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Ending torture, seeking justice for survivors

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Introduction

This briefing paper was written by TRIAL International in partnership with the Open Society Justice Initiative and REDRESS. It provides an overview of the national legal framework of England and Wales on universal jurisdiction, including statutory and case law, and its application in practice.¹

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.²

The content is based on desk research with the support of *pro bono* lawyers from the relevant jurisdiction. In addition, interviews with national practitioners were conducted on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the jurisdiction in question. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

The authors would like to thank Valérie Paulet, Charlie Loudon, Tayyiba Bajwa and Caitlan Lloyd as well as all experts and practitioners who agreed to be interviewed for their invaluable contribution to this briefing paper.

1 The United Kingdom is divided into three distinct legal jurisdictions, namely England and Wales, Scotland, and Northern Ireland. This briefing paper focuses on the legal regime in England and Wales.

2 See all briefing papers at https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/?utm_content=Netherlands%2CTrial%2CFrance%2CUniversalJurisdiction%2CGermany&utm_campaign=social&utm_source=twitter&utm_medium=TRIAL+International.

1. Crimes that invoke universal jurisdiction

The criminal law of England and Wales expressly provides for universal jurisdiction over the crimes of torture³ and grave breaches of the Geneva Conventions,⁴ allowing national authorities to investigate and prosecute these offences under certain conditions when they were committed abroad by foreign nationals (see Universal jurisdiction requirements).

It also provides for active personality and a very restricted form of universal jurisdiction over three of the crimes under the Rome Statute of the International Criminal Court (Rome Statute)⁵ – war crimes, crimes against humanity and genocide, pursuant to the International Criminal Court Act 2001 (ICCA).⁶

This briefing paper will focus on the offences of torture, grave breaches of the Geneva Conventions, genocide, war crimes and crimes against humanity, and will consider each of these offences in turn.⁷ Grave breaches of the Geneva Conventions and war crimes as defined in the ICCA will be dealt with in separate sections as they have different requirements.

1.1 Torture

The crime of torture is defined by section 134 of the Criminal Justice Act 1988 (CJA). The elements of this offence are similar to those contained in Article 1(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),⁸ and require: (i) the intentional infliction of severe pain or suffering on another; (ii) by a public official or a person acting in an official capacity; (iii) in the performance (or purported performance) of their official duties, or when a public official (or a

3 Section 134 Criminal Justice Act 1988 (CJA), available at: <https://www.legislation.gov.uk/ukpga/1988/33/section/134>.

4 Section 1 Geneva Conventions Act 1957 (GCA), available at: <https://www.legislation.gov.uk/ukpga/Eliz2/5-6/52/section/1>.

5 Rome Statute of the International Criminal Court (Rome Statute), available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

6 Section 50 International Criminal Court Act 2001 (ICCA), available at: <https://www.legislation.gov.uk/ukpga/2001/17/section/50>.

7 Other crimes where universal jurisdiction applies include hostage taking (Taking of Hostages Act 1982), slave trade (Slave Trade Act 1873, as amended by Statute Law (Repeals) Act 1998) and offences against United Nations personnel (United Nations Personnel Act 1997).

8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), available at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

person acting in an official capacity) instigates, consents, or acquiesces in the conduct. In contrast to the Convention against Torture, no specific purpose is required under the CJA.

Official capacity

The Supreme Court recently considered the requirement for non-state actors to act in an “official capacity” in the case of Agnes Reeves Taylor, the ex-wife of the former Liberian president and convicted war criminal Charles Taylor. Reeves Taylor was arrested on 1 June 2017 in East London by the Metropolitan Police and charged with seven counts of torture and one count of conspiracy to commit torture under the CJA for her role in the Liberian civil war of 1990.⁹ In a seminal judgment on 13 November 2019, the Supreme Court interpreted a “person acting in an official capacity” as including:

*a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations [...] whether acting in peace time or in a situation of armed conflict.*¹⁰

The majority judgment emphasized that for the purposes of section 134, the exercise of a governmental function must be distinguished from purely military activity that does not involve the exercise of official or quasi-official powers, but noted that it would be necessary to make allowance for the particular conditions which may make administration difficult and for different views of appropriate structures of government.¹¹ The determinative issue is whether the entity has established “a sufficient degree of control, authority and organisation to become

9 R v Reeves Taylor (AP) (Appellant) v Crown Prosecution Service (Respondent), 13 November 2019, [2019] UKSC 51, UKSC 2019/0028 (R v Reeves Taylor (UKSC)), para. 1, available at: <https://www.supremecourt.uk/cases/uksc-2019-0028.html>; REDRESS, Court dismisses torture case against Agnes Taylor, 6 December 2019, available at: <https://redress.org/news/court-dismisses-torture-case-against-agnes-taylor/>.

10 R v Reeves Taylor (UKSC), para. 76.

11 Ibid, paras. 78-79.

an authority exercising official or quasi-official powers, as opposed to a rebel faction or mere military force.”¹²

Having decided this point of law, the Supreme Court remitted the case back to the Central Criminal Court to re-assess its facts. On 6 December 2019, the trial judge dismissed all charges against Reeves Taylor as the prosecution had failed to prove that, at the time of the offence, the rebel group she was a member of exercised “functions normally exercised by governments over their civilian populations”.¹³ Accordingly, Reeves Taylor’s actions fell outside the scope of section 134 of the CJA.

1.2 Grave breaches of the Geneva Conventions

The Geneva Conventions Act 1957 (GCA) provides universal jurisdiction for “grave breaches” of the 1949 Geneva Conventions committed in an international armed conflict (i.e. wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly).¹⁴ It also provides universal jurisdiction for grave breaches of the Additional Protocol I to the Geneva Conventions as listed in paragraph 4 of Article 11 and paragraphs 2, 3 and 4 of Article 85 of the Additional Protocol I which apply to international armed conflict, and the misuse of distinctive emblems set out in Article 6 of the Third Protocol to the Geneva Conventions.

Universal jurisdiction does not extend to violations of common Article 3 of the Geneva Conventions, nor to violations of the Second Protocol to the Geneva Conventions, both of which relate to non-international armed conflict.

1.3 ICCA crimes

The ICCA criminalizes and provides for a very restricted form of universal jurisdiction in relation to the offences detailed below.¹⁵ (See Universal jurisdiction

¹² Ibid, para. 79.

¹³ R v Reeves Taylor (unreported); BBC News, Torture charges against former Liberia leader’s ex-wife dismissed, 6 December 2019, available at: <https://www.bbc.co.uk/news/uk-50685426>.

¹⁴ Article 50 First Geneva Convention, Article 51 Second Geneva Convention, Article 130 Third Geneva Convention, Article 147 Fourth Geneva Convention, all available at: <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>; as the Geneva Conventions 1949 only apply to international armed conflict, arguably the GCA does not provide universal jurisdiction to prosecute crimes committed in an internal armed conflict.

¹⁵ Section 51 ICCA.

requirements below for more information). It also expressly provides such jurisdiction over conduct ancillary to the below offences (i.e., aiding, abetting, counselling, procuring, inciting, attempting, conspiring, assisting or concealing the commission of the offence).¹⁶

1.3.1 Genocide

The crime of genocide is defined according to the Rome Statute. It encompasses any acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, including by: (i) killing/causing serious bodily or mental harm; (ii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iii) imposing measures intended to prevent births within the group; or (iv) forcibly transferring children of the group to another group.¹⁷

1.3.2 Crimes against humanity

Crimes against humanity are defined according to the Rome Statute and encompass:

*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: murder, extermination, enslavement, deportation, forcible transfer of population, imprisonment, or other severe deprivation of physical liberty, torture, rape, sexual slavery and other sexual offences of comparable gravity, persecution against any identifiable group, enforced disappearance, apartheid, and other inhumane acts of a similar character intentionally causing great suffering/serious injury to body or to mental/physical health.*¹⁸

1.3.3 War crimes

War crimes for the purposes of the ICCA are defined according to the Rome Statute and include grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflict.¹⁹ In contrast to

¹⁶ Sections 52 and 55 ICCA.

¹⁷ Article 6 Rome Statute; section 50(1) ICCA.

¹⁸ Article 7 Rome Statute; section 50(1) ICCA.

¹⁹ Article 8(2) Rome Statute; section 50(1) ICCA.

the GCA, crimes committed in non-international armed conflicts are expressly within the scope of the ICCA.

1.3.4 Enforced disappearance

The ICCA does not establish enforced disappearance as an autonomous offence, but it is listed as an example of a crime against humanity. The ICCA confirms that the crime is defined according to Article 7 of the Rome Statute and, as all ICCA offences, should be interpreted in light of the Elements of Crimes of the Rome Statute.²⁰

1.4 Conspiracy

A conspiracy to commit any of the offences set out above will also trigger universal jurisdiction.²¹ Conspiracy pursuant to Section 1 of the Criminal Law Act 1977 requires: (i) an agreement between at least two persons; (ii) to pursue a course of conduct that amounts to or involves the commission of an offence. Proof of the existence of a conspiracy is generally “a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”²²

Where such an agreement is found to exist, the defendants can be subject to criminal liability regardless of whether they later withdraw from the agreement and/or the crime is actually realized.²³

The crime of conspiracy was applied in a case against UK resident Faryadi Sarwar Zardad, an Afghan warlord who was sentenced to 20 years in prison for conspiracy to commit torture in Afghanistan during the Afghan Civil War (1992-1996).²⁴

²⁰ Section 50(2) ICCA.

²¹ Section 1A(12) Criminal Law Act 1977, available at: <https://www.legislation.gov.uk/ukpga/1977/45/contents>.

²² *Brisac* (1803) 4 East 164 at para. 171.

²³ *R v. Gortat and Pirog* [1973] Crim.L.R. 648; *O’Connell v. R* (1844) 5 St.Tr.(N.S.) 1.

²⁴ *R v Zardad (Faryadi Sarwar)* [2007] EWCA Crim 279, available at: <https://www.asser.nl/upload/documents/20130417T031419-Top%20of%20Form.pdf>.

2. Modes of liability

2.1 Primary/principal liability

Any person directly committing any of the substantive offences detailed above bears individual criminal responsibility as a “principal”. There may be joint principals where more than one person carries out the substantive offence.

2.2 Secondary/accessory liability

Anyone “who aids, abets, counsels or procures” a principal to commit the substantive offence is an accessory and can be prosecuted for the same offence as though they were the principal offender.²⁵ This is commonly referred to as secondary liability, and requires the following:

- (1) The accessory must assist, encourage, command, or procure the commission of the substantive offence by the principal;
- (2) the accessory must intend to encourage or assist the commission of the substantive offence, with knowledge of any existing facts necessary to give the principal’s intended conduct a criminal character;
- (3) the substantive offence must have been perpetrated (or at least attempted) by the principal; and
- (4) the accessory must not have withdrawn at the time of the offence.²⁶

The ICCA expressly codifies these principles as “ancillary offences” for the purposes of ICCA crimes. Many instances of secondary liability involve an agreement between principal and accessory, but this is not strictly necessary.²⁷ Simple foresight may be evidence of intention but for an individual to be criminally liable as a secondary party, they themselves must be proven to have the requisite intent.

²⁵ Section 8 of the Accessories and Abettors Act 1861, available at:

<https://www.legislation.gov.uk/ukpga/Vict/24-25/94/section/8>; Dennis J. Baker, Glanville Williams Textbook of Criminal Law (4th edn, Thomson Reuters 2018).

²⁶ Crown Prosecution Service, Secondary Liability: charging decisions on principals and accessories, Legal Guidance, available at: <https://www.cps.gov.uk/legal-guidance/secondary-liability-charging-decisions-principals-and-accessories>; R v Mitchell [1990] Crim.L.R. 496 (on withdrawal).

²⁷ Crown Prosecution Service, Secondary Liability: charging decisions on principals and accessories, Legal Guidance, available at: <https://www.cps.gov.uk/legal-guidance/secondary-liability-charging-decisions-principals-and-accessories>; R v Mitchell [1990] Crim.L.R. 496 (on withdrawal).

Secondary liability may cover situations in which the accused orders a crime or creates the conditions for it (by providing funds, military or logistical means or other support).

Where a prosecutor is unable to charge the principal(s) with a substantive offence (for instance, if the principal did not attempt to commit the offence or where there is no conspiracy which requires multiple parties), the Serious Crime Act 2007 provides an alternative ground on which to prosecute the accessory for their encouragement and/or assistance.²⁸ The accused may also be guilty of conspiracy to commit the substantive offence (see Conspiracy).

2.3 Command/superior responsibility

The ICCA sets out the requirements for command responsibility in relation to genocide, war crimes and crimes against humanity.²⁹ Pursuant to this law, a military commander, or a person effectively acting as a military commander, is responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where—
(a) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences, **and**
(b) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.³⁰

A superior other than a military commander is responsible for offences committed by subordinates under their effective control if they knew/consciously disregarded information which clearly indicated that the subordinates were committing or about to commit offences, the offences concerned activities that were within the superior's effective responsibility and control, and the superior failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. A person responsible for an offence under this provision is liable as an accessory.³¹

Articles 86 and 87 of the Additional Protocol I to the Geneva Conventions provide for command/superior responsibility. However, whilst the Additional

²⁸ Serious Crime Act 2007, available at: <https://www.legislation.gov.uk/ukpga/2007/27/contents>.

²⁹ Section 65 ICCA.

³⁰ Section 65(1) ICCA.

³¹ Section 65(4) ICCA.

Protocol I is appended to the GCA, the GCA itself does not make explicit reference to these articles. Accordingly, it is unclear whether this form of liability is properly recognized by English and Welsh law for grave breaches of the Geneva Conventions. It also remains to be tested whether customary international law would allow the courts to apply a form of criminal liability not recognized by domestic statute.³²

In the absence of command/superior responsibility, and for torture under the CJA, the ordinary principles of primary and secondary liability will apply (as set out at Modes of liability).

3. Temporal application

3.1 Beginning of temporal application

The CJA entered into force in England and Wales on 29 September 1988 and established an offence of torture with prospective effect.³³ Although acts of physical torture had already been criminalized before then, only the CJA introduced universal jurisdiction for this particular torture offence. Accordingly, the statutory offence only applies to torture **from 29 September 1988**.

The GCA has effect from: (i) **31 July 1957** for grave breaches of the 1949 Geneva Conventions;³⁴ (ii) **20 July 1998** for grave breaches of the Additional Protocol I;³⁵ and (iii) **5 April 2010** for grave breaches of the Third Additional Protocol.³⁶

As a starting point, the ICCA applies to genocide, crimes against humanity and war crimes (and ancillary offences) committed **on or after 1 January 1991**.³⁷ However, an alternative mechanism applies to crimes against humanity, and to

32 E.g., *R v Jones and Others* [2006] UKHL 16, available at:

<https://www.bailii.org/uk/cases/UKHL/2006/16.html>; *R v Bow Street Magistrate, Ex Parte Pinochet (No.3)* [2000] 1 AC 147 (Pinochet Judgment), available at: <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf>.

33 Introductory text and section 171(6) CJA; Pinochet Judgment.

34 The date of entry into force of the GCA.

35 The date of entry into force of the Geneva Conventions (Amendment) Act 1995, which amended the GCA to criminalize grave breaches of the Additional Protocol I.

36 The date of entry into force of the Geneva Conventions and United Nations Personnel (Protocols) Act 2009, which amended the GCA to criminalize grave breaches of the Third Additional Protocol.

37 Section 70 Coroners and Justice Act 2009, available at:

<https://www.legislation.gov.uk/ukpga/2009/25/section/70>; section 65A ICCA.

war crimes within Article 8.2(b) or (e) of the Rome Statute. If at the time of these offences (or the accompanying ancillary offence), the act amounted to a criminal offence under international law, the ICCA has effect **from 1 January 1991** as usual. If not, the ICCA has effect **from 1 September 2001**.³⁸

3.2 Statute of limitations

No statutes of limitation apply to torture, graves breaches of the Geneva Conventions or ICCA crimes.

In *R v Anthony Sawoniuk*, the Court of Appeal rejected the claimant's application that his conviction for war crimes under the War Crimes Act 1991 should have been stayed on account of the time delay between the offence (1942) and the date on which the prosecution was brought (1999).³⁹ The War Crimes Act 1991 confers jurisdiction specifically for murder, manslaughter or culpable homicide in violation of the laws and customs of war that were committed during the Second World War in places that were part of Germany or occupied by Germany, by a person who later became a British citizen.⁴⁰

³⁸ Section 65A ICCA.

³⁹ *R v Anthony Sawoniuk*, available at: asser.nl/upload/documents/DomCLIC/Docs/NLP/UK/Sawoniuk_Appeal_10-2-2000.pdf.

⁴⁰ Sections 1 and 2 War Crimes Act 1991, available at: <https://www.legislation.gov.uk/ukpga/1991/13>.

4. Universal jurisdiction requirements

4.1 Presence/residence of suspects

A nexus to England and Wales is required in order to open investigations on the above-mentioned crimes committed abroad. The precise nexus required depends on the crime(s) in question.

4.1.1 Torture and grave breaches of the Geneva Conventions

The courts of England and Wales can exercise jurisdiction over the offences of torture and grave breaches of the Geneva Conventions committed abroad by any person, independent of their nationality.⁴¹ If the suspect is not already in the UK, but likely to be coming to the UK, the special unit dealing with international crimes at the Metropolitan Police (SO15) prefers to open an investigation before the accused enters the territory, using the prospect of their presence as a ground to investigate.⁴² This allows the special unit to build a stronger case and collect evidence, before requiring the suspect's arrest upon arrival.⁴³

However, for an arrest warrant to be issued and for the suspect to be charged, the suspect must either be present or their presence anticipated.⁴⁴

The case of Colonel Kumar Lama is an example of an arrest executed while the suspect was visiting the UK. Colonel Kumar Lama, who was allegedly participating in the torture of insurgents in Nepal in 2005, was arrested in Sussex while he was visiting relatives.⁴⁵ He was eventually acquitted by the Central

41 Section 1 GCA; section 134 CJA.

42 The reasonable prospect of the suspect coming to the UK is a factor to be considered as part of SO15's scoping exercise. Should SO15 conclude that there is no such reasonable prospect, it will refer the case to the Special Cases Department of the National Security Directorate of the Home Office for potential future immigration action, taking into account victim and witness safety issues. War Crimes/Crimes Against Humanity Referral Guidelines issued by the Crown Prosecution Service (CPS Referral Guidelines), available at: <https://www.cps.gov.uk/publication/war-crimescrimes-against-humanity-referral-guidelines>.

43 Interview with a police officer from SO15, 27 September 2021.

44 Application for Arrest Warrant Against General Doron Almog (Bow St. Mag. Ct. Sept.10.05) (per Workman, Sr Dist.J.).

45 REDRESS, Colonel Kumar Lama's acquittal: prosecuting torture suspects should remain a priority of the UK, 6 September 2017, available at: <https://redress.org/news/colonel-kumar-lamas-acquittal-prosecuting-torture-suspects-should-remain-a-priority-of-the-uk/>.

Criminal Court in London following the failure of the jury to reach a verdict on 1 August 2016.⁴⁶

4.1.2 ICCA crimes

The courts of England and Wales can exercise jurisdiction over the offences of genocide, war crimes and crimes against humanity committed abroad by any person who: (i) is/was a UK national or UK resident at the time of the crime; or (ii) became a UK national or UK resident after the crime and still resides in the UK when proceedings are brought.⁴⁷ If the suspect is/was a resident but is not currently present in the UK, the actual or reasonable prospect of his/her return to the UK will be sufficient for an investigation to be initiated.⁴⁸

These terms are defined as follows:

- (1) **UK national:** A UK national includes an individual who is: (i) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas Citizen; or (ii) a British subject or a British protected person under the British Nationality Act 1981.
- (2) **UK resident:** A UK resident means a person who is resident in the UK. This is a relatively broad definition in practice. Section 67A of the ICCA defines it as, *inter alia*, a person who has: (i) indefinite leave to remain in the UK; (ii) leave to enter or remain in the UK to work or study; or (iii) made an asylum or human rights claim. Section 70(4) of the Coroners and Justice Act 2009 extends this definition to also include, *inter alia*, an individual who is detained in lawful custody in the UK.

⁴⁶ Ibid; see also *R v Lama (Kumar)* [2014] EWCA Crim 1729 – 6 September 2016 (Central Criminal Court) (unreported) for the decision to acquit.

⁴⁷ Section 68 ICCA.

⁴⁸ CPS Referral Guidelines; see also War Crimes/Crimes Against Humanity: Guidance for making an application for DPP consent for an application for a private arrest warrant in accordance with section 1(4A) of the Magistrates' Courts Act 1980, available at: <https://www.cps.gov.uk/publication/war-crimescrimes-against-humanity-guidance-making-application-dpp-consent-application> (Private Arrest Warrant Guidance).

4.1.3 Conspiracy

According to Section 1A of the Criminal Law Act 1977, the courts of England and Wales can exercise jurisdiction over conspiracies to commit an offence committed abroad. It is immaterial for these purposes whether or not the accused was a British citizen at the time of the crime.⁴⁹

However, a nexus with England and Wales is still required and can be established if:

- (1) a conspirator, or their agent, did anything in England and Wales in relation to the conspiracy agreement before its formation;
- (2) a conspirator joined the conspiracy in England and Wales (either in person or through an agent); or
- (3) a conspirator, or their agent, did or omitted anything in England and Wales in pursuance of the conspiracy agreement.⁵⁰

4.2 Double criminality

As a starting point, there is no double criminality requirement for the exercise of universal jurisdiction under the laws of England and Wales. However, there is such a requirement for the offence of conspiracy.⁵¹

4.3 Prosecutorial discretion

When deciding whether to indict a suspect, the prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction and, in addition, that there is a public interest in prosecuting (see Necessary evidence for indictment). This two-pronged test is referred to as the Full Code Test, regulated by the Code for Crown Prosecutors.⁵² The Full Code Test requires the prosecutors to consider a series of set questions with regard to the available evidence and other factors, such as harm caused to victims (see list of questions below in Necessary evidence for indictment).

Prosecutors enjoy a margin of discretion in applying the Full Code Test. Reviews of decisions not to prosecute will grant prosecutors a margin of prosecutorial

49 Section 1A(12) Criminal Law Act 1977.

50 Section 1A(5) Criminal Law Act 1977.

51 Section 1A(3) Criminal Law Act 1977.

52 Crown Prosecution Service, The Code for Crown Prosecutors, October 2018, available at: <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> (hereinafter Code for Crown Prosecutors).

discretion when determining if such a decision was wrong, particularly when making difficult decisions on complex evidence or the public interest.⁵³

4.4 Political approval

The consent of the Attorney General is required to institute proceedings for crimes of torture committed outside the UK, grave breaches of the Geneva Conventions and ICCA crimes.⁵⁴ The Attorney General is a political appointment. He or she has discretion in making such a decision and no other approvals are required to institute proceedings.⁵⁵

This consent must be obtained before the initiation of the proceedings. However, it shall not prevent the arrest without warrant, or the issuance or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence.⁵⁶

The Attorney General can consider a broad range of public interest issues including international relations and national security. Very little guidance exists as to how the Attorney General should exercise their power to grant or withhold consent, effectively leaving them with a wide discretion.⁵⁷ At the date of the publication of this report, the Attorney General has never refused to give consent to a case involving torture or ICCA crimes.⁵⁸

4.5 Subsidiarity

Although there is no express principle of subsidiarity under the law of England and Wales for crimes under international law, past practice indicates that such a principle is effectively applied in practice, i.e., the territory where the crime was committed will have priority to prosecute. The authorities of England and Wales will prosecute if the authorities in the territory where the crime was committed are

53 Crown Prosecution Service, 1. Was the decision not to prosecute wrong?, Reconsidering a Prosecution Decision, 26 February 2021, available at: <https://www.cps.gov.uk/legal-guidance/reconsidering-prosecution-decision>.

54 Section 135 CJA; section 1A (3)(a) GCA; section 53(3) ICCA; section 153 Police Reform and Social Responsibility Act 2011, available at: <https://www.legislation.gov.uk/ukpga/2011/13/section/153/enacted>.

55 Interview with a prosecutor, 23 September 2021.

56 Section 25(2) Prosecution of Offences Act 1985 (POA), available at: <https://www.legislation.gov.uk/ukpga/1985/23/section/25>; a limited exception applies where a private prosecutor seeks to obtain an arrest warrant, on which see Initiation of investigations.

57 Crown Prosecution Service, Consents to Prosecute, Legal Guidance, available at: <https://www.cps.gov.uk/legal-guidance/consents-prosecute>.

58 Interview with a prosecutor, 23 September 2021.

unable or unwilling to prosecute, or an extradition to the territorial state is not possible.⁵⁹

5. Key steps in criminal proceedings

5.1 Investigation stage

5.1.1 *Initiation of an investigation*

BY AUTHORITIES

The Metropolitan Police is responsible for conducting inquiries into any alleged crime and for deciding how to deploy its resources. This includes decisions to start or continue an investigation and on the scope of any such investigation.⁶⁰

SO15 has the national mandate for investigating serious international crimes. This includes responsibility for investigating all allegations of torture, grave breaches of the Geneva Conventions and ICCA crimes.⁶¹ SO15 exercises its discretion in line with the War Crimes / Crimes Against Humanity Referral Guidelines (CPS Referral Guidelines).⁶²

The Crown Prosecution Service (CPS) is the principal public prosecution service for England and Wales. The CPS Counter Terrorism Division (CTD) is responsible for prosecuting any universal jurisdiction crimes.⁶³ SO15 and the CPS operate together pursuant to the CPS Referral Guidelines.⁶⁴

When the SO15 investigative team receives a referral suggesting that a crime was committed (see below), it will conduct a scoping exercise in order to decide whether to conduct an investigation, as required by the CPS Referral Guidelines.⁶⁵

The scoping exercise will include the following questions (among others):

- (1) Is the suspect named or identifiable?

⁵⁹ Interview with an academic, 28 September 2021.

⁶⁰ Section 3.2 Code for Crown Prosecutors, available at: <https://www.cps.gov.uk/publication/code-crown-prosecutors>.

⁶¹ CPS Referral Guidelines.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Part A CPS Referral Guidelines.

- (2) If not, is there a realistic prospect of identifying the suspect?
- (3) For **crimes of torture or grave breaches of the Geneva Conventions**, are there reasonable grounds to believe that the suspect is present in the UK or will come to the UK?
- (4) For ICCA crimes, is the suspect a UK national, present in the UK or in a country from which the UK can extradite?
- (5) Are the victims/witnesses named or identifiable?
- (6) Are there any outstanding investigations in relation to the suspect?⁶⁶

SO15 will, at an early stage of a potential case, forward a report to the CPS for its advice on jurisdiction, immunity and any potential offences disclosed by the evidence available. The CPS must decide whether there is a realistic prospect of conviction in these cases.⁶⁷

Prosecutors should advise SO15 about possible reasonable lines of inquiry, evidential requirements, pre-charge procedures, disclosure management and the overall investigation strategy. This can include decisions to refine or narrow the scope of the criminal conduct and the number of suspects under investigation. Such advice assists the police and other investigators to complete the investigation within a reasonable period of time and to build the most effective prosecution case.⁶⁸ If the CPS concludes that there is no reasonable prospect of conviction, SO15 will not proceed with its investigation.⁶⁹

BY VICTIMS AND/OR NGOS

Crimes involving universal jurisdiction can be reported to the police in the same way as any other offence – the report will then be passed to SO15 for investigation.⁷⁰ SO15 provides a direct email address where referrals can be sent.⁷¹ The crime can be reported on behalf of a victim, whether by his/her legal representative or by an NGO.

⁶⁶ CPS Referral Guidelines.

⁶⁷ Section 4.6 Code for Crown Prosecutors.

⁶⁸ Section 3.2 Code for Crown Prosecutors.

⁶⁹ CPS Referral Guidelines.

⁷⁰ See Crown Prosecution Service, Reporting a crime, available at: <https://www.cps.gov.uk/reporting-crime>.

⁷¹ Referrals can be made to: SO15Mailbox.WarCrimesunit@met.pnn.police.uk.

PRIVATE PROSECUTION

Private prosecution allows private individuals to request the issuance of an arrest warrant directly and to commence criminal proceedings without the involvement of SO15/CPS. The right to bring private prosecutions is provided by section 6(1) of the Prosecution of Offences Act 1985 (POA). Regarding war crimes and crimes against humanity, it is also regulated by the “Guidance for making an application for Director of Public Prosecutions (DPP) consent for an application for a private arrest warrant in accordance with section 1(4A) of the Magistrates’ Courts Act 1980” (Private Arrest Warrant Guidance).

A private prosecutor can apply to the District Judge at Westminster Magistrates’ Court to request the issuance of an arrest warrant.⁷² This should be submitted when there is a reasonable belief that a suspect will be entering the jurisdiction within 14 days of the application.⁷³ In the case of torture and grave breaches of the Geneva Conventions, a private prosecutor must obtain prior consent from the DPP ahead of being granted a warrant.⁷⁴ It appears that no such consent is required for ICCA crimes. If there is sufficient evidence and it is in the public interest, the DPP will grant consent for the application for the issuance of a warrant.⁷⁵ In practice, it might be difficult to obtain the DPP’s consent when diplomatic interests are at stake.⁷⁶

A private prosecution can, in theory, run its course through to verdict and, in appropriate cases, sentencing. However, the CPS may take over a private prosecution where there is a particular need for it to do so. It may also stop a private prosecution where the papers show that either the sufficiency or public interest stage of the Full Code Test is not met (see Necessary evidence for an indictment).⁷⁷

Private prosecutions are rarely used, particularly in cases involving universal jurisdiction. The expenses of bringing such a case might be considerable if it does not succeed as the private prosecutor would have to carry the defendant’s legal costs.⁷⁸ At present, provided that the proceedings are brought with good cause,

⁷² Section 4 Private Arrest Warrant Guidance.

⁷³ Section 5 Private Arrest Warrant Guidance.

⁷⁴ Section 153 Police and Social Responsibility Act 2011. The starting point (when this Act does not apply) is set out at section 25(2)(a) POA.

⁷⁵ Section 18 Private Arrest Warrant Guidance.

⁷⁶ Interview with a practitioner, 15 September 2021.

⁷⁷ Crown Prosecution Service, Private Prosecutions, Legal Guidance, available at: <https://www.cps.gov.uk/legal-guidance/private-prosecutions>.

⁷⁸ Interview with a practitioner, 15 September 2021; interview with a prosecutor, 23 September 2021.

unsuccessful private prosecutors can generally still recover the reasonable costs of their investigation and prosecution from a UK government fund referred to as “central funds”.⁷⁹ However, the UK government recently announced its intention to amend the law in this area in order to cap recoveries at legal aid rates, and to also cap/reduce the costs that a successful private prosecutor can recover.⁸⁰

In 2005, a Palestinian human rights NGO successfully applied for an arrest warrant, as private prosecutor, against the Israeli Major-General Doron Almog.⁸¹ Almog evaded arrest after Israeli authorities were tipped off about the arrest warrant.

5.1.2 Completion of investigations

POSSIBLE OUTCOMES

On completion of its investigation, SO15 will submit a file of evidence to CTD. The prosecutor charged with examining the file will apply the Full Code Test and its two stages (an evidential stage followed by a public interest stage). In summary, the prosecutor must first assess whether there is a realistic prospect of conviction.⁸² If there is sufficient evidence to justify a prosecution, prosecutors must then consider whether a prosecution is required in the public interest.⁸³ If there is insufficient evidence, the prosecutor may, in limited circumstances, apply a different set of criteria to decide whether to bring charges (for more detail, see Necessary evidence for an indictment).

⁷⁹ Section 17 POA; see also Section 19 POA and *R v Esher and Walton Justices ex p Victor Value & Co Ltd* [1967] 111 Sol Jol 473 regarding misconduct.

⁸⁰ Justice Committee, UK Parliament, Government commits to change law to make private prosecutions fairer, 4 March 2021, available at: <https://committees.parliament.uk/work/401/private-prosecutions-safeguards/news/149646/government-commits-to-change-law-to-make-private-prosecutions-fairer/>.

⁸¹ See BBC News, Police feared ‘airport stand-off’, 19 February 2008, available at: http://news.bbc.co.uk/2/hi/uk_news/7251954.stm.

⁸² Section 4.6 Code for Crown Prosecutors.

⁸³ Section 4.9 Code for Crown Prosecutors.

POSSIBLE CHALLENGES

Under the Victims' Right to Review scheme (VRRS), victims can seek a review of a CPS decision not to prosecute, to discontinue proceedings or to offer no evidence.⁸⁴ The VRRS applies to universal jurisdiction cases.

For the purposes of the VRRS, a victim is a person who has made an allegation that they have suffered harm, including physical, mental, or emotional harm or economic loss which was directly caused by criminal conduct.⁸⁵ The VRRS extends to close relatives of a person whose death was directly caused by the criminal conduct, parents or guardians where the main victim is under the age of 18, and police officers who are victims of crime. An NGO can be considered a victim where it has suffered harm itself and can apply for a review of the relevant prosecutor's decisions.⁸⁶ An NGO can also act on behalf of a victim where it has written authority to do so.⁸⁷

A review can result in two outcomes: either the earlier decision is overturned and **a new decision is issued**, or the original decision is upheld.⁸⁸ Following conclusion of the VRRS review process, an unsatisfied victim may challenge the earlier decision further by applying to the High Court for judicial review.⁸⁹

Requests for decisions to be reviewed by the CPS pursuant to the VRRS should be submitted within ten working days of the date on which such decision is communicated to the victim.⁹⁰ However, the CPS states that it will consider requests for review for up to three months from the communication of the decision, and beyond that period in exceptional circumstances having considered the facts of the case.⁹¹

84 Victims' Right to Review scheme, 16 December 2020, available at: <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme> (VRRS); Victim Communication and Liaison (VCL) Scheme, available at: <https://www.cps.gov.uk/legal-guidance/victim-communication-and-liaison-vcl-scheme>.

85 Paragraph 16 VRRS.

86 Paragraph 16 VRRS.

87 Paragraph 17 VRRS.

88 Paragraph 12 VRRS.

89 Paragraph 47 VRRS.

90 Paragraph 30 VRRS.

91 Ibid.

5.1.3 Arrest warrant

Domestic warrants of arrest are ordinarily obtained from magistrates. Magistrates can issue arrest warrants (as well as summons to appear before the court) on being presented with evidence that the suspect in question has, or is suspected of having, committed an offence.⁹² This evidence can contain a statement that describes the offence and identifies any legislation applicable as well as the allegations made against the defendant.⁹³

Arrests may be carried out without warrants if certain conditions are satisfied. This power of arrest applies where the officer believes it is necessary to effect an arrest for statutory purposes⁹⁴ and is limited to persons within the following categories:⁹⁵

- (1) Anyone who is about to commit an offence;
- (2) Anyone who is in the act of committing an offence;
- (3) Anyone whom the police officer has reasonable grounds for suspecting to be about to commit an offence; and
- (4) Anyone whom the police officer has reasonable grounds for suspecting to be committing an offence.

The International Criminal Police Organization (Interpol) may publish an international request for cooperation or an alert allowing police forces to share critical crime-related information.⁹⁶ The Interpol Red Notice, which is Interpol's highest priority category for such notices, denotes a request to locate and to arrest a suspect pending extradition. Such a notice may be issued by the General Secretariat of Interpol at the request of a member country or an international tribunal based on a valid arrest warrant. An Interpol Red Notice does not have mandatory effect. Interpol cannot compel any member country to arrest a suspect who is the subject of a Red Notice, but rather each member State decides for itself whether to give effect to a Red Notice within its borders.

⁹² Section 1(1) Magistrates' Court Act 1980, available at: <https://www.legislation.gov.uk/ukpga/1980/43/section/1>.

⁹³ Halsbury's Laws of England, Criminal Procedure, Volume 27 (2015), para. 143.

⁹⁴ Section 24(5) Police and Criminal Evidence Act 1984 (PACE), available at: <https://www.legislation.gov.uk/ukpga/1984/60/section/24>.

⁹⁵ Section 24(1) PACE.

⁹⁶ See INTERPOL, About Notices, available at: <https://www.interpol.int/INTERPOL-expertise/Notices>.

The UK was previously party to the European Arrest Warrant system, a simplified cross-border judicial surrender procedure which allowed the UK judiciary to request that an EU country arrest a person in its jurisdiction and surrender them for prosecution, or to execute a custodial sentence or detention order issued in the UK. Post-Brexit transition period, and having agreed to the EU-UK Trade and Cooperation Agreement, the UK and EU have introduced a new surrender procedure applicable in the UK. This new regime is substantially similar to the European Arrest Warrant system, albeit there are some new grounds on which an EU Member State can decline to cooperate.

5.1.4 Victim rights and participation at investigation stage

A victim, including in universal jurisdiction cases, is defined by the Code of Practice for Victims of Crime (Victims' Code) as:⁹⁷

- (1) a person who has suffered harm, including physical, mental, or emotional harm or economic loss which was directly caused by a criminal offence; or
- (2) a close relative of a person whose death was directly caused by a criminal offence. This normally refers to the spouse, the partner, the relatives in direct line, the siblings, and the dependants of the victim. Other family members, including guardians and carers, may be considered close relatives at the discretion of the service provider.

Before the courts of England and Wales, a victim's role in the criminal proceedings is restricted to being a witness at trial and preparing a written or oral Victim Personal Statement (VPS). The police have a duty under the Victims' Code to provide the CPS with the VPS, along with the victim's decision on whether they wish to have it read or played to the court. Victims are entitled to be offered the chance to make a VPS at the same time as giving a witness statement to the police about the crime.⁹⁸

⁹⁷ Ministry of Justice, Code of Practice for Victims of Crime in England and Wales, November 2020, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974376/victims-code-2020.pdf (Victims' Code).

⁹⁸ Ibid.

The rights provided for the victims are defined in the Victims' Code, and include:⁹⁹

- Right 1: To be able to understand and to be understood (e.g., translation);
- Right 2: To have the details of the crime recorded without unjustified delay;
- Right 3: To be provided with information when reporting the crime (if they report a crime to the police, victims have the right to written confirmation of their allegations);
- Right 4: To be referred to services that support victims and have services and support tailored to the victim's needs;
- Right 5: To be provided with information about compensation;
- Right 6: To be provided with information about the investigation and prosecution (including regarding key decisions on the investigation);
- Right 7: To make a VPS (allowing victims to explain in their own words how a crime has affected them, whether physically, emotionally, financially or in any other way);
- Right 10: To be paid expenses and have property returned (when a victim attends court to give evidence, they have the right to claim certain expenses from the CPS, for example, for travel, child care, loss of earnings, refreshments and meals);
- Right 11: To be given information about the offender following a conviction; and
- Right 12: To make a complaint about these rights not being met.

Rights 1, 4 and 12 apply to all victims. The other rights apply where a crime has been reported to the police. Rights 8 and 9 will be addressed below at Victim rights and participation at trial stage. Certain victims, including victims of the most serious crimes, are eligible for enhanced rights under the Victims' Code which entitle them to preferential treatment (e.g., earlier notice of key decisions).¹⁰⁰

⁹⁹ Ibid.

¹⁰⁰ Ibid.

5.3 Trial Stage

5.3.1 *Competent authorities*

The Crown Court deals with serious criminal cases, including torture, grave breaches of the Geneva Conventions and ICCA crimes. Trials in the Crown Court are before a jury composed of 12 jury members, which acts as the fact-finding tribunal in relation to guilt and innocence of the accused; the judge remains responsible for decisions on the law and sentence. Guilt must be established “beyond a reasonable doubt”.¹⁰¹

5.3.2 *Possible challenges*

Victims do not have a right to appeal a Crown Court decision acquitting the accused.¹⁰²

5.3.3 *Victim rights and participation at trial stage*

Victims have the right to prepare a written or oral VPS, which is presented to the court at the sentencing of the defendant or at subsequent parole hearings. The VPS allows victims of crime the opportunity to speak and give their personal point of view of the crime that was committed, including how it has impacted their life. The VPS also allows the court to consider how its decision will affect the victim of the crime in the present and future.

When testifying as witnesses, victims have the right to re-read their witness statements before appearing in court, to request to enter from a separate entrance, to be seated in a separate area from the accused and to have supporting family members and friends with them in court.¹⁰³

They also have the following rights pursuant to the Victims’ Code:¹⁰⁴

- Right 8: To be given information about the trial, trial process and victim’s role as a witness (e.g., dates of the hearing);
- Right 9: To be given information about the outcome of the case and any appeals; and

101 Woolmington v DPP [1935] 1 AC 462, available at: <https://www.bailii.org/uk/cases/UKHL/1935/1.html>.

102 See Part 9 Criminal Justice Act 2003, available at: <https://www.legislation.gov.uk/ukpga/2003/44/part/9>.

103 Ministry of Justice, The Witness Charter: Standards of care for witnesses in the criminal justice system, December 2013, available at: https://www.cps.gov.uk/sites/default/files/documents/victims_witnesses/witness_charter.pdf.

104 Victims’ Code.

- Right 11: To be given information about the offender following a conviction.

6. Rules of evidence

The rules of evidence in England and Wales are complex. This briefing paper does not intend to cover exhaustively the subject and will give an overview of the main rules applicable to criminal procedure.

6.1 At investigation stage

6.1.1 *Necessary information for a referral*

Victims or NGOs should include in their complaints enough material to convince SO15 to open an investigation.¹⁰⁵ Hearsay evidence is not accepted.¹⁰⁶ Evidence may be sourced from: complainant statements, statements/accounts from crime-scene witnesses, direct evidence such as photographs or video footage and open source material such as reports from media, human rights organizations, UN bodies and certified experts.¹⁰⁷ The complaint should also include a legal analysis of the crimes alleged.¹⁰⁸

If a private prosecution is attempted, the evidence gathered and provided will need to be sufficient to obtain the consent of the DPP for the issuance of an arrest warrant (except in the case of ICCA crimes). A key requirement for this is: “sufficient admissible and reliable and credible evidence in accordance with the rules of the criminal courts of England and Wales or capable of being put into such a format within a relatively short period of time to provide a realistic prospect of conviction for each of the charges.”¹⁰⁹

6.1.2 *Necessary evidence to open an investigation*

- 1.1 There is no singular threshold which must be satisfied for the police to lawfully start investigations. The evidence gathered and provided for an investigation to be opened should be intended to:¹¹⁰

¹⁰⁵ Interview with a practitioner, 13 September 2021.

¹⁰⁶ Interview with a police officer from SO15, 27 September 2021.

¹⁰⁷ Interview with a practitioner, 13 September 2021.

¹⁰⁸ Interview with a practitioner, 13 September 2021.

¹⁰⁹ Section 7 Private Arrest Warrant Guidance.

¹¹⁰ CPS Referral Guidelines.

- (1) ensure that SO15's scoping exercise results in a positive decision, so that an investigation is commenced; and
- (2) provide a core of material which will be useful in SO15's investigation and which may ensure that it is able to be carried out as quickly as possible.

More substantial evidence may be required in instances where SO15 will face difficulties carrying out its own investigation, either because of a lack of mutual legal assistance avenues in the country in question, or because of local conditions which would make such an investigation unsafe to investigators or witnesses.¹¹¹

6.1.3 Necessary evidence for an indictment

Before the investigation is completed, the prosecutor will apply the Full Code Test to decide whether to start or continue a prosecution.¹¹² Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test (which includes the evidential stage and the public interest stage) or, in limited circumstances, the Threshold Test¹¹³ (See below).

The evidential stage:

A prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the suspect.¹¹⁴ When deciding whether there is enough evidence to charge the suspect, Crown Prosecutors must consider several points:¹¹⁵

- (1) Can the evidence be used in court (admissibility and weight)?
- (2) Is the evidence reliable (including accuracy and integrity)?
- (3) Is the evidence credible?
- (4) Is there other material that might affect the sufficiency of evidence?

If the prosecutor considers that there is sufficient evidence to justify a prosecution, he/she must then consider whether a prosecution is required in the public interest.¹¹⁶

111 See CPS Referral Guidelines.

112 Section 4.3 Code for Crown Prosecutors.

113 Section 4.1 Code for Crown Prosecutors.

114 Section 4.6 Code for Crown Prosecutors.

115 Section 4.8 Code for Crown Prosecutors.

116 Section 4.9 Code for Crown Prosecutors.

The public interest stage:

When deciding on the public interest, prosecutors should consider the following questions:¹¹⁷

- (1) How serious is the offence committed? The more serious the offence, the more likely it is that a prosecution is required.
- (2) What is the level of culpability of the suspect? The greater the suspect's level of culpability, the more likely it is that a prosecution is required.
- (3) What are the circumstances of and the harm caused to the victim? The more vulnerable the victim's situation, the more likely it is that a prosecution is required.
- (4) What was the suspect's age and maturity at the time of the offence?
- (5) What is the impact on the community? The greater the impact of the offending on the community, the more likely it is that a prosecution is required.
- (6) Is prosecution a proportionate response?
- (7) Do sources of information require protecting?

In practice, one public interest factor alone may be decisive, and may outweigh a number of other factors which tend in the opposite direction.¹¹⁸

If the Full Code Test is not met, the prosecutor may apply the Threshold Test instead.¹¹⁹ This requires prosecutors to make a rigorous examination of the five following conditions:¹²⁰

- (1) Are there reasonable grounds to suspect that the person to be charged has committed the offence?¹²¹
- (2) Can further evidence be obtained to provide a realistic prospect of conviction?¹²²
- (3) Does the seriousness or the circumstances of the case justify the making of an immediate charging decision?¹²³

117 Section 4.14 Code for Crown Prosecutors.

118 Section 4.13 Code for Crown Prosecutors.

119 Section 5.1 Code for Crown Prosecutors.

120 Ibid.

121 Section 5.3 Code for Crown Prosecutors.

122 Section 5.5 Code for Crown Prosecutors.

123 Section 5.8 Code for Crown Prosecutors.

- (4) Are there continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and, in all the circumstances of the case, is it proper to do so?¹²⁴
- (5) Is it in the public interest to charge the suspect?¹²⁵

Prosecutors must carefully consider these conditions to ensure that the Threshold Test is only applied when necessary and that cases are not charged prematurely. All five conditions must be satisfied before the Threshold Test can be applied.¹²⁶

6.1.4 Admissibility of evidence

GENERAL RULES

The Crown Court has a general discretion to exclude evidence where it is satisfied that the case for excluding it substantially outweighs the case for admitting it, taking account of the value of the evidence.¹²⁷ It may also exclude evidence on which the prosecution proposes to rely if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.¹²⁸

According to *May on Criminal Evidence*, “[t]he golden rule of admissibility is that all evidence which is relevant is admissible and that which is irrelevant is inadmissible ... evidence is relevant if its effect is to make more or less probable the existence of any fact which is in issue, i.e. upon which guilt or innocence depends”.¹²⁹

In a criminal trial, the burden of proof rests upon the prosecution to prove the whole of its case, including: the identity of the accused; the nature of his or her act; and the existence of any necessary knowledge or intent.¹³⁰ Any evidence which impacts whether or not the prosecution is able to do so is therefore admissible unless it is within the scope of an exception.

124 Section 5.9 Code for Crown Prosecutors; Bail Act 1976, available at: <https://www.legislation.gov.uk/ukpga/1976/63/section/5>.

125 Section 5.10 Code for Crown Prosecutors.

126 Section 5.1 Code for Crown Prosecutors.

127 Section 126 Criminal Justice Act 2003.

128 Section 78 PACE.

129 Powles et al., *May on Criminal Evidence* (6th edn, Sweet & Maxwell: London 2015) (Powles et al.), p. 8.

130 Section D.5 CPS Referral Guidelines.

Relevant evidence may be excluded under certain exceptions to the general rule. These exceptions include the following:

- (1) **Opinion evidence:** Opinion evidence (defined as an inference drawn from perceived facts) is inadmissible.¹³¹ However, there are some exceptions, such as expert evidence which is admissible.¹³²
- (2) **Privileged information:** This covers the privilege against self-incrimination or legal professional privilege, where such privilege has not been waived.¹³³
- (3) **Hearsay:** Hearsay evidence is not admissible unless it is within the scope of one of the exceptions set out at Section 114(1) CJA. Detailed review of these exceptions is beyond the scope of this briefing paper.
- (4) **Bad character evidence:** Bad character evidence is evidence relating to a person's misconduct (or disposition towards misconduct) that is: (i) unconnected to the alleged facts of the offence with which the defendant is charged; and (ii) not evidence of misconduct in connection with the investigation or prosecution of that offence. Bad character evidence is not admissible unless it is within the scope of one of the exceptions set out at Section 101(1) CJA. Detailed review of these exceptions is beyond the scope of this briefing paper.
- (5) **Public interest:** If it is deemed that the disclosure of evidence to the court "might imperil the security of that civil society which the administration of justice itself subserves", an application may be made for Public Interest Immunity. If this application is successful, evidence may be excluded or withheld on that basis.¹³⁴
- (6) **Evidence obtained in contravention of rights under the European Convention on Human Rights:** In particular, evidence which has been obtained through violations of Articles 3 (torture and inhuman or degrading treatment), 5 (right to liberty), 6 (fair trial) and/or 8 (privacy and family life) may be excluded by the courts under Section 8 of the Human Rights Act 1998 or (as stated above) Section 78 of the Police and Criminal Evidence Act 1984 (PACE).¹³⁵

131 Powles et al., p. 8.

132 Powles et al., p. 107.

133 Powles et al., p. 323.

134 Powles et al., p. 363.

135 Powles et al., p. 392 and 410; Section 8 Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/section/8>; Section 78 PACE.

- (7) **The court's discretion:** The court may exclude relevant evidence where this is deemed necessary in order to ensure a fair trial both at common law¹³⁶ and (as stated above) under Section 78 PACE.¹³⁷

CLASSIFICATION OF DIFFERENT TYPES OF EVIDENCE

Some commonly used classifications of evidence types are as follows:

- (1) **Direct and indirect evidence:** Direct evidence comprises of exhibits/documents shown to the court or the testimony of a witness regarding what he or she perceived first-hand or regarding the physical/mental state of that witness. Indirect evidence encompasses any evidence which is not actually before the court, such as hearsay or circumstantial evidence.¹³⁸
- (2) **Primary and secondary evidence:** Both of these types of evidence relate to the proof of a document's contents. Primary evidence refers to the original document, whereas secondary evidence denotes any inferior evidence of that document, for example a copy or oral testimony from its author regarding its contents.
- (3) **Circumstantial evidence** relates to circumstances surrounding an event or offence from which a fact in issue may be inferred.

There is no rule under which any of these evidence types are deemed intrinsically to hold more or less weight than any other. However, direct evidence and witness testimonies will be preferred by SO15.¹³⁹

6.2 At trial stage

6.2.1 Open source material as evidence

Messages on social media (particularly Facebook) have in recent years frequently been used as evidence.¹⁴⁰ Open source evidence has been used to disprove alleged lack of consent and as evidence of inciting children to engage in sexual activity in *R v Kay*.¹⁴¹ Facebook messages were also used to prove the *mens rea* of the

¹³⁶ *R v Sang* [1980] A.C. 402, available at: <https://www.bailii.org/uk/cases/UKHL/1979/3.html>.

¹³⁷ Powles et al., p. 297 ; section 78 PACE.

¹³⁸ Powles et al., p. 3 and 4.

¹³⁹ Interview with a police officer from SO15, 27 September 2021.

¹⁴⁰ Interview with a police officer from SO15, 27 September 2021.

¹⁴¹ *R v Kay* [2017] EWCA Crim 2214, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2017/2214.html>.

defendant in a manslaughter case.¹⁴² However, there is no example yet involving crimes of torture, grave breaches of the Geneva Conventions or ICCA crimes.

6.2.2 Proof by formal admission

Under section 10 of the Criminal Justice Act 1967, a formal written admission may be admitted at trial, and will be considered as conclusive evidence regarding the matters to which it relates.¹⁴³

142 R v Palmer [2016] EWCA Crim 2237, available at:

<https://www.bailii.org/ew/cases/EWCA/Crim/2016/2237.html>.

143 Section 10 Criminal Justice Act 1967, available at:

<https://www.legislation.gov.uk/ukpga/1967/80/section/10>.

7. Witness and victim protection

Victims have the right to be protected from re-victimization, intimidation, and retaliation during and after the investigation and proceedings.¹⁴⁴

Witnesses and victims may request protection of their identity, which includes the measures set out below.¹⁴⁵ However, there is no guarantee that the court will grant the measures in a given case.

- (1) Witnesses in criminal proceedings can be eligible for “*special measures*”, on the grounds of fear or distress about testifying, if the court is satisfied that the quality of evidence given by that witness is likely to be diminished for those reasons.¹⁴⁶ These special measures include screening the witness from the accused, evidence being given by video link and evidence being given in private. The procedure for applications for special measures is governed by Rule 18.10 of the Criminal Procedure Rules.¹⁴⁷
- (2) The courts have the power to make a reporting direction in relation to adult witnesses, prohibiting any matter relating to the witness from being included in any publication during the lifetime of the witness, if it is likely to lead members of the public to identify the individual as a witness in criminal proceedings.¹⁴⁸
- (3) The court can order that proceedings be held *in camera* (in private behind closed doors, with the public excluded) if it deems that doing so is necessary for the administration of justice.¹⁴⁹
- (4) The court may allow a witness to withhold his or her name, and to write it down rather than stating it aloud, to keep his/her identity from being in the public domain. In such cases, the witness may be referred to throughout the trial by a letter of the alphabet rather than his/her name.¹⁵⁰

144 Victims’ Code.

145 Crown Prosecution Service, Witness protection and anonymity, Legal Guidance (Witness Protection Guidance), available at: <https://www.cps.gov.uk/legal-guidance/witness-protection-and-anonymity>.

146 Section 17 Youth Justice and Criminal Evidence Act 1999, available at: <https://www.legislation.gov.uk/ukpga/1999/23/section/17>.

147 Rule 18.10 Criminal Procedure Rules, available at: <https://www.legislation.gov.uk/uksi/2020/759/article/18.10/made>.

148 Section 46 Youth Justice and Criminal Evidence Act 1999.

149 Witness Protection Guidance.

150 Ibid.

- (5) Prior to the commencement of criminal proceedings, applications for investigation anonymity orders can be made either by police officers or prosecutors, providing witnesses with assurance that their identities will not be disclosed.¹⁵¹ However, it does not guarantee that anonymity will be granted at trial, as a separate application must be made.¹⁵²

8. Reparation for victims in criminal proceedings

A victim cannot request reparation as part of any criminal proceedings. However, victims who were injured through a violent crime outside England, Wales or Scotland can claim monetary compensation from the Criminal Injuries Compensation Authority provided they are UK residents.¹⁵³

9. Immunities

9.1 General rule

Serving Heads of State and foreign ministers are immune from civil and criminal suits whilst in office.¹⁵⁴ This is known as immunity *ratione personae* (or personal immunity). This form of immunity covers all conduct of Heads of State and foreign ministers while they hold office and thus draws no distinction between what they did in their official capacity (i.e., what they did as Heads of State or foreign ministers for State purposes) and what they did in their private capacity.

In the case against Robert Mugabe, the former Zimbabwean President and Prime Minister, allegations were made of torture when he was still serving as Head of

151 Sections 74-85 Coroners and Justice Act 2009.

152 Sections 86-90 Coroners and Justice Act 2009.

153 UK Government, Criminal injuries compensation: a guide, available at: <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide>.

154 Section 14(1) State Immunity Act 1978, available at: <https://www.legislation.gov.uk/ukpga/1978/33/section/14>; Re Mugabe ILDC 96 (2004), 14 January 2004 (Bow Street Magistrates Court) (unreported); International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), I.C.J. Reports 2002, p. 3, available at: <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-BI.pdf>; Pinochet Judgment.

State. It was held that serving Heads of State have absolute immunity against prosecution and are not liable to any form of arrest or detention.¹⁵⁵

Once they leave office, immunity from criminal prosecution remains intact only for acts performed in an official capacity. This form of immunity is known as immunity *ratione materiae* (or functional immunity). These immunities belong to the State in question and not to the individual and exist to protect the sovereignty of that State from interference by other States.¹⁵⁶

The issue of immunity was raised in the Pinochet case before the House of Lords: the applicant sought a warrant for the extradition of General Augusto Pinochet to Spain to face trial for crimes committed while he was President of Chile. The warrant was granted and Pinochet, as former Head of State, was found not to be immune from prosecution for offences of torture and conspiracy to commit torture under the Convention against Torture.¹⁵⁷

The issue of immunities was also raised in the Colonel Kumar Lama case:¹⁵⁸ the accused was arrested in Sussex, UK over allegations of torture during the armed conflict in Nepal which ended in 2006. The court found that Colonel Kumar Lama was entitled to neither personal nor functional immunity.¹⁵⁹

155 *Re Mugabe* ILDC 96 (2004), 14 January 2004 (Bow Street Magistrates Court).

156 *Pinochet* Judgment.

157 *Ibid.*

158 *R v Lama (Kumar)* [2014] EWCA Crim 1729, 6 September 2016 (Central Criminal Court) (unreported).

159 *Ibid.*

9.2 Special mission immunity

A special mission is a temporary mission representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.¹⁶⁰ The Convention on Special Missions 1969 sets out the immunities of missions and their staff which include: exemptions from prosecution, custom duties, jurisdiction and tax. In the case *R ex rel. Freedom & Justice Party v Secretary of State for Foreign & Commonwealth Affairs*,¹⁶¹ the Court of Appeal held that special mission immunity is a rule of customary international law, recognized by the common law.

¹⁶⁰ Article 1(a) Convention on Special Missions 1969, available at:
https://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf.

¹⁶¹ *R ex rel. Freedom & Justice Party v Secretary of State for Foreign & Commonwealth Affairs*, [2018] EWCA Civ 1719.



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