

It is safer and probably cheaper (although not necessarily quicker) to effect service through the foreign government, judicial authorities and British consuls using one of the methods set out in CPR 6.26. If serving the state itself, the procedure set out in CPR 6.27 applies.

12.3.6 (a) service on an individual

Where the claim is made in the High Court, the claimant's solicitor or representative must lodge the necessary documents at the Foreign Process Office.⁴⁵⁹ Where the claim is made in the County Court, the Court will forward the documents to the Foreign Process Office in order that service may be effected. The documents to be included may differ for each country and it is advisable to check with the Foreign Process Office of the Royal Courts of Justice beforehand.

In general, the claimant will need to file:

- a copy of the claim form and response pack together with additional copies for each defendant to be served;⁴⁶⁰

458 CPR 6.15(2).

459 Room E202 of the Royal Courts of Justice (see n. 457 above).

460 CPR 6.26(2) and Practice Direction 6B, para. 2.1. For details of the content of the Response Pack see above, Section 12.1.1, n. 364.

- each copy of the claim form and response pack must be accompanied by a translation of the claim into the official language or one of the official languages of that country;⁴⁶¹
- certification by the person making it to be a correct translation;⁴⁶²
- a request in duplicate indicating the method of service sought;⁴⁶³
- the fee (if necessary);⁴⁶⁴
- an undertaking to pay expenses of service by the Foreign and Commonwealth Office.⁴⁶⁵

The method of service of a claim form is set out in CPR 6.25. Service may vary according to the relationship between the country and England.

Under CPR 6.25(2) service can be made on a defendant in another country which has a civil procedure convention with the UK (other than the 1965 Hague Convention on Service Abroad) through (1) the judicial authorities of that country, or (2) a British consular authority

461 CPR 6.28(1), (2), (4) and (5), and Practice Direction 6B para. 2.1.4. It is necessary to translate the court forms in their entirety, including the small print.

462 CPR 6.28(3). There is no standard form of certification, but it must contain a statement of that person's full name, address and qualifications for making the translation. For details of translators who do legal translations, contact the Law Society.

463 CPR 6.26(2)(a). See also directly below in this section.

464 There is no fee for effecting service on a Hague Convention country. Otherwise the cost of service is £72.00.

465 CPR 6.29.

in that country (subject to any provision of the convention as to the nationality of persons who may be so served).⁴⁶⁶

Where a claim form is served on a defendant in any country which is party to the 1965 Hague Convention on Service Abroad, under CPR 6.25(1), the claim may be served (1) through the authority designated under the Convention in respect of that country; or (2) if the law of that country permits: (a) through the judicial authorities of that country; or (b) through a British consular authority in that country.⁴⁶⁷

Where the defendant is to be served in a country where there is no civil procedure convention providing for service of process in that country,⁴⁶⁸ the claim may be served (1) through the government of that country, where that government is willing to effect service; or (2) through a British consular authority in that country, except where service through such an authority is contrary to the law of that country.

CPR 6.25(4) lists those states for which CPR 6.25 does not apply (unless they are party to the 1965 Hague Convention on Service Abroad). Service will need to be effected by the claimant or an agent directly.⁴⁶⁹

Once service has been effected, the Masters' Secretary will notify the applicant's solicitor of the receipt of the certificate and the amount of expenses incurred.⁴⁷⁰

466 A list of the countries with convention agreements is set out in *Civil Procedure: The White Book 1999* (2nd edn), para. R11.6.3.

467 The states parties to the Hague Convention are set out in CPR 6.24.6.

468 CPR 6.25(3).

469 For the list of independent Commonwealth countries, inquire to the Foreign Process Office (Room E202) of the Royal Courts of Justice (see n. 457 above).

470 These are payable to the Finance Officer of the Diplomatic Section. If the certificate is sent for filing in the Filing Department a filing fee is payable.

12.3.6 (b) service on a foreign state

If the defendant is a foreign state, claim forms and other documents are served through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that state.⁴⁷¹

The time for the defendant state to acknowledge service will begin to run two months after the date on which the process has been received at the Ministry of Foreign Affairs.⁴⁷²

Where a person has been granted leave to serve a claim on a state,⁴⁷³ in order to effect service on that state, they will, in general, need to lodge at the Foreign Process Office:

- a request for service to be arranged by the Foreign and Commonwealth Office;⁴⁷⁴
- a copy of the claim form⁴⁷⁵ and response pack;
- a translation of the claim into the official language or one of the official languages of that country;⁴⁷⁶
- certification by the person making it to be a correct translation;⁴⁷⁷

471 State Immunity Act 1978, s.12(1).

472 Section 12(2).

473 For the definition of "state" see s.14 of the State Immunity Act 1978.

474 CPR 6.27(2)(a).

475 CPR 6.27(2)(b).

476 CPR 6.28. It is necessary to translate the court forms in their entirety, including the small print.

477 CPR 6.28(3). There is no standard form of certification, but it must contain a statement of that person's full name, address and qualifications for making the translation. For details of translators who do legal translations, contact the Law Society.

- the fee (if necessary);⁴⁷⁸
- an undertaking by the person making the request to be responsible for all the expenses incurred by the Foreign and Commonwealth Office in respect of service requested.⁴⁷⁹

Service of the claim form must be effected within six months from the date when leave to serve out of the jurisdiction is granted.⁴⁸⁰ Service on a diplomatic mission is not recognised as service on the state of that mission for the purposes of the State Immunity Act s.12(1).⁴⁸¹ An official certificate of service by the British consular authority, government or judicial authorities or any other authority under the Hague Convention on Service Abroad 1965 in that country shall be evidence of service on the date stated.

12.4 Service on an individual or state outside the jurisdiction – contracting state

12.4.1 Service without leave of the court

Permission of the court is never required for service out of the jurisdiction on a contracting state or on an individual in a contracting state.⁴⁸² Where the court has the power to hear and determine a claim by virtue of the Civil Jurisdiction and Judgments Act, CPR 6.19(1) would allow a survivor of torture to serve the claim form out of the jurisdiction without the permission of the court.⁴⁸³ The conditions are that there must be no other proceedings between the parties concerning the same cause of action in

478 There is no fee for effecting service on a Hague Convention country. Otherwise the cost of service is £144.00.

479 CPR 6.29.

480 CPR 7.5(3).

481 See *Kuwait Airways Corporation v. Iraqi Airways Co*, n. 258 above.

482 However, the English court must have jurisdiction – see below, Section 12.4.2.

483 CPR 6.19(2), through which service may be effected without leave of the court, is not relevant here.

England or any other contracting state, and the defendant must be domiciled in a contracting state.⁴⁸⁴

Where there are two or more defendants out of the jurisdiction and service will be required in both contracting and non-contracting states, leave will be required to serve in the non-contracting state but will not be required to serve in the contracting state.

12.4.2 Establishing the jurisdiction of the court

The sole criterion for commencing an action is that the jurisdictional rules set out in the Conventions are met.

The basic rule set out in the Civil Jurisdiction and Judgments Act Schedule 1 Article 2 provides that:

“persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State”.

In Canada Trust Co. v. Stolzenberg (No. 2) it was held that the critical date for testing whether the defendant was domiciled in England for the purposes of Article 2 was the date of issue of the proceedings rather than the date of service.⁴⁸⁵ The court will never be concerned with the domicile of the claimant. The intention of Article 2 is to avoid a “wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2”.⁴⁸⁶

However, there are certain exceptions to the domicile rule, known as special rules of jurisdiction. The most significant for survivors of torture is Schedule 1, Article 5(3) of the Civil Jurisdiction and Judgments Act, which states that the court has jurisdiction, in matters relating to tort, if England is the place where the harmful event occurred.

484 CPR 6.19(3); see also CPR 6.19.2 and Practice Direction 6B, para. 1.

485 [1998] 1 WLR 547.

486 Somafer SA v. Saar Ferngas AG Case 33/78 [1978] ECR 2183, p. 2191.

In Shevill v. Press Alliance the court considered the question of the appropriate jurisdiction in the case of an action in England in respect of an alleged libel published in a French newspaper article distributed in several contracting states. It held that the claimants could bring an action for damages either before the courts of one of the contracting states which would rule solely on the harm caused by publication in that particular state, or the place where the publisher of the defamatory publication is established.⁴⁸⁷

In Domicrest v. Swiss Bank Corporation, the court stated that for the purposes of Article 5(3), the place where a negligent misstatement giving rise to the damage occurs is, by analogy with defamation, the place where the misstatement originated and that the place where the misstatement is received and relied upon is likely to be the place where the damage is suffered.⁴⁸⁸

12.4.2 (a) direct injury

Those who drafted the Brussels Convention deliberately left open the question whether the relevant “place” was the place where the wrongful act occurred or the place where the damage was suffered, if they were different places. The point arose for decision under Article 5(3) in Bier.⁴⁸⁹ The European Court of Justice held that the meaning of “place where the harmful event occurred” in Article 5(3) must be interpreted so that the claimant has an option to commence proceedings either at the place where the damage occurred or at the place of the event giving rise to it. Therefore, it is possible that psychological damage that develops in England as a result of acts committed abroad may result in a civil action being brought in either state.

⁴⁸⁷ [1995] ECR I-415; (1996) AC 959.

⁴⁸⁸ [1999] QB 548.

⁴⁸⁹ Above, n. 401.

12.4.2 (b) consequential damage

The heads of special jurisdiction, such as Article 5(3), are exceptions to the general rule that jurisdiction is based on the defendant's domicile, and will only be accepted under compelling circumstances. For instance, the mere fact that the victim went to a certain state for medical treatment is not a circumstance that would give the courts of that state special jurisdiction.⁴⁹⁰ However, it is not known whether the place where any aggravated pain or suffering occurs, or the place of the subsequent death of an injured person, may be taken by a court as the place of the tort and result in jurisdiction arising in that place.⁴⁹¹

The European Court of Justice has drawn a distinction between the initial injury and consequential financial loss. In Netherlands v. Ruffer the opinion of Advocate-General Warner was that consequential damage suffered at a place other than where primary damage occurs does not give rise to jurisdiction. He stated that deciding otherwise:⁴⁹²

“would be tantamount to holding that, under the Convention, a plaintiff in tort had the option of suing in the courts of his own domicile, which would be quite inconsistent with Article 2 *et seq* of the Convention”.

The court stated in Marinieri v. Lloyds Bank that jurisdiction could not be interpreted so extensively as to encompass any place where the adverse consequences of an event which had already caused actual damage elsewhere could be felt.⁴⁹³

490 See C. McLachlan and P. Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles* (Oxford: Clarendon Press, 1996), p. 81.

491 *Ibid*, pp. 80-1.

492 (1981) 3 CMLR 293, p. 310.

493 [1996] QB 217.

In the case of Dumez a claimant attempted to confer jurisdiction on the court of his domicile by alleging that by suffering economic loss there, he was the victim of a harmful act committed abroad. However, the court stated that Article 5(3):⁴⁹⁴

“cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were the direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.”

But it is noteworthy that none of the European or domestic cases concerning contracting states have been concerned with intentional trespass to the person. The European Court of Justice stated in Dumez that the place where the damage occurred:⁴⁹⁵

“can be understood only as indicating the place where the event giving rise to the damage ... directly produced its harmful effects upon the person who is the immediate victim of that event”.

Therefore the language of the court might possibly allow for the establishment of consequential damage where it was the result of personal injury, particularly if it was caused intentionally, as in the case of torture.

12.4.3 Method of service

The procedure for service out of the jurisdiction is essentially the same whether or not leave is required.⁴⁹⁶ One variation is that, under the 1965 Hague Convention on Service Abroad, it is possible to send judicial documents directly through the post to defendants in

494 Dumez France and Tracoba v. Hessische Landesbank [1990] ECR I-49, p. 80 (para. 22).

495 *Ibid*, p. 80 (para. 20).

496 Therefore see above, Section 12.3.6.

other contracting states, provided it is in accordance with the law of the state where service is to be effected.⁴⁹⁷

Where the claim form is served without leave in accordance with CPR 6.19(1) the period for acknowledging service is set out in CPR 6.22. The period for filing a defence is set out in CPR 6.23.

12.4.4 Relevant factors following service

Jurisdiction under the Civil Jurisdiction and Judgments Act is far less flexible than it is under the common law. The court does not have any discretion on issues of jurisdiction. A defendant who wishes to dispute the jurisdiction of the court may apply for an order declaring that it has no jurisdiction, and also for an order setting aside service.⁴⁹⁸

In England the standard to be applied in considering whether the jurisdiction of the court has been established for the purposes of the Brussels and Lugano Conventions, following an application to set aside service, is the same as under CPR 6.20, that is, a good arguable case.⁴⁹⁹

12.5 Service on a defendant who submits to the jurisdiction of the court

A person who would not otherwise be subject to the jurisdiction of the court may preclude themselves by their own conduct from objecting to the jurisdiction, and thus give the court an authority over them which, but for their submission, it would not possess. However, by submitting to the jurisdiction of the court, a defendant may only remove objections which are purely personal to that party. Therefore, submission cannot give the court jurisdiction to entertain

497 Noirhomme v. Walklate TLR 2 August 1991.

498 CPR 11(6). See contesting the jurisdiction below, Section 13.1.

499 Canada Trust v. Stolzenberg (No. 2), n. 485 above.

proceedings which lie beyond the competence or authority of the court, that is, where no damage was sustained within the jurisdiction.

12.5.1 Submission under the common law (in cases involving a non-contracting state)

A person who appears before the court voluntarily after service on them is regarded as having submitted to the jurisdiction, even though they may have been out of England at the time of issue and service. Where a solicitor is authorised to accept service on behalf of a party, in principle, process can be served on the solicitor.⁵⁰⁰ However, the solicitor may accept service on the basis that the defendant remains free to contest the jurisdiction which the court may have.⁵⁰¹

Submission has been inferred where the defendant applies to strike out part of the claim endorsed on a writ or files affidavits with the court,⁵⁰² and where the defendant appears through counsel to argue the merits of the case.⁵⁰³ However, a person who appears merely to contest the jurisdiction of the court does not thereby submit.⁵⁰⁴ This would not be the case if the defendant were to apply for a stay of proceedings without simultaneously challenging jurisdiction.

Submission to the jurisdiction where the action is brought against a state must be made by the state and must be express.⁵⁰⁵

500 CPR 6.4(2).

501 Sphere Drake Ins. v. Gunes Sikorta [1988] 1 Lloyd's Rep. 139.

502 The Messiniaki Tolmi [1984] 1 Lloyd's Rep. 266.

503 Boyle v. Sacker (1888) 39 Ch.D 249.

504 Re Dulles' Settlement (No. 2) [1951] Ch. 842.

505 Propend Finance Pty Ltd. v. Alan Sing (1997) TLR 238.

12.5.2 Submission under the Civil Jurisdiction and Judgments Act (in cases involving a contracting state)

Under Article 18 of the Brussels and Lugano Conventions, the court has jurisdiction over a defendant who submits to its jurisdiction by appearance, unless the defendant appeared solely in order to contest the jurisdiction. If the case is within the scope of the Conventions, an appearance by the defendant will confer jurisdiction even though without that appearance jurisdiction could not have been taken.⁵⁰⁶

The use of the word “solely” was brought into question in Elefanten Schuh GmbH v. Jacqmain. The European Court of Justice held that a defendant did not submit to the jurisdiction by pleading to the merits as well as contesting the jurisdiction but:⁵⁰⁷

“only if the plaintiff and the court seised of the matter are able to ascertain from the time of the defendant’s first defence that it is intended to contest the jurisdiction.”

12.5.3 Counterclaim

A person who begins proceedings, in general, gives the court jurisdiction to entertain a counterclaim against them which may extend to cases in which, if separate proceedings were to be brought, permission to serve process under CPR 6.20 might not be obtainable.⁵⁰⁸ Leave is not needed to serve a counterclaim on a foreign claimant. By suing in England the person submits to

506 See Dicey & Morris, n. 305 above, para. 11-347.

507 [1981] ECR 1671, p. 1685.

508 Republic of Liberia v. Gulf Oceanic Inc. [1985] 1 Lloyd’s Rep. 539, pp. 544-7.

the jurisdiction in regard to any counterclaim, as well as waiving immunity.⁵⁰⁹

A defendant is entitled to bring a counterclaim in order that justice may be done between the parties.⁵¹⁰ In English law this principle is given effect by the rule that if the counterclaim is irrelevant to the claim, the court may require it to be disposed of separately.⁵¹¹

509 Derby & Co. v. Larsson [1976] 1 All ER 401, p. 414.

510 Griendtoveen v. Hamlyn & Co. (1892) 8 TLR 231.

511 CPR 3.1(2)(e).

13. Jurisdiction and Choice of Law Issues Following Service of the Proceedings

13.1 Contesting the jurisdiction

A defendant who wishes to dispute the jurisdiction of the court to try the claim, or to argue that the court should not exercise any jurisdiction, must file an acknowledgement of service and apply to the court for an order declaring that it has no jurisdiction or should not exercise any jurisdiction which it may have.⁵¹² The application must be made within the period for filing a defence.⁵¹³

The challenge to the jurisdiction may be on the basis that service was irregular or ineffective and should be set aside, or, in the case of service out of the jurisdiction, on the basis that the court should not have granted leave to the claimant to serve the writ out of the jurisdiction, and that the writ, the order granting leave to serve it, and the service of the writ should be set aside.⁵¹⁴

If the court accepts that it has no jurisdiction, it will make a declaration saying so. However, if the court is satisfied that it has jurisdiction, the acknowledgement of service ceases to have effect and the defendant has a further period in which to file a further acknowledgement of service, in order to be treated as having accepted that the court has jurisdiction to try the claim.⁵¹⁵

512 CPR 11(1).

513 CPR 11(4).

514 CPR 11(6).

515 CPR 11(7) and (8). With respect to non-contracting states it is important to note that the determination as to jurisdiction must be distinguished from *forum non conveniens* below. The challenge being made at this point is that the court does not have jurisdiction to hear the matter, whereas the argument of *forum non conveniens* is a request for a stay of proceedings, once the court is satisfied that it has jurisdiction, on the basis that England is not the most appropriate forum to hear the matter.

13.1.1 *Forum non conveniens*

Even though the English courts may be satisfied that jurisdiction has been validly obtained, and the proceedings have been properly served on an individual from a non-contracting state (or on the state itself), the court retains an inherent jurisdiction, preserved by statute, to stay its own proceedings.⁵¹⁶ The law concerning *forum non conveniens* was examined in detail by Lord Goff in Spiliada Maritime Corporation v. Cansulex Ltd.⁵¹⁷

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.⁵¹⁸

The burden of proof initially rests on the defendant to persuade the court to exercise its discretion to grant a stay.⁵¹⁹ The court will have to consider where is the “natural forum” for the action. The natural forum was defined by Lord Keith of Kinkel as being “that with which the action has the most real and substantial connection”.⁵²⁰ Lord Pearson in Distillers v. Thompson⁵²¹ stated that the right approach when the tort was complete was to look back over the series of events constituting it and to ask where in substance did the cause

516 Supreme Court Act 1981, s.49(3).

517 [1987] 1 AC 460.

518 See the quotation from Sim v. Robinow above, Section 12.3.4(c).

519 Société du Gaz de Paris v. Société Anonyme de Navigation “Les Armateurs français” [1926] SC 13, p. 21. Note that the burden of proof would be on the claimant who was trying to establish that England was the *forum conveniens*.

520 The Abin Daver [1984] AC 398, p. 425.

521 Above, n. 308, p. 468.

of action arise. Ackner LJ in Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) stated that this approach made it clear that:⁵²²

“...the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of a dispute”.⁵²³

The court must first look for the connecting factors referred to by Lord Keith, which may include areas “affecting convenience or expense (such as the availability of witnesses)”.⁵²⁴ Lord Goff stated that he did not believe that factors such as damages on a higher scale, a more generous limitation period, a more complete discovery procedure, or a power to award interest should deter the court from granting a stay of proceedings or exercising its discretion against granting leave under Order 11 (now CPR 6.20):⁵²⁵

“... provided that the court is satisfied that substantial justice will be done in the available appropriate forum”.

In Mohammed v. Bank of Kuwait the court stated that if there are practical obstacles, such as having to instruct an unknown lawyer in another country and to deal with the proceedings from outside the jurisdiction, it would be more consistent with the notions of practical justice to proceed in another country which had jurisdiction but not the practical obstacles.⁵²⁶

If the court is satisfied that there is another available forum which is a more appropriate one to hear the action, a stay will normally be granted unless the claimant can show that additional circumstances

522 [1984] 2 Lloyd's Rep. 91, p. 94.

523 See also the dictum of Lord Goff, *ibid*, p. 96.

524 Spiliada Maritime Corporation v. Cansulex Ltd., n. 517 above, p. 478.

525 *Ibid*, p. 482.

526 [1996] 1 WLR 1483, p. 1496.

exist “by reason of which justice requires that a stay should not be granted”.⁵²⁷ The burden will then shift to the claimant to show that special circumstances exist which mean that, in the interests of justice, the trial should nevertheless take place in this country. The following factors have been considered relevant in determining that a claimant will not otherwise obtain justice:

- the claimant will not obtain justice in the foreign jurisdiction, because, for instance, the judiciary is not independent;⁵²⁸
- the claimant has an arguable claim under what English law would regard as the governing law but his claim would summarily be rejected in the alternative jurisdiction;⁵²⁹
- there will be an inordinate delay, such as a delay of 10 years, before an action comes to trial;⁵³⁰
- a derisory low limit on damages will be imposed by the foreign court;⁵³¹
- the claimant would be liable to imprisonment if they were to return to the alternative forum abroad.⁵³²

In light of these decisions, the fact that the claimant has been the victim of torture in the other jurisdiction at the hands of or with the acquiescence of state officials from that country may well be regarded as giving a strong indication that the interests of justice would not be served if the matter were heard there. The fact that the applicant

⁵²⁷ Spiliada Maritime Corporation v. Cansulex Ltd., n. 517 above, p. 478.

⁵²⁸ The Abin Daver, n. 520 above, p. 411.

⁵²⁹ Banco Atlantico v. The British Bank of the Middle East [1990] 2 Lloyd’s Rep. 504, p. 509.

⁵³⁰ The Vishva Ajay [1989] 2 Lloyd’s Rep. 558, p. 560.

⁵³¹ The Adhiguna Meranti [1988] 1 Lloyd’s Rep. 384, p. 395.

⁵³² Purcell v. Khayan *The Times*, 23 November 1987.

has received asylum having fled from that jurisdiction may serve to reinforce the assertion that they could not hope to obtain justice there.

It is noteworthy that the House of Lords in Spiliada Maritime Corporation v. Cansulex Ltd.⁵³³ emphasised economic factors rather than those of justice in determining whether to allow service abroad or stay proceedings. In terms of commercial actions, the courts are more concerned with the efficiency of litigation than questions of fairness. This point is supported by the decision in Jeyaretnam v. Mahmood where it was held that the factor of “justice abroad” was not relevant in the exercise of the discretion where the applicant feared a biased trial in his own jurisdiction.⁵³⁴ However, in the case of torture, reliance on economic considerations by the court may well give rise to a violation of the UK’s positive obligations with respect to Article 3 of the European Convention, which confers an absolute and non-derogable right.

13.2 Joining parties to the action

A claimant may add an individual or the state to the proceedings where their inclusion would allow the court to resolve all the disputed matters in the proceedings.⁵³⁵

The joining of a party will not be statute barred because the application for joinder was made after the limitation period set out under the Limitation Act 1980 or provided for in the Foreign Limitation Periods Act 1984.⁵³⁶

533 Above, n. 517.

534 *The Times*, 21 May 1982. Brooke J. said that the court was precluded from embarking on an inquiry into such a claim by principles of judicial restraint.

535 CPR 19.1(2).

536 See above, Section 11.5 and below, Section 13.4. Whether s.12 of the Limitation Act 1980 (which concerns fatal accident legislation) applies shall be determined at trial.

The claimant's application for permission to add a party can be made without notice. It must be supported by affidavit evidence.⁵³⁷ Where the court makes an order for the addition of a party, it may give consequential directions about service and the management of proceedings.⁵³⁸

It should also be noted that the defence may wish to join a third party to the proceedings, if they are alleged to be responsible for the harm suffered by the claimant.⁵³⁹

13.2.1 Joining a party from a non-contracting state

Under CPR 6.20(3), formerly Order 11 Rule 1(1)(c), the court may assume jurisdiction against a person outside England, where:

“the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto”.

Permission will be required for service out of the jurisdiction in much the same way as has been previously outlined.⁵⁴⁰ However, the court will be able to serve out of the jurisdiction under CPR 6.20(3) only if the following conditions are fulfilled:

Firstly, it is necessary that the defendant has been or will be served with proceedings, whether in England or another jurisdiction.

Secondly, a claimant must satisfy the court by way of written evidence that there is a real issue with the party to be added which

537 CPR 19.3(2).

538 CPR 19.3(5).

539 CPR 20. Article 6(2) of the Brussels and the Lugano Conventions is concerned with jurisdiction for third party proceedings.

540 See above, Sections 12.3.3 to 12.3.5.

the court may be reasonably asked to try.⁵⁴¹ This provides a safeguard against a specious claim against the original defendant being used as a device to found jurisdiction to serve another party outside the jurisdiction. The minority view of May LJ,⁵⁴² that it must be established that the claim against the third party be a plausible one and not brought in bad faith, now seems to be the present position.⁵⁴³ Permission will not be granted if the defendant in the proceedings or the party who is to be added has a complete answer to the claim.⁵⁴⁴ But permission may be granted if the causes of action are alternative so that the claim against either the defendant or the party to be joined will ultimately fail.⁵⁴⁵

Finally, the party to be served out of the jurisdiction must be either a necessary or a proper party to the proceedings.⁵⁴⁶ They will be the proper party if they could have been served if they had been within the jurisdiction.⁵⁴⁷

13.2.2 Joining a party from a contracting state

The general principle that an action will be brought in the country of the defendant's domicile stands, unless it comes within one of the special jurisdiction exceptions.⁵⁴⁸

541 CPR 6.20(3)(a). This rule was derived from Ellinger v. Guinness Mahon n. 425 above, p. 22.

542 Multinational Gas and Petrochemical Co. v. Multinational Petrochemical Services [1983] Ch. 258.

543 See Dicey & Morris, n. 305 above, para. 11-147.

544 Tyne Improvement Commissioners v. Armament Anversois SA (The Brabo) [1949] AC 326; Multinational Gas Co., n. 542 above.

545 Massey v. Heynes [1988] 21 QBD 330, p. 338.

546 CPR 6.20(3)(b) and Société Commerciale de Réassurance v. Eras International Ltd., n. 452 above.

547 Massey v. Heynes, n. 545 above, p. 338.

548 Civil Jurisdiction and Judgments Act, Schedule 1 Article 5(3), see above, Section 12.4.2(b).

Article 6(1) in both the Brussels and Lugano Conventions provides that a person domiciled in a contracting state may, where they are one of a number of defendants, be sued in the courts for the place where one of them is domiciled.⁵⁴⁹

Under Article 6(1) the English courts would have jurisdiction over a co-defendant in another contracting state only where the principal defendant is domiciled in England.⁵⁵⁰ The provision is narrower than the “necessary or proper party” provision in CPR 6.20(3). It was adopted to prevent the handing down in contracting states of judgments which are irreconcilable with each other. The European Court of Justice has held that Article 6(1) must be interpreted in a manner that avoids it being abused to oust the jurisdiction of the courts of the contracting state in which a defendant is domiciled.⁵⁵¹

13.3 The choice of law

13.3.1 The law applicable to torts

At common law, it was established in the case of Phillips v. Eyre that, as a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, the wrong must be of a character which would have been actionable if committed in England, and must not have been justifiable in the country where it was committed.⁵⁵² This is the rule of double actionability. Civil liability is imposed by the law of the place where the tort was committed, but only if such a tort would have been actionable in England.

549 Schedules 1 and 3C, and Schedule 4 Article 6(1).

550 Therefore this might only apply to the limited scenario where a person who instigated acts of torture was later found to be domiciled in England and others involved in the torturous act were domiciled in other contracting states.

551 Kalfelis v. Schroder Case 189/87 ECR [1988] 5565.

552 (1870) LR 6 QB 1, pp. 28-9.

However, an exception to the general rule, set out in Boys v. Chaplin, is that a particular issue between the parties may be governed by the law of the country which has the most significant relationship with the act and with the parties.⁵⁵³

The principal effect of the Private International Law (Miscellaneous Provisions) Act 1995 is to remove the double actionability rule. Part III of the Act abolishes the common law rules which were applicable to determine the law applicable to torts and to issues in tort.⁵⁵⁴ However, the Act will not affect the determination of issues arising in defamation cases.⁵⁵⁵ The Act entered into force on 1 May 1996. The applicable law for any tort that arises before that period will be decided under common law principles.

The general rule set out in s.11(1) is that the applicable law with respect to issues of tort is the law of the country in which the events constituting the act of tort occurred.

13.3.2 Variations to the general rule

However, under s.11(2) where elements of those events occur in different countries, the applicable law is varied. In the case of a cause of action in respect of personal injury or death resulting from personal injury, the applicable law will be the law of the country where the injury is sustained.⁵⁵⁶ Personal injury includes disease or any impairment of physical or mental condition.⁵⁵⁷

553 [1971] AC 356.

554 Private International Law (Miscellaneous Provisions) Act 1995, s.10.

555 Sections 9(3) and 13.

556 Section 11(2)(a).

557 Section 11(3).

Accordingly, where a person starts to suffer from a mental condition, such as Post-Traumatic Stress Disorder, within the jurisdiction as a result of torture carried out in another country, English law will be applicable. The fact that a claimant suffers consequential loss in a different country seems to be irrelevant for the purposes of s.11(2)(a).⁵⁵⁸

The general rule may be displaced if, after comparing the significance of the factors which connect the tort with the country whose law is applicable under the general rule with those factors connecting the tort with another country, it seems substantially more appropriate for the applicable law to be the law of the other country.⁵⁵⁹ For the purposes of the rule of displacement the factors that may be taken into account as connecting a tort with a country include, in particular, factors relating to the parties, to any of the events which constitute the tort in question or to any of the circumstances or consequences of those events.⁵⁶⁰

More significantly, nothing in Part III of the Act should authorise the application of a foreign law which would conflict with principles of public policy.⁵⁶¹ It may be that, on closer examination, a foreign cause of action is based on laws which are contrary to fundamental principles of public policy. For example, if consequential loss was not recognised by a foreign applicable law it may be argued that public policy should dictate that English law would be applicable.⁵⁶²

558 This is contrary to the position taken in the Canadian case of *Vile v. Von Wendt*, n. 408 above.

559 Private International Law (Miscellaneous Provisions) Act, s.12(1).

560 Section 12(2). For a discussion on relevant factors to be considered, see Dicey & Morris, n. 305 above, paras 35-098 to 35-101.

561 Section 14(3)(a)(i).

562 Note that Article 14 of the Torture Convention calls for "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".

The case of Oppenheimer v. Cattermole is authority for the proposition that the courts should give effect to clearly established principles of public international law. The House of Lords indicated that a foreign law should be disregarded if it would represent a serious infringement of human rights.⁵⁶³

What constitutes public policy may be developed in the light of the incorporation of the European Convention through the Human Rights Act 1998. If a foreign applicable law was incompatible with or did not recognise a claim in tort, where the situation was one in which the European Convention regarded the claimant as having rights which should be protected by such a claim, the absence of such a claim could also be regarded as contrary to public policy, so that English law would be applied instead.

13.4 Time limitations and choice of law

In general, the English law as to limitation of actions has been regarded as procedural (rather than substantive).⁵⁶⁴ The Foreign Limitation Periods Act 1984 adopts the general rule that the limitation rules of the place where the tortious act occurred are to be applied in actions in England.⁵⁶⁵ It does not matter that the rules of another jurisdiction do not lay down any limitation period for the claim.⁵⁶⁶ If the law in the country where the injury occurred confers a discretion, an English court must so far as is practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of the foreign country.⁵⁶⁷ English law will determine whether and at what time proceedings must be commenced.⁵⁶⁸

563 Above, n. 257, p. 278; see also Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] AC 368, p. 428.

564 Williams v. Jones (1811) 13 East 439.

565 Foreign Limitation Periods Act, s.1(1)(a).

566 Dubai Bank Ltd. v. Abbas [1998] IL Pr 391.

567 Foreign Limitation Periods Act, s.1(4).

568 Section 1(3).

The general principle is subject to one major exception based on public policy.⁵⁶⁹ Such a conflict with public policy is deemed to arise where the application of the general rule would result in undue hardship for a person who is or who might be made a party to the proceedings.⁵⁷⁰ A finding of undue hardship depends on all the circumstances of a particular case. The mere fact that the foreign limitation period is shorter than the English limitation period does not, by itself, give rise to undue hardship.⁵⁷¹ The court has established that it would be contrary to public policy to allow a foreign limitation rule to be relied upon by a thief.⁵⁷²

In cases where the exception applies, the issue of limitation would be governed by common law. Since the English limitation of actions is regarded as procedural rather than substantive, English law, as the law of the forum where the matter is to be heard, will be applied.⁵⁷³ Additionally, the Foreign Limitation Periods Act does not affect any action commenced before 1 October 1985, or any matter for which the limitation period would have expired before that date.⁵⁷⁴ In those circumstances the issue of limitation would also be governed by common law.

569 Section 2(1).

570 Section 2(2).

571 Durham v. T. & N. Noble 1 May 1996 (unreported).

572 Gotha City v. Sotheby's *The Times*, 8 October 1998.

573 See above, Section 11.5.

574 Section 7(3). See Jones v. Trollope Colls Cementation Overseas Ltd. *The Times*, 26 January 1990.

14. Immunities, Acts of State and Amnesties

14.1 Immunity – general principles

The notion that one state may not be sued in the courts of another is derived from the rules of public international law, in particular the principle that one state does not intervene in the affairs of another, and the legal maxim *par in parem non habet imperium*, one of two equals cannot render judgment on the other. While the absolute doctrine of immunity prevailed during the nineteenth and for much of the twentieth century, the increase in commercial trading by states saw the development of what is known as the restrictive doctrine. Broadly, the restrictive doctrine preserves state immunity for acts of sovereign authority while lifting immunity for acts of a private law character.⁵⁷⁵ It was given further recognition in the European Convention on State Immunity 1972. The decisions of the English courts started to reflect that international law had now moved away from the absolute to the restrictive doctrine. In 1975, the Privy Council held in The Philippine Admiral⁵⁷⁶ that a foreign government was not entitled to claim immunity in an action against a vessel used for trading purposes. This was followed in 1977 by the decision of the Court of Appeal in Trendtex Trading Corporation v. Central Bank of Nigeria that a state was not entitled to immunity in respect of commercial transactions. Lord Denning stated that:⁵⁷⁷

“Many countries have now departed from the rule of absolute immunity. So many have now departed from it that it can no longer be considered a rule of international law.”

The recognition of the restrictive doctrine was consolidated with the passing of the State Immunity Act 1978. However, it should be noted that although the restrictive doctrine is accepted as standard by most scholars, international opinion is far from clear as to its precise

575 Brownlie, n. 57 above, p. 335.

576 [1977] AC 373.

577 Above, n. 29, p. 366.

nature and extent.⁵⁷⁸ The distinction between immunity *ratione materiae* and immunity *ratione personae* is explained in Part II of this Manual dealing with criminal cases.⁵⁷⁹

14.2 State immunity

Part I of the State Immunity Act 1978 applies to civil but not to criminal proceedings.⁵⁸⁰ Section 14 of the Act states that:

“(1) The immunities and privileges conferred by this Part of this Act apply to any foreign and commonwealth State other than the United Kingdom, and references to a State include references to—

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government,

but not to any entity (hereinafter referred to as a ‘separate entity’) which is distinct from the executive organs of the government of that State and capable of suing and being sued.”

Section 1(1) of the Act allows a state general immunity from the jurisdiction of the English courts subject to any exceptions within the Act. One such exception is provided in s.5:

“A State is not immune as respects proceedings in respect of—

- (a) death or personal injury; or

578 Brownlie, n. 57 above, pp. 332-9.

579 See above, Section 8.1.

580 State Immunity Act 1978, s.16(4).

(b) damage or loss of tangible property,

caused by an act or omission in the United Kingdom.”

Although s.5 restricts immunity in respect of death and personal injury, the restriction is only concerned with acts or omissions which are caused in the UK. Therefore, it would be unlikely that a claimant would be able to restrict the immunity of the responsible foreign state for the mental suffering which manifested itself while in England, because the act of torture was inflicted outside the jurisdiction.

The Court of Appeal in the second *Al-Adsani* decision⁵⁸¹ held that, although there was no doubt that torture was prohibited under international law, the general principle in s.1 of the State Immunity Act was not subject to any overriding qualifications which restricted immunity outside the express exceptions provided for in the Act. This was the case even if the acts attributed to the state or to those individuals with state immunity amounted to the violation of a right which has attained the status of *jus cogens*.⁵⁸²

The current state of the law, therefore, makes it extremely difficult to overcome the immunity of a foreign state from claims of civil redress for torture where the acts of torture are perpetrated outside the UK.⁵⁸³

While *Pinochet (No. 3)* was not concerned with civil issues, as was expressly pointed out by certain judges, one element of the decision is very important to both criminal and civil areas, and might provide

581 Above, n. 298.

582 See the status of *jus cogens* above, Section 1.1.3, and in particular the decision of Ward LJ.

583 This matter is currently before the European Court of Human Rights in the case of *Al-Adsani v. UK* which has challenged the immunity of foreign states from suit in the UK courts for torture committed abroad. See also n. 294 above.

an opportunity for development of the law in cases concerning civil redress. The court considered whether Augusto Pinochet was acting in his official capacity or in a private capacity with regard to his alleged responsibility for acts of torture, and concluded that torture cannot be a state function.⁵⁸⁴ It would seem inconsistent to be able to argue that, in terms of immunity for the same acts, a person can be acting outside their official capacity in terms of criminal liability, but not in terms of civil liability. Therefore it can be argued that, just as acts of torture are not subject to immunity *ratione materiae* in criminal cases, they are not subject to such immunity in civil cases.⁵⁸⁵

14.3 Other holders of immunity

14.3.1 Separate entities

The question arises whether entities related to the state, and in particular individual state officials, are entitled to enjoy the same immunity as the state itself. Section 14(1) of the State Immunity Act 1978 states that separate entities are distinct from executive organs of that government. Section 14(2) goes on to provide that:

“A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

- (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
- (b) the circumstances are such that a State (or, in the case of proceedings to which s.10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.”

⁵⁸⁴ See, for example, Lord Browne-Wilkinson, above, Section 8.2.3 and n. 245.

⁵⁸⁵ See above, Section 8.2.3.

Whether an official is considered to be part of the executive organs of the government or a separate entity was considered in the case of Propend Finance Ltd v. Sing.⁵⁸⁶ The crucial issue in the case was whether the Australian Federal Police was a branch of the government, and therefore within s.14(1)(c), or a separate entity in terms of s.14(2). In the court below, Mr Justice Laws concluded that the Australian Federal Police were “holders of an independent office under the Crown and fulfilling public duties of maintenance and enforcement of the Law”. He regarded the suggestion that every member of the Australian Federal Police was part of the executive government of Australia as “bizarre”. However, at the Court of Appeal Legatt LJ held that:⁵⁸⁷

“the protection afforded by the 1978 Act would be undermined if employees [or] officers ... could be sued as individuals for matters of state conduct in respect of which the state they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign state protection under the same cloak as protects the state itself.”

This would appear to indicate that a functionary of a foreign government could claim immunity by virtue of status rather than the acts undertaken. Therefore they would have immunity *ratione personae* rather than immunity *ratione materiae*.⁵⁸⁸ This appears to give employees and officers a much stronger immunity than seemed to be the intention of the State Immunity Act.

In the United States, the state immunity legislation has been held not to cover individuals acting under state authority, at least where they act beyond the scope of their official authority.

586 Above, n. 505.

587 Ibid, unofficial transcript, p. 21.

588 Subject to the exception in s.5 of the State Immunity Act (see above, Section 14.2).

Committing gross violations of human rights has been judged to be outside the official authority of a state official or head of state.⁵⁸⁹ Indeed, if that were not the case the legislation permitting civil redress for violations committed abroad would be of very limited applicability since most of the cases brought under the Alien Tort Claims Act and the Torture Victim Protection Act have involved defendants acting under colour of official authority.⁵⁹⁰

The State Immunity Act states in s.1(2) that the court is to give effect to the immunity conferred by the Act even though the state does not appear in the proceedings in question.⁵⁹¹ Therefore, it would require the state to expressly waive immunity against that person in order for a civil action to progress.

14.3.2 Diplomatic and consular immunity

In the Diplomatic and Consular Staff (USA v. Iran) cases, the International Court of Justice confirmed that the principles of diplomatic and consular immunity were deep-rooted in international law. Every state which maintained diplomatic or consular relations was under an obligation to recognise these imperative obligations, which are now codified in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.⁵⁹² These privileges have been recognised at common law for centuries.⁵⁹³

589 B. Stephens and M. Ratner, *International Human Rights Litigation in US Courts* (New York: Transnational Publishers, 1996) pp. 126-31.

590 See Appendix 8, Section 2.

591 United Arab Emirates v. Abdelghafar [1995] ICR 65.

592 USA v. Iran (1979) ICJ Reports 7, pp. 19-20; (1980) ICJ Reports 3, p. 42.

593 Engelke v. Musmann [1928] AC 433, p. 459.

Diplomatic and consular immunity may be waived by the sending state⁵⁹⁴ and waiver by the acting head of state or head of mission is deemed to constitute waiver.⁵⁹⁵ Waiver must always be express, except that the initiation of proceedings precludes the claimant from invoking immunity from jurisdiction in respect of any counterclaims directly connected with the principal claim.⁵⁹⁶

14.3.2 (a) diplomats

The Diplomatic Privileges Act 1964 incorporated significant aspects of the 1961 Vienna Convention on Diplomatic Relations. It abolished the doctrine of absolute immunity for diplomats. Immunities apply only to permanent and not to “ad hoc” missions.⁵⁹⁷ Diplomats have been divided into three main categories for the purposes of immunity:⁵⁹⁸

- The first group are diplomatic agents.⁵⁹⁹ Provided they are not nationals of or permanently resident in the receiving state, diplomatic agents enjoy immunity from civil and administrative jurisdiction and from execution.⁶⁰⁰ Therefore they have immunity *ratione personae* while in office. Once they leave office they will have immunity *ratione materiae* for acts carried out in their official capacity.
- The second group are members of administrative and technical staff.⁶⁰¹ They have immunity from civil and

594 Diplomatic Privileges Act 1964, Schedule 1 Article 32(1); Consular Relations Act 1968, Schedule 1, Article 45(1).

595 Diplomatic Privileges Act, s.2(3); Consular Relations Act, s.1(5).

596 *A & Co. Ltd. v. Republic of X* [1990] 2 Lloyd's Rep. 520.

597 *R v. Governor of Pentonville Prison, Ex parte Teja* [1971] 2 QB 274.

598 Diplomatic Privileges Act 1964, Schedule 1, Article 1.

599 See n. 216 above.

600 Diplomatic Privileges Act, Schedule 1 Article 37(1).

601 See n. 218 above.

administrative jurisdiction but this does not extend to acts performed outside the course of their duties.⁶⁰² Therefore they only have immunity *ratione materiae*.

- Thirdly, members of the service staff⁶⁰³ also enjoy immunity from civil jurisdiction only in respect of acts performed in the course of their duties.⁶⁰⁴

Orders in Council provide that a person who is a member of the mission of specified independent countries of the Commonwealth, or the Republic of Ireland, or who is a private servant of such a member, and is a citizen of that country and also a British citizen, shall be entitled to the same privileges and immunities as they would have been entitled to if they were not a British citizen.⁶⁰⁵

The immunities of members of the family and of the household and private servants are set out in Articles 37 and 38 of the 1961 Vienna Convention on Diplomatic Relations as well as s.2(6) of the Diplomatic Privileges Act.

A person is entitled to enjoy diplomatic immunity from the moment they enter the receiving state.⁶⁰⁶ Immunity can be enjoyed even if the person becomes entitled to it only at the end of the proceedings to which they are a party.⁶⁰⁷ However, in cases of serious offences such as torture this should be unlikely to arise in practice because immunity can be granted only if the Foreign and Commonwealth Office have been notified by the sending state of the appointment of the person as a member of its diplomatic mission and the

602 Diplomatic Privileges Act, Schedule 1 Article 37(2).

603 See n. 220 above.

604 Diplomatic Privileges Act, Schedule 1 Article 37(3).

605 SI 1999 No. 670.

606 1961 Vienna Convention on Diplomatic Relations Article 39.

607 Ghosh v. D'Rozario [1963] 1 QB 106.

appointment has been accepted in the UK. Therefore, diplomatic immunity cannot be conferred by the unilateral action of the sending state.⁶⁰⁸

When the person's functions come to an end, immunity normally ceases at the moment when they leave the country, or on the expiry of a reasonable period in which to do so. With respect to acts performed by such a person in the exercise of their functions as a member of a mission, they will continue to receive immunity *ratione materiae*.⁶⁰⁹ If a person entitled to immunity dies, the members of their family continue to enjoy immunity until the expiry of a reasonable period in which to leave the country.⁶¹⁰

14.3.2 (b) foreign consuls

The Consular Relations Act 1968, which enacts part of the 1963 Vienna Convention on Consular Relations, appears to recognise that consuls are entitled to immunity in respect of their official acts,⁶¹¹ but not in respect of their private acts.⁶¹² Therefore they are entitled to immunity *ratione materiae*. The periods marking the beginning and end of consular immunities are set out in Schedule 1, Article 53 of the Consular Relations Act.

608 This is the case even though the relevant articles of the 1961 Vienna Convention (Articles 2, 4 and 10) are not included in Schedule 1 to the Diplomatic Privileges Act 1964. See *R v. Governor of Pentonville Prison, Ex parte Osman (No. 2)* [1989] COD 446.

609 1961 Vienna Convention Article 39(2).

610 Diplomatic Privileges Act, Schedule 1 Article 39(3).

611 For the definition of consular officers and consular employees, see Consular Relations Act 1968, Schedule 1 Article 1(d) and (e).

612 Consular Relations Act, Schedule 1 Articles 41 and 43, reflecting *Engelke v. Musmann*, n. 593 above, pp. 437-8.

14.3.2 (c) international organisations

The International Organisations Act 1968⁶¹³ empowers the Crown by Order in Council to confer immunity from suit and legal process in the UK upon any international organisation of which the UK is a member.⁶¹⁴

- Representatives, members of subordinate bodies, high officers, experts, persons on missions, and members of the official staff of a representative receive immunity *ratione personae*.⁶¹⁵ Members of their families who form part of their household are entitled to the same immunity.⁶¹⁶
- Official staff in administrative and technical service are entitled to immunity in civil proceedings for acts committed in the course of their official duties, that is, immunity *ratione materiae*.⁶¹⁷ Members of their families who form part of their household are entitled to immunity to a like extent.⁶¹⁸
- Officers and servants, and members of the official staff employed in domestic service of the representative, receive immunity for actions or omissions in the course of the performance of their official duties, that is, immunity *ratione materiae*.⁶¹⁹

⁶¹³ The International Organisations Act 1968 repealed and replaced the International Organisations (Immunities and Privileges) Act 1950.

⁶¹⁴ Section 1(1) as amended by the International Organisations Act 1981, s.1.

⁶¹⁵ International Organisations Act 1968, s.1(2)(c) and s.1(3); Schedule 1 Part II, para. 9; Schedule 1 Part IV, para. 20.

⁶¹⁶ Schedule 1 Part IV, paras 23(1) to 23(3).

⁶¹⁷ Schedule 1 Part IV, para. 21.

⁶¹⁸ Schedule 1 Part IV, para. 23(4).

⁶¹⁹ Section 1(2)(d); Schedule 1 Part III para. 14; Schedule 1 Part IV para. 22.

Under the Commonwealth Secretariat Act 1966, the Commonwealth Secretariat is accorded immunity similar to that of diplomatic missions and international organisations.⁶²⁰

- Senior officers of the Commonwealth Secretariat, who are citizens of an independent country of the Commonwealth, and members of their family forming part of the household, as long as they are not British citizens and are permanently resident outside the UK, have the same immunity accorded to diplomatic agents, that is, immunity *ratione personae*.⁶²¹
- All other officers and servants of the Secretariat have immunity for acts or omissions carried out in the course of their official duties, except in respect of civil matters relating to motor traffic offences.⁶²²

The immunity of officers and servants and members of their families may be waived by the Commonwealth Secretary-General or any person exercising those functions.⁶²³

14.4 Act of State

It has been suggested that, following the Propend case,⁶²⁴ there is a danger of:

“... the implication of a more general act of state doctrine being developed which would allow individuals to rely either upon their status as employees, officers or functionaries of an entity exercising sovereign authority or upon a direct order from their

620 Commonwealth Secretariat Act 1966, Schedule Part I para. 1 accords immunity from suit and legal process except in respect of motor traffic offences involving vehicles belonging to or operated on behalf of the Secretariat.

621 Schedule Part II para. 5.

622 Schedule Part II para. 6.

623 Schedule Part III para. 8.

624 Above, n. 505.

national government as a basis either for invoking immunity or for defending an action before the courts of the United Kingdom.”⁶²⁵

The Act of State doctrine is rooted in domestic constitutional law and not in international law and deals with the extraterritorial effects of governmental acts. The expression “Act of State” may be used to describe executive acts which are authorised by the state in the exercise of sovereign power.⁶²⁶ The victim may be denied any redress because the act, once it has been identified as an Act of State, is one which the court has no jurisdiction to examine.⁶²⁷

At its widest, Act of State has been taken to mean that:⁶²⁸

“Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”

However, the modern, and more accepted view, was put forward in Buttes Gas & Oil Co. v. Hammer. Lord Denning stated that:⁶²⁹

“If a person is sued for an alleged wrong, a defence may in proper circumstances be available to him on the ground that he acted under the orders of the British Government or a foreign government, or that he was authorised by it or subsequently ratified by it”.

He continued:

“the circumstances in which this defence is available are very ill-defined.”

625 J. Craig Barker, “State Immunity, Diplomatic Immunity and Act of State: A triple protection against legal action” (1998) 47 ICLQ 950, p. 958.

626 AG v. Nissan [1970] AC 179, pp. 218 and 238.

627 Buron v. Denman (1848) Exch 167.

628 Underhill v. Hernandez (1897) 168 US 250, p. 252.

629 [1975] 1 QB 557, p. 573.

While the Court in Oppenheimer v. Cattermole agreed that it “must be very slow to refuse to give effect to legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction”⁶³⁰ Lord Cross stated that:⁶³¹

“What we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as law at all.”

14.5 Amnesties

If the applicable law of tort under the choice of law rules is that of the place where the act of torture was committed,⁶³² the English courts will still have to consider the effect of certain common law or statutory rules forming part of English law that will exclude or modify the effects of choice of law rules.⁶³³ These are known as mandatory rules of law. Mandatory rules have been described as being:⁶³⁴

“so important that as a matter of construction or policy they must apply in any action before a court of the forum, even where the issues are in principle governed by a law selected by a choice of law rule”⁶³⁵

630 [1976] AC 249, p. 277.

631 *Ibid.*, p. 278.

632 See above, Section 13.3.

633 Private International Law (Miscellaneous Provisions) Act 1995, s.14(4).
See J.J. Fawcett, “Evasion of Law and Mandatory Rules in Private International Law”, (1990) CLJ 44.

634 Current Law Statutes Annotated 1995 at 42/15.

635 The Human Rights Act 1998 would be an example of a mandatory rule.

However, since the effect of this provision is not limited to mandatory rules of the forum, that is, England, it is possible that the courts may also have to enforce mandatory rules from the country where the torture occurred. It is possible that amnesty legislation might be regarded as a mandatory rule of law. This could result in a conflict between the English courts and the courts of the country where the act occurred, regardless of which country's laws would normally be applied under the choice of law rules.

By accepting a provision granting amnesty to a person who has been involved in serious human rights violations such as torture, the English courts could be acting in conflict with the Human Rights Act 1998. Indeed, an acceptance by the English courts that such a provision has blanket applicability in domestic proceedings could be open to challenge as a violation of this country's positive obligations under Articles 3 and 6 of the European Convention on Human Rights.⁶³⁶

In terms of the English courts, while a "mandatory rule" that was established for sound public policy reasons is most likely to be accepted, it would appear irrational if the English courts had to decide on issues that protected people from the consequences of having committed serious violations such as torture, just because they met the criteria of a mandatory rule. As may be seen from reference to amnesties in the criminal section of this Manual it is possible that an amnesty provided for by domestic legislation would be found to be contrary to international law.⁶³⁷

636 *Osman v. UK*, n. 293 above.

637 See above, Section 8.4.

15. Evidential Issues

15.1 Disclosure of documents

Disclosure must be made in accordance with Civil Procedure Rule 31.6. This includes disclosure of documents both within and outside the jurisdiction. Issues of disclosure may affect both parties.

Certain categories of documents are regarded as privileged and do not have to be disclosed. These include documents which have legal professional privilege, such as communications between a solicitor and third party, if they come into existence after litigation is contemplated or commenced and are made with a view to such litigation.⁶³⁸ Privilege applies also to communication between the claimant and a third party if the dominant purpose for which a document was prepared was for submission to a legal adviser in view of contemplated or pending litigation.⁶³⁹ The other categories of privilege concern disclosure which would incriminate the party making it; and documents which are privileged on the grounds of public interest, which may receive public interest immunity.

Documents will not be entitled to privilege merely because they are considered confidential. Thus, a litigant is not entitled to claim privilege in respect of a document merely by reason that it was supplied in confidence by a third party. However, protection will be given by the court in certain cases of confidentiality. The governing principle is that the court should order a controlled measure of disclosure. It must decide what measure of disclosure is appropriate, to whom it is to be made and on what terms.

Documents held by a third party, such as a human rights organisation, and containing interviews with survivors and others who have

638 It is not possible to attach privilege to enclosures to a letter simply because they are sent under cover of a letter which itself may be privileged.

639 Waugh v. British Railways Board [1980] AC 521.

provided information on the basis that it remains confidential and do not wish to become involved in legal proceedings, are not necessarily privileged. A general request for the disclosure of all files might be regarded as a “fishing expedition”. However, a request for specific disclosure may be used to challenge the sufficiency of a list of documents, or if a party has difficulty in obtaining inspection of documents referred to in the other side’s list of documents.⁶⁴⁰ An application for specific disclosure must provide details of what is asked for and be supported by evidence stating that, in the belief of the deponent, the other party has or has had certain documents which are relevant to the action. The evidence must show that the documents are subject to disclosure.

In the case of D v. NSPCC⁶⁴¹ an informant had wrongly suggested that a mother was beating her child. The mother brought an action in damages for personal injuries resulting from the NSPCC’s negligence in failing to properly investigate the complaint. The NSPCC was able to withhold discovery of documents which would identify the informant. It claimed that the proper performance by the NSPCC of its duties (set out in an Act of 1969) required that absolute confidentiality of information given in confidence should be preserved; otherwise sources would dry up and that would be contrary to the public interest. The House of Lords held that immunity from disclosure of identity of informants in civil proceedings should be extended to those who gave information to the NSPCC in the same way as it would be allowed to police informers. In his judgment, Lord Hailsham stated that the categories of public interest are not closed and must be considered in the light of social conditions and developing social legislation.⁶⁴² It can, therefore, be argued that the discovery of confidential information should not be ordered on the basis that it may prevent torture victims and witnesses coming forward and could put witnesses at risk.

640 CPR 31.12.

641 [1978] AC 171.

642 Ibid, p. 230.

Normally documents must be disclosed for inspection in their entirety, but there is scope for blanking out irrelevant passages.⁶⁴³

A foreign state does not have the same obligations with respect to the disclosure of documents. Section 13(1) of the State Immunity Act 1978 provides that no penalty by way of committal or fine is to be imposed in respect of any failure or refusal by a state to disclose or provide any document or other information in proceedings to which it is a party. However, the court may draw inferences from the failure of the state to give discovery, or may even strike out its defence.⁶⁴⁴

15.2 Obtaining evidence from outside the jurisdiction

Questions as to the admissibility of evidence are decided in accordance with English law⁶⁴⁵ as is the competence and compellability of witnesses.⁶⁴⁶ In addition, copies of foreign documents are inadmissible in England unless they comply with the English rules as to the admissibility of secondary evidence of documents.⁶⁴⁷

Under the Civil Evidence Act 1995 the general rule is that a hearsay statement will be admissible unless it should be excluded on the basis that it is, for instance, privileged, lacks relevance or the maker of the statement was not competent at the time when it was made.⁶⁴⁸ If one of the parties wishes to rely on a statement made by a person but does not propose to call that person to give evidence, because for instance, they live abroad, they must provide

643 GE Capital Corporate Finance Group Ltd. v. Bankers Trust Co. [1995] 1 WLR 172.

644 See Dicey & Morris, n. 305 above, para. 10-018.

645 Yates v. Thompson (1835) 3 Cl & F 544.

646 Bain v. Whitehaven & Furness Junction Railway (1850) 3 HLC 1.

647 Roe v. Roe (1916) 115 LT 792.

648 Civil Evidence Act 1995, s.1.

a hearsay notice to that effect.⁶⁴⁹ This must be served on the other party within 28 days after the matter is set down for trial or such period as a court may specify.⁶⁵⁰ The other party may want that evidence to be tested under cross-examination and must serve a notice to that effect no later than 28 days after service of the hearsay notice.⁶⁵¹

The court cannot directly compel a person from abroad to attend court to give evidence or produce documents.⁶⁵² However, there may be occasions where the evidence of a witness abroad will be of particular importance to the determination of the trial. In such a situation, English law grants the courts powers to obtain evidence abroad. However these powers will be exercised with great caution. This is partly because in the common law tradition obtaining evidence is the responsibility of the parties while in many civil law countries it is part of the judicial function, and the courts will be reluctant to interfere with the rules of other jurisdictions. The court will also take into account the desire to avoid unnecessary expense, delay and inconvenience.

The courts are generally reluctant to grant applications by claimants for evidence to be taken from abroad.⁶⁵³ The same reluctance will not apply in relation to an application from a defendant, since this might interfere with a person's right to defend themselves. Before granting such an application the court will need to be satisfied that a witness cannot attend for an examination in England, for example because of costs⁶⁵⁴ or ill-health,⁶⁵⁵ and has material evidence

649 CPR Schedule 1, Order 38 Rule 21(1).

650 Order 38 Rule 21(4).

651 Order 38 Rule 23.

652 Nadin v. Bassett (1884) 25 Ch.D 21.

653 Berdan v. Greenwood (1881-1882) 20 Ch.D 764n.

654 *Ibid.*

655 Wong Doo v. Kana Bhana (1973) NZLR 1455.

to give.⁶⁵⁶ In such cases the court will be keen not to make an order which would deprive the claimant of the opportunity to test the evidence by cross-examination where the credibility of the witness and/or their identity is at issue.⁶⁵⁷

The court has the general power to order depositions to be taken before an examiner. There are different procedures available when the person is to be examined out of the jurisdiction.⁶⁵⁸ Usually this involves the issue of a Letter of Request to the judicial authorities of the foreign country asking the foreign court to take or cause to be taken the evidence required.⁶⁵⁹ It may be accompanied by interrogatories and may request that cross-examination be permitted. The second way is the appointment of a special examiner to take evidence abroad, but only if the government of that country allows it.⁶⁶⁰ Or, thirdly, a British consul may be appointed to act as a special examiner.⁶⁶¹

The court has the power to make whatever request of a foreign court is desirable in the interests of justice and to which the foreign court would be likely to be receptive. It is only in very exceptional circumstances that the English court will make an order against someone who is not party to English proceedings to produce documents situated in a foreign jurisdiction or to allow such documents to be inspected or copied.⁶⁶² The same principles apply

656 Hardie Rubber Co. Pty Ltd. v. General Tire and Rubber Co. (1973) 129 CLR 521.

657 Nadin v. Bassett, n. 652 above.

658 CPR 34.8.

659 CPR 34.13.

660 CPR 34.13(4).

661 Practice Direction 34 para. 5.8.

662 MacKinnon v. Donaldson Lufkin & Jenrette Securities Corporation [1986] Ch.482.

where the English court is asked to make an order for disclosure of documents against someone who is joined as a defendant solely for that purpose.⁶⁶³

A growing number of countries, including the UK, are parties to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970, which establishes clear procedures and improves the flow of information between contracting states. A request under the Convention can cover a variety of forms of evidence, including oral testimony and the inspection of documents or other property.⁶⁶⁴

15.3 Witness protection

Witnesses will not be entitled to the same protection which may be available in criminal cases.⁶⁶⁵ The courts would make a distinction between witnesses coming forward in order to bring about the criminal conviction of a perpetrator of torture, and people giving testimony in a private claim for civil redress.

663 Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] AC 133.

664 Article 3(1)(f)(g).

665 See above, Section 9.2.

16. Damages and their Enforcement

16.1 Damages

The law relating to damages is partly procedural and partly substantive. This may be significant when considering which law is applicable under the choice of law rules.⁶⁶⁶ Distinctions can be drawn between, on the one hand, heads of damages and questions of remoteness which are substantive and governed by the law applicable to the tort, and, on the other hand, the quantification of damages, which is a procedural matter and will be settled by English law.⁶⁶⁷

English law distinguishes between general and special damages. General damages are those losses, usually non-pecuniary, such as pain and suffering which are not capable of precise quantification in monetary terms. They arise naturally and in the normal course of events. By contrast, special damages are those losses which can be calculated. They do not arise naturally out of the defendant's breach and are only recoverable if they are within the reasonable contemplation of the parties.⁶⁶⁸ Special damages must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, so the claimant must only assert and prove that damage was suffered. Consequential loss usually refers to pecuniary loss consequent on physical damage, such as loss of profit.

The principal heads of non-pecuniary damages include pain and suffering and loss of amenity. Pain and suffering is likely to be a particularly important aspect of any claim for damages for torture, and may include physical, emotional and psychological damage such as Post-Traumatic Stress Disorder.

666 See above, Section 13.3.

667 For further details, see Dicey & Morris, n. 305 above, paras 7-034 to 7-039.

668 Hadley v. Baxendale (1854) 9 Exch 341, para. 1015 et seq.

Exemplary and aggravated damages may also be claimed. In the cases of Thompson and Hsu v. Commissioner of Police of the Metropolis, the Court of Appeal considered the directions a judge should include in summing up to assist a jury as to the appropriate amount of damages in an action against the police for unlawful conduct, and set out the principles that should govern the awarding of exemplary and aggravated damages in such cases.⁶⁶⁹ In sum, aggravated damages may be awarded where there are aggravating features about the defendant's conduct, such as humiliating circumstances or high-handed, insulting, malicious or oppressive behaviour. Such damages could be awarded where a basic award is not considered sufficient to compensate the injury suffered, and could contain a penal element. Exemplary damages will be an exceptional remedy in cases where there has been conduct including oppressive or arbitrary behaviour by police officers and the object is to punish the defendant and to mark the jury's disapproval of such behaviour. Both aggravated and exemplary damages must be specifically claimed.⁶⁷⁰

16.2 Enforcement of judgments

The method of enforcing judgment is a matter of procedure for the purposes of the choice of law rules. Therefore whichever law is applicable, the method of enforcement of a judgment will be according to English law.⁶⁷¹

⁶⁶⁹ Thompson v. Commissioner of Police of the Metropolis; Hsu v. Commissioner of Police of the Metropolis, considered together by the Court of Appeal, [1997] 2 All ER 762, particularly pp. 774-7. See also regarding exemplary damages Rooks v. Barnard [1964] 1 All ER 367.

⁶⁷⁰ However, under the Law Reform (Miscellaneous Provisions) Act 1934, s.2(a)(i), where a cause of action survives for the benefit of the estate there is no entitlement to exemplary damages.

⁶⁷¹ Minister of Public Works of Kuwait v. Sir Frederick Snow and Partners [1983] 1 WLR 818, p. 829.

Even where a state is not entitled to claim immunity under the State Immunity Act 1978, its property (except that used for commercial purposes) is immune from process of execution.⁶⁷² However, the property of a separate entity would be subject to execution, unless the act was carried out in the exercise of sovereign authority.

If the defendant has assets in the UK the judgment can be enforced in the usual way. However if a defendant has no assets within the jurisdiction, efforts to enforce judgments in other countries are beset with difficulties. This has proved to be a problem in the United States where almost none of those who have been successful in obtaining multi-million dollar judgments against foreign torturers abroad have managed to collect the damages.⁶⁷³

The Brussels and Lugano Conventions, to which the UK is a party, provide for the recognition and enforcement of judgments obtained from the courts of other member states. However it is mainly only EU states which are parties to those Conventions.⁶⁷⁴

Where no treaty applies it will be a question of investigating the law of each individual country where enforcement is sought, and in particular how each such country deals with the recognition and enforcement of judgments in general, and judgments issued by a UK court in particular. The formal requirements and the extent to which the foreign court will re-examine a foreign judgment will vary. Some countries will automatically reject enforcement of default judgments.⁶⁷⁵

672 J. Crawford, "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820, p. 860; M. Byers "State Immunity: Article 18 of the International Law Commission's draft" (1995) 44 ICLQ 882.

673 See Appendix 8, Section 2.

674 See Appendix 3.

675 For a useful summary of comparative law and reference texts see Stephens and Ratner, n. 589 above, p. 220.

There is a need for international attention to address the weakness of national enforcement mechanisms to obtain judgments against parties that reside and have assets outside the jurisdiction. The development of the global economy may mean that states will soon find it in their interests to establish bilateral or multilateral conventions for the enforcement of judgments. If that is the case, it will be important for judgments obtained as a result of severe violations of human rights to be included in any such treaty. A new international convention may be concluded in 2001 which would govern the enforcement of foreign judgments worldwide.⁶⁷⁶

⁶⁷⁶ A new international convention, the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, is currently being negotiated by the members of the Hague Conference on Private International Law; see above, Section 12.1.3.

CONCLUSION

Although there has been only limited case law, torture committed abroad is an area of concern for English law. The reality is that in 1999, according to Amnesty International, people were reportedly tortured or ill-treated by security forces, police or other state authorities in 132 countries, and torture or ill-treatment, lack of medical care or cruel, inhuman or degrading prison conditions were confirmed or suspected to have led to deaths in custody in 81 countries.⁶⁷⁷ A major factor is that those responsible are not brought to justice but are able to continue committing violations with impunity.

The fact that international law has classified freedom from torture as the absolute and non-derogable right of every man, woman and child reflects the universally held view that such crimes are abhorrent. The ratification by states of international human rights treaties and the efforts made by many to ensure that torture does not occur within their own territory are important steps forward in the prevention of torture. Further, the development of international enforcement mechanisms, such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the agreement to establish an International Criminal Court, has marked a significant step away from the principle of non-interference which has helped to allow violators to continue their practices.

The increasing frequency with which torturers and survivors find themselves in a foreign country means that there will be opportunities to bring cases concerning torture committed abroad before the UK courts.⁶⁷⁸ International law recognises that torture is a crime against international law. A consequence of this is that a duty is placed on states to ensure that perpetrators found within their jurisdiction,

677 Amnesty International Report 2000.

678 REDRESS has been involved in a number of such cases and explored the possibilities for bringing criminal or civil proceedings in the UK. In some of those cases proceedings have been instituted.

no matter where they carried out their crimes, will be either prosecuted or extradited to stand trial elsewhere.

Section 134 of the Criminal Justice Act 1988 criminalises acts of torture and confers exceptional extraterritorial jurisdiction on UK courts to hear such cases. However this provision, by itself, is not sufficient to guarantee successful prosecutions. Competent and properly resourced mechanisms for the investigation and prosecution of international crimes is crucial. The setting up of special units within the Metropolitan Police and the Crown Prosecution Service for the investigation of World War II crimes under the War Crimes Act 1991 could prove a useful model. The establishment of such specialist units in other jurisdictions has proved to be effective.

Since torture is regarded as an offence under English law, it appears inconsistent that there is no specific equivalent statutory basis for bringing civil actions for torture committed abroad under the present law of torts. REDRESS is sponsoring a proposal for law reform which will establish torture as an actionable civil wrong, provide a clear jurisdictional basis and create an exception to the immunity which states and their officials might otherwise enjoy from suit in UK courts.⁶⁷⁹ Civil redress for torture would not only provide survivors with damages and the funds for rehabilitation, but the awarding of judgments against those responsible for torture could help to act as a deterrent. The effectiveness of such actions would be enhanced by more effective international mechanisms for establishing jurisdiction and enforcing civil judgments. A new Hague Convention currently being negotiated will strengthen the ability to enforce judgments awarded in one country in other member states.⁶⁸⁰

The English courts have already played a significant role in bringing torturers to account. The decision of the House of Lords in the

679 See Appendix 7.

680 See above, Section 12.1.3.

Pinochet case, that a former head of state is not entitled to claim immunity for international crimes such as torture, has had worldwide reverberations. Leaders and officials who oversee and commit acts of torture are now more cautious when travelling abroad, whether for vacation, medical treatment or retirement. However, the relatively small number of criminal and civil actions in the UK and other jurisdictions⁶⁸¹ highlights the very real legal and practical difficulties involved in bringing to court cases relating to torture committed in another jurisdiction.

This Manual presents the situation as it is but the law as it stands only goes so far. There is a need to strengthen the legislation which provides a basis for the exercise of universal jurisdiction for international crimes.⁶⁸² The need to enact legislation to enable the UK to ratify the International Criminal Court Statute provides a good opportunity. Further developments in the law in relevant areas are expected, such as a reform of the law regarding limitation periods in civil actions. At the level of international standards, the UN Commission on Human Rights is currently debating, with a view to adoption at a future session, a set of Basic Principles and Guidelines on the right to reparation.⁶⁸³

Although law, by itself, will not prevent torture from occurring, it provides a means of calling torturers to account, deterring others and providing reparation to survivors. And while it is most appropriate for violators to be brought to justice in their own country, starting legal process elsewhere can have a dynamic impact on the home country. After years of impunity in Chile, once legal proceedings were under way in Spain and he was stripped of his immunity in the UK, Augusto Pinochet now faces a real prospect of facing some sort of legal process in Chile.

681 See Appendix 8 for a description of some cases in other jurisdictions.

682 See *Law Reform in the Wake of the Pinochet Case: The way ahead*, REDRESS, July 1999.

683 See above, n. 292.

The legal process, whether a criminal or a civil case, is not just about trying to prevent and prosecute acts of torture. It is of great significance to the survivor, for whom the effects of the torture will be very personal. When considering a case it will be important to understand and recognise what the torture survivor wants from the law and the effect that being involved in such an action will have on them.

Many challenges remain. The task for lawyers, human rights organisations and others is to bring more cases which will enable the law to develop and to increase the number of practitioners who have experience in relevant areas of the law. In such an endeavour, this Manual is intended as a practical guide. REDRESS will continue to work with those willing to undertake this work, and will look forward to receiving feedback from those who use the Manual and who try to bring forward cases.

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Lugano Convention on Jurisdiction and the Enforcement of
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Hague Convention on the Service Abroad of Judicial and Extra
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Hague Convention on the Taking of Evidence Abroad in Civil and
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Human Rights Committee General Comment No. 20 on Article 7
of the International Covenant on Civil and Political Rights

Harare Scheme 1990 relating to mutual assistance in criminal
matters within the Commonwealth

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

1 The Hague Conventions were negotiated under the auspices of the Hague Conference on Private International Law, which has 47 member states from all regions of the world. The Brussels and Lugano Conventions were negotiated among European states; the states parties are set out in Appendix 3.

Draft texts

Draft international Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters²

Draft Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (UN)³

Draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union⁴

Draft second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1959 (Council of Europe)

2 Presently being negotiated by members of the Hague Conference on Private International Law. For text, see <http://www.hcch.net/e/conventions/draft36e.html>.

3 For text, see UN Doc. E/CN.4/2000/62, 18 January 2000.

4 For text, see OJ C251, 02/09/99, or Appendix F to C. Murray and L. Harris, *Mutual Assistance in Criminal Matters* (Sweet & Maxwell, 2000).

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Seeking Reparation for Torture Survivors

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To promote the right to reparation of people who are, or at any time have been, survivors of torture anywhere in the world and to:

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- promote the development and implementation of national and international standards which provide effective remedies for torture
- make accountable all those who perpetrate, aid and abet acts of torture
- increase awareness of the widespread use of torture and of existing measures to provide redress

The Pinochet case raised awareness of two facts: first, that those who suffer torture are too often unable to obtain justice, and second, that those responsible for perpetrating torture can and do enter the UK. It is not known how many human rights violators visit or reside here, but the UK has committed itself under international treaties such as the Torture Convention to 'prosecute or extradite' such persons if they come within its borders.

This Manual aims to contribute to this still developing and little known area of law. Relevant cases including Pinochet and Al-Adsani are analysed, and the applicable law and procedure are set out for bringing criminal and civil proceedings in the courts of England and Wales for torture committed abroad. The Manual aims to be of practical use to legal practitioners and human rights activists in the UK, but will also be of interest to those in other jurisdictions.

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