

UNITED KINGDOM

SURVEY QUESTIONS & RESPONSES (2004)¹

A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions

The following is part of a larger project looking into the potential liabilities facing companies under public international law, specifically the laws governing genocide, crimes against humanity, and international humanitarian law. This survey is intended to assist in decisionmaking by companies, governments, and affected communities. It is not intended as a definitive description of liability or culpability under the law in the United Kingdom or internationally. It is not specific to any particular case or situation and is intended to be the basis for further research.

I. Status of business entities under criminal law:

- 1. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**

Various interpretations were offered for this question. Some readings of the question maintained that various statutes in the U.K. make express provisions for criminal liability on the part of corporations or other bodies of persons for certain offences, eg Companies Act 1985, section 734.

¹ For the purposes of this note only the jurisdiction of England and Wales will be considered and references to the English courts, English law and England shall be deemed to include Wales. References to the U.K. will apply to the extent that they apply to England and Wales unless otherwise specified. England, Wales and the United Kingdom (*U.K.*) are to be interpreted, in the absence of any express wording to the contrary in any Statute, according to section 5 of, and Schedule 1 to, the Interpretation Act 1978 (*IA*). England shall mean the counties of England, the Isles of Scilly and Greater London; Wales shall mean the counties of Wales; and the U.K. shall mean Great Britain and Northern Ireland. Great Britain shall mean England, Wales and Scotland. The responses to this survey of the law of UK were provided by Stephen Powles, Rosanna Mesquita, Jeremy Carver and Richard Hermer. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of the United Kingdom (Powles et al.), 'Business and International Crimes' Fafo AIS, [date accessed] 2004". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

General provision is thus made by the Interpretation Act 1978. Subject to the appearance of a contrary intention, the word “person” in a statute or subordinate legislation is to be construed as including “a body of persons corporate or unincorporate.” (See sections 5 and 11 and Schedules 1 and 2.)

Liability for a corporation depends on whether the offence is one for which there is vicarious liability, or, if there is not, whether the natural persons who performed the prohibited act with the requisite state of mind was part of the controlling mind of the company.

In *R v ICR Haulage Co Ltd* [1944] KB 551, a limited company was convicted of a common law conspiracy to defraud. On appeal it was contended that a company could not be guilty of an offence involving as an essential ingredient *mens rea* in the restricted sense of a dishonest or criminal mind. It was held that a limited company can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity. Exceptions to this general rule exist; such exceptions include “cases in which, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed.” Other exceptions include bigamy rape (which must be committed by natural persons and cannot be committed by a company) and murder (as the penalty is life imprisonment, which clearly cannot be imposed upon a company).

In answering this question, others felt that, since there is no penal code that exists in English law to address the issue of criminal prosecution for violations of such code, the questions should be amended to include common law offences (developed through case law) and statutory offences laid down by the English Parliament. The original question was thus amended to:

“Does the law in your country provide that business entities may be prosecuted for criminal offences under both common law and statutes?”

With this varied approach to the initial question in mind, an exploration took place on the common law position and the position under statute in relation to:

- (a) incorporated bodies (i.e. companies and corporations);
- (b) unincorporated associations; and
- (c) partnerships.

There is no separate category applicable to state-owned enterprises: state-owned enterprises will fall into the appropriate category above. However, issues of sovereign immunity may arise in relation to state-owned enterprises, as discussed below in our answer to question 12.

It is important to note that under English law most criminal offences consist of two elements, the actual act, the *actus reus*, and the mental element, the *mens rea*.² For a successful prosecution the *actus reus* and *mens rea* must coincide in the same person at the same time.³ As discussed below, this has proved to be one of the main obstacles prosecutors have encountered in indicting business entities for criminal offences.

Companies/corporations

Common law

In general, a company is subject to common law criminal offences in the same manner as a natural person. A corporation is a distinct legal entity with its own rights and responsibilities.

There was mutual agreement that, due to the fact that companies are, in effect, artificial legal entities, a number of necessary exceptions to this general rule exist. As listed above, these exceptions include:

- (a) a company cannot commit an offence for which the only penalty is imprisonment (e.g. murder);⁴
- (b) a company cannot commit an offence which, by its very nature, may be committed only by natural persons (e.g. bigamy, incest); and
- (c) a company cannot commit an offence which cannot be committed variously (e.g. perjury).⁵

It was once thought that a corporation could not be convicted of an offence involving personal violence, but in *R v P&O European Ferries Ltd*⁶ (*P&O European Ferries*), individual employees and their company were charged with manslaughter as a result of the sinking of the car ferry, the Herald of Free Enterprise, in March 1987. It was held that an indictment for manslaughter could lie against the accused company in respect of the Zeebrugge disaster if the acts of an individual could be attributed to the company.⁷ On the facts, however, the appropriate *mens rea* for the offence was not present in any identifiable officers and the prosecution failed.

This case highlights the fact that successful prosecution of large corporations has proven difficult, as it is often extremely difficult to identify the “controlling mind” of the company to whom the *mens rea* must be attributed. Furthermore, where the controlling mind can be found, it is unlikely that the same person or persons committed the *actus reus*. In *R v Great Western Trains*⁸, the Court of Appeal threw out seven charges of manslaughter brought against the company in relation to the

² Note that some criminal offences do not require a *mens rea* and are known as strict liability offences (e.g. speeding).

³ There are a number of cases where the non-coincidence of the *actus reus* and *mens rea* have resulted in unsuccessful prosecutions.

⁴ *R v ICR Haulage Ltd* [1944] KB 551 at 554, 557.

⁵ Per curiam in *R v ICR Haulage*, *ibid*.

⁶ (1990) 93 Cr App Rep 72. (1.2)

⁷ This is known as the *alter ego doctrine* or the *doctrine of identification*.

⁸ Unreported, 13/8/99 and also on 18/11/99: the first case considered breaches of the Health and Safety at Work Act 1974 (*HSWA*) whilst the second considered liability for manslaughter.

Southall rail disaster.⁹ The court emphasised that the doctrine of identification (otherwise known as the *alter ego* doctrine) was the relevant doctrine by which a corporation may be fixed with liability for manslaughter by gross negligence. The elements of the offence of manslaughter by gross negligence would need to be established against an individual before a company could be convicted. As there was no such guilty individual whose offence could be attributed to the company, no successful prosecution of the company could take place.¹⁰

The need to apply the alter ego doctrine means that it is much easier to successfully convict smaller companies as the *mens rea* and *actus reus* are more likely to be found in one and the same person. For example, there was a successful prosecution in *R v Kite and OLL Ltd*¹¹ where a conviction for manslaughter was secured against a water sports company and its managing director (it was essentially a “one man” business) following the deaths of four teenagers while attending a course of instruction provided by the company. The company was fined and the director was jailed.

In the wake of several disasters and their public enquiries¹², the U.K. Government has realised that the law, as it stands, does not provide for the *effective* prosecution of corporations who have caused death or injury to persons. The Law Commission published a report in 1996¹³ calling for the introduction of an offence of corporate homicide. A bill was put before Parliament on 18 April 2000 containing a new offence of corporate killing.¹⁴ The bill was not passed and, although the U.K. Government accepts the proposals in principle¹⁵ and has published a consultation paper, no legislation has been placed on the parliamentary timetable, let alone enacted.¹⁶

Statutory law

Various statutes explicitly impose criminal liability on corporations and/or their directors.¹⁷ The imposition of criminal liability on directors is intended to act as an

⁹ Though Great Western Trains did plead guilty, and were fined for, breaches of the HSWA.

¹⁰ The courts followed the decision in *P&O European Ferries* but did consider the impact of *R v Adamako* ([1995] 1 AC 171) in which the test for manslaughter by gross negligence was held to be objective, making the offence one of strict liability. The courts declined to interpret the common law in order to find Great Western Trains guilty as they thought this would be legislating under the guise of interpreting common law. The courts favour an incremental approach to the development of the common law in relation to corporate manslaughter.

¹¹ (1994) *Times*, 9 December.

¹² For example, the Southall and Kings Cross rail disasters and the sinking of the *Herald of Free Enterprise*.

¹³ *Legislating the Criminal Code: Involuntary Manslaughter* (Law Commission Report 237).

¹⁴ The Corporate Homicide Bill provides in section 1 that “a corporation will commit the offence of corporate killing if: a) a management failure by the corporation is the cause or one of the causes of the person’s death; and b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.”

¹⁵ This was confirmed in a Parliamentary answer given by the Parliamentary Secretary, Lord Chancellor’s Department on 10 April 2002 in relation to the status of various Law Commission reports.

¹⁶ A number of questions have been put to Parliament in connection with this matter. A written question to the Secretary of State for the Home Department on 7 November 2002 elicited the reply that Parliament would reconsider this issue “when parliamentary time allows.”

¹⁷ Section 52 of the Criminal Justice Act 1993 sets out the offence of insider dealing (liability for directors); sections 13 and 14 of the Company Directors Disqualification Act 1986 (liability for directors and bodies corporate); section 118 of the Environmental Protection Act 1990 sets out a range of offences including land pollution (individuals and bodies corporate); section 33 of the Health and Safety at Work Act 1974; and numerous provisions in the Companies Act 1985.

incentive for companies to comply with legislation, as it is difficult to find an appropriate sanction for a “criminal” company. The normal criminal sanction for corporations is a fine, but it is important to note that:

- (d) a corporation can afford to pay more than an individual but the amount will differ between companies. Furthermore, any loss suffered by a corporation may be passed on to the shareholders (in the form of reduced dividend payments) or customers (in the form of increased prices for goods and/or services); and
- (e) the persons responsible for determining the acts of a company are usually the directors and/or management. A fine served on the company will not necessarily affect these persons directly and therefore may not deter these persons from committing such acts.

Unincorporated business entities

The essential element of an unincorporated association is the formation of a group of persons to promote a common lawful interest or purpose. Most types of unincorporated business entities will therefore fall within this definition.

Unincorporated associations have been described in the following manner:

*In English law unincorporated associations include churches other than the Church of England, the Inns of Court, many clubs and societies, partnerships, friendly societies, and trade unions. The general characteristics of such bodies are that relations between members are contractual, their property is vested in trustees for the group, and they sue and are sued by representatives, save where practice or statute allows the group to sue and be sued under its group name.*¹⁸

As there is a body of law specifically dealing with partnerships they shall be considered separately.

Common law

An unincorporated body is not a legal person under common law and therefore cannot incur criminal liability under criminal law, though its members can.

Statutory law

The IA provides that unless a contrary intention appears, “person” in any Act passed after 1889 includes a body of persons unincorporate.¹⁹ Therefore, many statutory crimes have the ability to be committed by unincorporated associations.

In *R v Clerk to Croydon Justices ex parte Chief Constable of Kent*²⁰, fixed penalty notices were issued under section 27 of the Transport Act 1982 and affixed to a truck, of which the registered keeper was an unincorporated association. It was held that

¹⁸ The Oxford Companion to Law (David M. Walker).

¹⁹ Section 5 and Schedule 1 and paragraph 4(1)(a) of Schedule 2.

²⁰ [1991] RTR. 257.

“person” in section 36(1) of the Transport Act 1982 could include an unincorporated association. Furthermore, certain statutes make special provision for criminal proceedings against unincorporated associations: for example, the Trade Union and Labour Relations (Consolidation) Act 1992 (*TULRCA*)²¹ and the Financial Services and Markets Act 2000 (*FSMA*).²²

Partnerships

The Partnership Act 1890 (*PA*) provides that a partnership is the relationship that exists between persons carrying on business in common with a view of profit.²³ These persons can either be individuals or bodies corporate. Persons who have entered into partnership with each other are known collectively as a “firm.”²⁴ A firm is not a person or legal entity in English law.²⁵ A firm is merely convenient shorthand for expressing who the individual members of the partnership are at any one time.

Common law

Under English common law, a partnership cannot be prosecuted as a firm for criminal offences. Furthermore, the criminal acts of one partner cannot be attributed to the others.

Statutory law

Although a partnership cannot generally be the subject of criminal proceedings under common law there are situations in which successful prosecutions have taken place, in relation to offences of strict liability under statute.²⁶ For statutory offences other than those of strict liability a successful criminal prosecution will only be possible if the mens rea and actus reus of the offence coincide, as discussed above. The courts have found that a company can both act and have a mental dimension for the purposes of a crime. However, as a partnership is not a person, either artificial or otherwise, it is difficult to see how the courts could find that it had a separate mind from the minds of its constituent partners. It will, of course, always be open to the courts to prosecute the individual partners for criminal offences.

2. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

²¹ Sections 45 and 131(1) of the TULCRA make trade unions and employer’s associations liable for refusing or wilfully neglecting to perform certain statutory duties.

²² The provisions of the FSMA prohibit unauthorised persons from carrying on certain regulated activities, such as financial promotion.

²³ Section 1(1) of the PA. Although any rules of common law and equity in determining the existence of a partnership will still apply to the extent they are not inconsistent with the provisions of the PA.

²⁴ Section 4(1) of the PA.

²⁵ *Sadler v Whiteman* [1910] 1 KB 868. Though in Scottish law a firm is a separate legal entity (section 4(2) of the PA).

²⁶ For example under the Trade Descriptions Act 1968: *Clode v Barnes* [1974] 1 WLR 544.

a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?

One interpretation of vicarious liability focused on the broader category of absolute liability crimes, holding that where an offence is held to be an absolute offence in that *mens rea* is not required, the “person on whom a duty is thrown is responsible, whether he has delegated or whether he has acted through a servant.” *R v Winson* [1969] 1 QB 371. However, the mere fact that the offence is one that requires some degree of *mens rea* does not preclude the possibility of vicarious liability (see *Mousell Bros Ltd v London and North Western Ry Co.* [1917] 2 KB 836).

In the class of cases where a duty is thrown on a particular category of persons, eg license holders, it has been held that if that person has delegated his responsibilities to another, the *mens rea* of the delegate will be imputed to the principal so as to make the latter criminally liable. This form of liability has become known as vicarious liability. The leading case on vicarious liability is *Linnet v Metropolitan Police Commissioner* [1946] KB 290.

Another interpretation focused on particular examples of this broader category of vicarious liability, such as nuisance, and explored the role of criminal and civil liability individually. The approach in this instance combined questions 2a and 2b (below). According to this particular reading of question 2, the standards applied in English law for attributing liability to a business entity for the actions of individual servants vary according to the type of business entity and whether the liability is civil or criminal.

Criminal liability

The general rule is that a master or principal (in this case, the company) will not be held criminally liable for an offence committed by his servant or agent (in this case, its employee(s) or director(s)).²⁷ However, as discussed above in our answer to question one, a company can be held liable for a criminal act if the act and necessary mental element can be found in one of its employees or directors and attributed to the company. This alter ego doctrine, has been considered in a number of cases where it was held that a company may be criminally liable for the acts only of “...superior officers²⁸ of the company who carry out the functions of management and speak and act as the company,”²⁹ in other words, the “directing mind” of the company.

There are further exceptions to the general rule both at common law and under statute. The sole exception at common law is in the case of public nuisance. A master will be criminally liable where his servant, in the course of employment creates a public

²⁷ It would seem that, unless express provision is found in a statute, vicarious liability cannot be implied unless there is a master and servant or principal and agent relationship: *Crawford v Haughton* [1973] QB 1. The courts held in this case that the owner of a vehicle would only be “using” that vehicle when it was being driven by an employee and not by a person, who although they have the owner’s consent, was not a servant of that owner.

²⁸ This includes managers, directors and other superior officers.

²⁹ In *Tesco Supermarkets Limited v Natrass* [1972] AC 153: the failure of an employee to comply with the provisions of the Trade Descriptions Act 1968 was not attributed to Tesco. Tesco argued that the employee was not the directing mind of the company and therefore his acts could not be attributed to the company.

nuisance.³⁰ It is not a defense for a master to show that he is either ignorant of the nuisance or that it was created contrary to his orders.³¹

Statutes may impose criminal liability on a master or principal for the acts or omissions of his servant or agent either expressly or by implication. In looking for the necessary implication the courts must look to find clear evidence that the imposition of vicarious liability was intended by the statute. It is not to be lightly presumed to exist.³² This implication may arise due to the delegation by one person to another of the performance of his own statutory duties³³ or because the acts of another may in law be his own acts. Where a statutory offence requires *mens rea*, vicarious liability can only arise where there has been delegation.³⁴ Delegation must be real and effective and the duty must be carried out by the delegate free from any supervision from the principal.³⁵ If the principal remains in control of the acts then he shall be liable for his own acts, but not those of his servant or agent.

Notwithstanding these exceptions, a master is not vicariously liable for an attempt by his servant to commit a crime even if vicarious liability would arise if the crime were completed. A master is also not vicariously liable for the aiding, abetting, counselling or procuring of a crime by his servant even where the master would have been liable had his servant been liable for the crime as principal.³⁶

An employer is not exempt from liability in tort because his employee's act amounts to a crime, provided that it is an act for which he would otherwise be liable (see the discussion below relating to an employer's *civil* liability). In *Nahhas v Pier House (Cheyne Walk) Management Ltd*³⁷ an employee was liable in negligence for failing to carry out the appropriate checks on an employee who was found guilty of theft.

A partnership cannot be held criminally responsible for the criminal acts of its partners, at least for common law crimes. However, the partners may assume a relationship of master and servant as regards any employees and therefore be liable as discussed above for those employees' acts.

No English court has had to decide whether an unincorporated association would be liable for the criminal acts of its employees. It is likely however that the position would be the same as for a partnership.

Civil liability

An employer is liable for the wrongful acts of his employee that have resulted in a breach of duty to the person injured³⁸ carried out in the course of employment³⁹ and

³⁰ *R v Medley* (1834) 6 C & P 292.

³¹ *R v Stephens* (1866) LR 1 QB 702.

³² *Moussell Bros v London and North Eastern Rly Co.* [1917] 2 KB 836.

³³ *R v Winson* [1969] 1 QB 371; *Howker v Robinson* [1973] QB 178.

³⁴ *R v Winson*, *ibid.*

³⁵ *Somerset v Hart* (1884) 12 QBD 360.

³⁶ This applies for both common law and statutory offences.

³⁷ (1984) 270 Estates Gazette 328.

³⁸ All the elements of a tort (duty of care, breach of duty and damage) must occur within the course of employment. An employer will not be liable otherwise, even if what is done within the course of employment would assist a third party to commit a tort: *Crédit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [1999] 2 WLR 540.

for acts that are expressly authorised by him. An employer will be liable for all authorised acts even if the employee carries out those acts in an unauthorised way.⁴⁰ An employer will also be liable for any act of his employee that results in a tort if that tort is a necessary outcome of an expressly authorised act. If, however, the act is not one that the employee did in the course of his employment or with authorisation, then an employer will only be liable to the extent that the act is capable of being ratified and has been ratified by him.⁴¹

In a principal–agent relationship the liability of the principal will depend upon the scope of authority or ratification given by the principal. Employees may be agents of their employers but there are a number of other situations in which this relationship arises, not least of all within a partnership, where one partner may act as agent for the others.

A corporation will be liable in tort for the acts of its employees committed in the course of their employment. A corporation will also be liable for any tort authorised by its directing mind,⁴² whether or not the act giving rise to the tort is one the company strictly does not have the power to carry out.⁴³ A corporation will also be liable for the acts of its employees done under a principal–agent relationship to the extent that such acts have been authorised by the directing mind.

A partnership, as a firm, will be bound the acts of its partners done in the usual course of business.⁴⁴ This will also apply to wrongful acts and omissions done in the ordinary course of the business of the firm that causes loss or injury to any party not a partner to the firm.⁴⁵ Partners will only be bound by the acts not done out in the usual course of business if they were carried out by a partner with the authority, implied or otherwise of the other partners. A firm will also be liable in tort for the acts of its employees as discussed above.

An unincorporated association will be vicariously liable for any of its employees' torts committed in the course of their employment as discussed above. It shall also be liable for acts carried out on the orders, or under the authorisation, of the association.

In respect of liability arising under statute, the law is not clear as to whether an employer will be liable for an employee's statutory breach of duty, where the duty is only imposed on the employee and not the employer.⁴⁶ However, such an act may

³⁹ This is a fundamental requirement for finding vicarious liability and a number of cases have considered this issue: *Smith v Stages* [1989] AC 928 and *Vandyke v Fender* [1970] 2 QB 292 are authority for the course of employment extending to travel to and from a place of employment only when that travel is to a place other than the usual place of work and the employee is paid for such travel. In *Paterson v Costain and Press (Overseas) Limited* [1972] 2 Lloyd's Rep 204 the courts held that an employee carrying out instructions is acting within the course of his employment.

⁴⁰ An employer will also be liable for his employee's authorised acts carried out using wrongful modes.

⁴¹ *Wilson v Tunman* (1843) 6 Man & G 236; *Lewis v Read* (1845) 13 M & W 834.

⁴² *Lennard's Carrying Co Limited v Asiatic Petroleum Co Limited* [1915] AC 705.

⁴³ In order to determine what is beyond the power of a company, the memorandum and articles of association need to be examined.

⁴⁴ Section 5 of the PA.

⁴⁵ Section 10 of the PA.

⁴⁶ The courts considered this point in *Harrison v National Coal Board* [1951] AC 639 although there was no consensus of opinion. Lord Normand reserved his opinion on this point as did Lord Reid, who did however add that the issue could not be dismissed summarily. Lord MacDermott was alone in

amount to negligence at common law and as such an employee may, subject to the discussion above, be held vicariously liable for such a breach.⁴⁷

- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present?**

The conventional view is that a company will have imputed to it the acts and state of mind of those of its directors and managers who represent its “directing mind and will,” *Lennard’s Carrying Co v Asiatic Petroleum Co.* [1915] AC 705. However, in *R v Andrews Weatherfoil Ltd* 56 CrAppR 31 it was held that it was not every “responsible agent” or “high executive” or “acting agent on behalf of the company” who could by his actions make the company criminally responsible, and that it was necessary for the judge to invite the jury to consider whether or not there were established those facts which the judge decided as a matter of law were necessary to identify the person concerned with the company. In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, it was said that the question was one of construction rather than metaphysics. A company’s rights and obligations are determined by rules whereby the acts of natural persons are attributed to the company, such rules are normally to be determined by reference to primary rules of attribution and to general rules of agency. The company will appoint servants and agents whose acts, by a combination of the general principles of agency and the company’s primary rules of attribution, count as the acts of the company. Having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as vicarious liability in tort. The company’s primary rules of attribution together with the general principles of agency and vicarious liability are usually sufficient to determine its rights and obligations.

- 3. Under your criminal code (penal law), what is the legal standard for convicting someone of aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?**

Aiding and abetting

The law governing complicity in criminal offences arises from the common law but has been codified in section 8 of the Accessories and Abettors Act 1861 (AAA) (as amended by section 65(4) of the Criminal Law Act 1977 and Schedule 12), which states:

Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

opining that an employer would be liable. This case was followed in *England v National Coal Board* [1953] 1 QB 724 at 730.

⁴⁷ *England v National Coal Board*, *ibid.*

The effect of this provision is that any person⁴⁸ who aids, abets, counsels or procures an offence shall be guilty of that offence as a principal offender. In *Ferguson v Weaving* [1951] 1 KB 814, it was held that the words “aid and abet” are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein. In some subsequent authorities, *National Coal Board v Gamble* [1959] 1 QB 11, the words “aiding and abetting” have been used in a wider sense, so as to include acts committed before the perpetration of the *actus reus*. In *Blakely v DPP* [1991] RTR 405 it was stated that there are many accessories before the fact of whose activity none of the words “counselling, procuring and commanding” would seem apt; for example, the man who supplies the equipment for use in a robbery which has already been determined upon by others and at which he will not be present. The words “aiding and abetting” would seem more appropriate to describe such activity.

Actus Rea

The four words (aid, abet, counsel and procure), though similar in character, must be treated as having four distinct meanings.⁴⁹ The words must be given their natural meaning.⁵⁰ It has been suggested that “abet” means incitement at the time of the offence and “counsel” incitement before the offence. Under the law of felonies, “aiding and abetting” would be carried out at the time of the offence whilst “counselling and procuring” occurred before the commission of the crime.⁵¹ However, except in the case of treason, assistance following the commission of a crime does not make a person party to the crime, though he may be guilty of assisting an arrestable offender.⁵²

Mere presence at the commission of a crime⁵³ or silent encouragement⁵⁴ will not incur criminal liability. Knowledge that a crime is to be committed is not enough either. There must, in order for a successful prosecution to occur, be some element of active encouragement or assistance, though this could be the active *omission* to act.⁵⁵ The offender must also know what particular type of crime is to be carried out, though he need not know the exact details.⁵⁶ If a person is to be guilty of procuring the commission of a crime there must be a causal link between his actions and the commission of the offence.⁵⁷ If a person is to be found guilty of counselling then they must counsel the principal offender, who must in turn act within the scope of that counsel and not by accident.⁵⁸

⁴⁸ As the AAA was passed before the introduction of the Interpretation Act 1889, it is not clear whether the definition of person in the AAA extends to bodies corporate and unincorporated. It has, however, been amended since (in 1977) and it is highly unlikely that a person for the purposes of the AAA will not include bodies corporate and unincorporated.

⁴⁹ *A-G's reference (No 1 of 1975)*.

⁵⁰ *Ibid.*

⁵¹ *Ferguson v Weaving* [1951] 1 KB 814; *Bowker v Premier Drug Co Limited* [1928] 1 KB 217 where aiding and abetting were held to imply presence.

⁵² Section 4 of the Criminal Law Act 1967.

⁵³ *Coal-Heavers' Case* (1768) 1 Leach 64; *R v Towle* (1816) Russ & Ry 314.

⁵⁴ *R v Allan* [1965] 1 QB 130.

⁵⁵ *R v Russell* [1933] VLR 59.

⁵⁶ *R v Bainbridge* [1960] 1 QB 129.

⁵⁷ *A-G's Reference*, supra note 49.

⁵⁸ *R v Calhaem* [1985] QB 808.

Finally, in order for a successful prosecution under section 8 of the AAA, a crime must have been committed.⁵⁹ The secondary offence and the crime need not both take place in the jurisdiction.⁶⁰

Mens Rea

Since criminal liability as a secondary party arises from the common law, *mens rea* is required for a successful prosecution even when it is not required for the principal offender (for example, in the case of offences of strict liability).⁶¹

The secondary party must have intended to do the acts that he knew would assist the commission of the crime. He must intend the crime to take place or be indifferent to its commission.⁶² He must also know of all the essential matters that make the act a crime but need not know that the act would amount to a crime.⁶³ Rendering assistance to a party known to have a criminal objective will not amount to an offence unless the secondary party knew that the crime contemplated was of the same kind or one of several kinds as that in fact committed.⁶⁴ However, there need not be a shared intention between the principal and secondary party.

The secondary offences envisaged under the AAA apply to all crimes, though as mentioned above in our answer to question two, there is no vicarious liability for abetment.

Criminal Conspiracy

In England and Wales, conspiracy is an offence both at common law and under Statute.

Section 1(1) of the Criminal Law Act 1977 provides

Subject to the following provisions of the Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

⁵⁹ *Johnson v Youden* [1950] 1 KB 544.

⁶⁰ *R v Robert Millar (Contractors) Limited* [1970] 2 QB 52: the primary offence was committed in England, whilst the secondary offence occurred in Scotland. Recent legislation (such as the Terrorism Act 2000) has extended the scope of this principle. Section 59 of this Act makes it an offence for a person to incite an act of terrorism wholly or partly outside the U.K.

⁶¹ *Ferguson v Weaving*, supra note 51.

⁶² *National Coal Board v Gamble* [1959] 1 QB 11.

⁶³ *Johnson v Yourdon*, supra note 59.

⁶⁴ *R v Bainbridge*, supra 56.

The essence of conspiracy is the agreement. The agreement in question must involve either spoken or written words or be evidenced by a course of conduct⁶⁵ and must relate to an offence triable in England and Wales. There must be conspiracy with another, and that other cannot be a company of which the first party is the controlling mind.⁶⁶ Section 1A of the CLA extends the jurisdiction of the courts to conspiracy to commit offences outside England and Wales, provided that the offence is an offence in the place it takes place, that if committed in England and Wales the conspirators would be liable under section 1 of the CLA, and that some aspect of the conspiracy took place in England and Wales.

When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself: *Mulcahy v R* (1868) LR 3 HL 306 and *R v Meyrick and Ribuffi* 21 CrAppR 94. *O'Connell v R* (1844) 5 St.Tr (N.S.) 1, repentance, lack of opportunity and failure are all immaterial: *R v Aspinall* (1876) 2 QBD 48. It follows that withdrawal from a conspiracy goes to mitigation only. There must be an intention to be a party to an agreement to do an unlawful act: *R v Anderson* [1986] AC 27.

Exceptions to the liability imposed by section 1 of the CLA are set out in section 2. An intended victim cannot be guilty of conspiracy, spouses cannot conspire and neither can those individuals under the age of criminal responsibility.⁶⁷

Mens rea

Section 1 of the CLA implies the need for an offender to intend to carry out the agreement.⁶⁸ However, there need not be any intention to take part in the crime. Liability arises on the entering into of the agreement.

Common law conspiracy

The classical definition of conspiracy at common law is “an agreement to do an unlawful act or a lawful act by unlawful means.” This definition was initially very broad and covered not only criminal acts but also torts, fraud, corruption of public morals and the outraging of public decency. The implementation of legislation relating to conspiracy has restricted the scope of common law conspiracy to three areas,⁶⁹ namely conspiracy:

- (a) to defraud;
- (b) to corrupt public morals; and
- (c) to outrage public decency.

⁶⁵ *Cooper v Compton* [1947] 2 All ER 701.

⁶⁶ *McDonnell* [1966] 1 QB 233: the court said that a company in this instance could not be said to have a separate mind or be a separate entity.

⁶⁷ As determined by section 50 of the Young Persons Act 1933.

⁶⁸ *R v McPhillips* (1990) 6 BNIL.

⁶⁹ Sections 5(2) and 5(3) of the CLA.

The offences under (b) and (c) will not be offences where the conduct would not amount to the commission of an offence if carried out by a single person otherwise than in pursuance of the agreement.⁷⁰

Actus reus

A person shall be guilty of conspiracy to defraud if he agrees with one or more persons to dishonestly⁷¹ deprive a person of something which is his or to which he may be entitled or to injure some proprietary right of another person.

A person shall be guilty of conspiracy to corrupt public morals if he enters into an agreement with any person or persons to engage in conduct⁷² that tends to corrupt public morals.

A person shall be guilty of conspiracy to outrage public decency if he enters into an agreement with any person or persons to engage in conduct⁷³ that tends to outrage public decency.

Mens rea

The mental element required to commit these common law offences of conspiracy is the intention to execute the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts that render the conduct unlawful.⁷⁴

4. Are there any other special elements not required in the conviction of a natural person that must be present when the defendant in a criminal proceeding is a business entity?

As discussed above, in bringing any proceedings for a criminal offence the prosecution must prove that both the *actus reus* and the *mens rea* of the offence were present at the appropriate time and in the appropriate person, and also that the person against whom proceedings are being brought has the necessary criminal capacity. In the case of individuals, factors such as age, mental stability and/or sovereign immunity may act as bars to prosecution.

When proceedings are brought against a business entity the same criteria need to be met, though the bars to prosecution will, for the most part, necessarily be different.

⁷⁰ Section 5(3)(b) CLA.

⁷¹ The meaning of dishonesty is that found in *R v Ghosh* [1982] QB 1053: the two pronged test set out in this case is: (a) whether his actions were dishonest according to the ordinary standards of reasonable and honest people; and (b) if so, whether he himself realised that his actions were, according to those standards, dishonest. This case has been considered (in *R v Wood* [2002] EWCA Crim 832), but not overruled and accordingly this test is still good law in England and Wales.

⁷² In *Shaw v DPP* [1962] AC 220 the courts held that the publication of a magazine containing advertisements by prostitutes could constitute conspiracy to corrupt public morals. However, agreeing to present or give a performance of a play will not be an agreement that could be the subject of a conspiracy: section 2(4) of the Theatres Act 1968.

⁷³ The insertion of outrageously indecent material on the inside pages of a book or magazine which is sold in public may constitute such conduct: *Knuller (Publishing, Printing and Promotions) Limited v DPP* [1973] AC 435. In the same case it was emphasised that the conduct must go far beyond merely offending susceptibilities and that the jury should remember that they “live in a plural society” and that “toleration is itself part of public decency” (per Lord Simon).

⁷⁴ *Kamara v DPP* [1974] AC 104 at 119, HL per Lord Hailsham of St Marylebone LC.

We have discussed above the problem in finding the apposite *actus reus* and *mens rea* in a business entity. A business entity can only operate through the actions of individuals. And, as we discussed above in questions one and two, there are only certain categories of individuals whose acts may impose liability on business entities.

Accordingly, when bringing criminal proceedings against a company an investigation of the status of the accused business entity is important. As we have pointed out above, only corporations can be prosecuted for criminal acts under the common law and even then not for all offences. If proceedings are to be brought against a company the controlling mind of that company needs to be identified, as only that person's acts can be attributed to the company. If the offence was committed by a person whose acts cannot be attributed to the company, then the proceedings must be brought against that person as an individual. Unincorporated bodies, including partnerships, can only be found criminally liable for statutory offences, and regard must be had to the provisions of the statute in question to determine how to prove the elements of the offence.

If the offence has been committed by an employee and civil proceedings for vicarious liability are to be brought against a business entity, then the nature of the offence and the law governing vicarious liability must be examined. This point is analysed in question two above, but broadly speaking liability will arise within the context of the master-servant or agent-principal relationships.

Business entities, insofar as they perform the functions of public bodies or exercise sovereign authority, may be able to claim state immunity at under common law, the State Immunity Act 1978 or the Crown Proceedings Act 1947. This point is discussed in our answer to question 12 below.

In conclusion, to bring proceedings against a business entity, it will therefore always be necessary to show not only the basic requirements of the offence in question, but also the nature of the business entity, its criminal capacity, that it does not enjoy immunity, and that the business entity is capable of committing the offence or that the natural person(s) who committed the offence was the servant or agent of the business entity and was acting within the course of his employment or, in the case of a corporation, whether the natural person was its directing mind.

II. Status of International Law/International Humanitarian Law in your Country's Legal Framework:

5. May an individual be prosecuted for violations of international law in the courts of your country?

Yes, in accordance with those Conventions that so require prosecution to which the United Kingdom has acceded, a natural person may be prosecuted for genocide, war crimes, crimes against humanity, torture, enslavement and forced labour (International Law Offences). However, it is only when a various convention has been incorporated into domestic U.K. law by an Act of Parliament that a person can be held criminally

liable in U.K. courts of international crimes. By and large, the domestic law whereby effect is given to these Conventions makes the “international” offence into a domestic law offence, thus “nationalizing” the wrongdoing irrespective in certain cases of where the offence was committed, eg. sex tourism, war crimes, corruption, and terrorism. Few if any breaches of international law are capable of being prosecuted as such in U.K. courts.⁷⁵

The statutes concerning the International Law offences has, for the most part, been enacted by the English (and Scottish⁷⁶) legislative in order to give effect to various treaties that the U.K. has entered into.⁷⁷ Because the U.K. has a dualist approach to the incorporation of treaty obligations into its domestic law, the rights and obligations created by treaties have no effect in domestic law unless legislation is passed to give effect to them. Accordingly, no individual or body corporate can be prosecuted in the U.K. for a criminal offence that is set out in a treaty to which the U.K. is a party unless the provisions of such treaty have been incorporated into national law by domestic legislation.⁷⁸

Prior to the entry into force of the International Criminal Court Act 2001 (*ICCA*), the treaties dealing with International Law had been separately incorporated into U.K. law. There was therefore no applicable overarching principle as to whether an individual may be prosecuted in English courts for an International Law offence. The entry into force of the *ICCA* brought some coherence to this area of law, at least in relation to the offences of genocide, crimes against humanity and war crimes.⁷⁹

Each offence needs to be examined individually, in the context of four possible scenarios:

- (i) offence committed by a U.K. national in the U.K.;
- (ii) offence committed by a U.K. national outside the U.K.;
- (iii) offence committed by a non-U.K. national in the U.K.; and
- (iv) offence committed by a non-U.K. national outside the U.K..

⁷⁶ We are unable to substantively advise on Scottish law but note that the Scottish Parliament passed the legislation required for the ratification of the Rome Statute of the International Criminal Court (*SICC*), the International Criminal Court (Scotland) Act 2001, which came into force on 17 December 2001.

⁷⁷ The relevant treaties for this discussion include, *inter alia*, the Geneva Conventions (1949), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1985) and the *SICC*.

⁷⁸ Although it is worth noting that many violations of international law will constitute offences under existing national legislation, for example murder committed by a U.K. national. Furthermore, failure to enact legislation giving effect to the provisions of a treaty may place the U.K. in breach of its international law obligations under that treaty.

⁷⁹ It is worth noting that in a number of cases the *SICC* sets a higher threshold for conviction than the treaties to which it gives effect purport to do. For instance the threshold for conviction for breaches of the Additional Protocol I of the Geneva Conventions (prosecutable under section 1A(b) of the Geneva Conventions Act 1949) was lower than the corresponding provision in the *SICC* (Article 8(2)(b)). Furthermore, certain defences available for defendants appearing in the International Criminal Court will not be available to defendants in the English courts due to domestic law, e.g. duress.

One point to note at the outset is that the permission of the Attorney General of England and Wales is needed to bring proceedings for many of the offences discussed below.⁸⁰

Genocide, crimes against humanity and war crimes

Genocide and crimes against humanity are triable in the U.K. pursuant to section 51(1) of the International Criminal Court Act (ICCA) of 2001 for acts committed either in the U.K. or by U.K. nationals abroad. The Act, which gives effect to the SICC, which entered into force 1 July 2002, is not retrospective and a person may only be prosecuted with the consent of the Attorney General.

Additionally, there is no requirement that U.K. nationals must be the victims of such offenses. The assertion of extra-territorial jurisdiction remains exceptional, and confined to specific statutes whereby U.K. national can be prosecuted for a narrow range of offences wherever committed. In practice, prosecution will depend on physical presence of the accused within the jurisdiction, in other words, a prosecution will probably not be commenced on a U.K. national resident outside the U.K. unless he can be physically arrested in the U.K. Also, in order for acts of genocide, crimes against humanity and war crimes to constitute offences under the ICCA, the material elements of each act or crime must be committed with intent and knowledge. The material elements are set out in Schedule 8 to the ICCA and are taken from the SICC.

Genocide is defined in Schedule 8 of the ICCA (which is taken from Article 6 of the SICC) as:

[. . .] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;*
- b) Causing serious bodily or mental harm to members of the group;*
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- d) Imposing measures intended to prevent births within the group;*
- e) Forcibly transferring children of the group to another group.*

Crimes against humanity are defined in Schedule 8 of the ICCA (which is taken from Article 7 of the SICC) as:

[. . .] 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:

- a) Murder;*
- b) Extermination;*

⁸⁰ That is, for torture (see section 135 of the CJA) and for offences under the ICCA (see section 60(3)).

- c) *Enslavement;*
- d) *Deportation or forcible transfer of population;*
- e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- f) *Torture;*
- g) *Rape, sexual slavery, enforced prostitution, forced pregnancy; enforced sterilisation, or any other form of sexual violence of comparable gravity;*
- h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ..., or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crimes within the jurisdiction of the Court;*
- i) *Enforced disappearance of persons;*
- j) *The crime of apartheid;*
- k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

U.K. legislation governing the crime of torture can be found in two Acts: the definition of war crimes as set out in Schedule 8 to the ICCA includes torture (therefore the discussion of war crimes as set out above also applies here); and it is also an offence under section 134 of the Criminal Justice Act 1988 (CJA).

The CJA provides that:

A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

The offence of torture will also be committed by any person, no matter where it has been committed in the world, intentionally inflicting such pain or suffering on another either at the instigation or with the consent or acquiescence of a public official or person acting in an official capacity (section 134(2)(a) of the CJA). Therefore the U.K. applies universal jurisdiction to the commission of the offence of torture – any person, whatever his nationality, who commits the offence of torture *anywhere* in the world can be prosecuted in the U.K.

Furthermore, any such public official or person acting in their official capacity who instigates, consents to or acquiesces in the committing of torture whilst performing or purporting to perform his official duties shall be guilty of torture (section 134(2)(b) of the CJA). The Act came into force in 1988, thus only acts of torture committed after the entry into force of the Act in 1988 can be prosecuted in the U.K. To prosecute someone for torture in the U.K., again it is necessary to first obtain the consent of the Attorney General.

(i) *Offence committed by a U.K. national in the U.K.*

Section 134(1) of the CJA provides that any public official or person acting in an official capacity, whether or not he or she is a U.K. national, shall be guilty of an offence if he commits an act of torture whilst in the U.K. Therefore a U.K. national can be prosecuted in England for acts of torture committed in the U.K.

(ii) *Offence committed by a U.K. national outside the U.K.*

Under section 134(1) of the CJA, any public official or person acting in an official capacity, of any nationality (including the U.K.), shall be guilty of the offence of torture for acts committed anywhere in the world.

(iii) *Offence committed by a non-U.K. national in the U.K.*

As discussed above, the provisions of section 134 of the CJA extend to all acts of torture committed within the U.K., whatever the nationality of the offender. Therefore non-U.K. nationals can be prosecuted in the U.K. for acts of torture committed within the U.K.

(iv) *Offence committed by a non-U.K. national outside the U.K.*

The courts have discussed the offence of torture committed outside the U.K. in *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet (No 3) (The Pinochet Case)*.⁸¹ Although the case concerned extradition and not the prosecution of an offence under the CJA, one of the criteria for such extradition was the commission of a criminal offence under English law. Therefore, the House of Lords had to consider whether Pinochet's acts in Chile constituted an offence under English law, notwithstanding any sovereign immunity issues. The courts held the Torture Convention, on which section 134 of the CJA is based, imposes universal jurisdiction on the crime of torture. Accordingly, Pinochet's acts were capable of constituting a criminal offence under section 134 of the CJA and the courts ruled that this criterion (i.e. the commission of a criminal offence) for extradition was fulfilled.⁸²

Violations of Geneva Conventions

The Geneva Conventions Act 1957 makes it an offence for someone of any nationality, no matter where the offence is committed, to commit a grave breach under the Geneva Conventions.

War crimes are defined in Schedule 8 of the ICCA (which is taken from Article 9 of the SICC) as:

a) *Grave breaches of the Geneva Conventions of 12 August 1949...*

⁸¹ [1999] WLR 827, HL.

⁸² However, one negative outcome of the Pinochet litigation is that the courts have made it practically impossible to prosecute international crimes directly on the basis of customary international law. Only Lord Millett was prepared to accept that customary international law was capable of creating offences in domestic law.

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law....

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 namely...violence to all life and persons, ... cruel treatment and torture...taking of hostages...

d) Paragraph ... (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature...

e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law...

f) Paragraph ... (e) applies to ... armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

“Intent” and “knowledge” are defined in section 66 of the ICCA in the following manner:⁸³

[. . .] *a person has intent –*

a) In relation to conduct, where he means to engage in the conduct, and

b) In relation to a consequence, where he means to cause the consequence or is aware that it will occur in the ordinary course of events; and

“knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

This type of “intent” is often called oblique intent, meaning that the accused anticipates that a particular harmful consequence is a *virtually certain result* of his act.

(i) *Offence committed by a U.K. national in the U.K.*

Section 51(2)(a) of the ICCA imposes criminal liability on any person (including U.K. nationals) for any act of genocide or any crime against humanity or war crime which is committed in the territory of England and Wales. Therefore a U.K. national who commits genocide or a war crime or a crime against humanity in English territory can be prosecuted in England.

(ii) *Offence committed by a U.K. national outside the U.K.*

The ICCA provides that genocide, a crime against humanity or a war crime has been committed where a U.K. national, a U.K. resident or a person subject to U.K. service jurisdiction, carries out such acts outside the U.K. (section 51(2)(b) of the ICCA). For

⁸³ This is the first time that intent has been defined in a U.K. criminal statute.

the purposes of the ICCA, a U.K. national is an individual who is a British citizen, a British overseas territories citizen, a British National (Overseas), a British Overseas Citizen or a British subject or British protected person under the British Nationality Act 1981.⁸⁴ A U.K. resident is defined as a person resident in the U.K.⁸⁵ and a person subject to U.K. service jurisdiction covers various military personnel.⁸⁶

(iii) *Offence committed by a non-U.K. national in the U.K.*

As indicated above, an individual, whether a U.K. national or not, who commits an offence under the ICCA within the territory of the England and Wales can be prosecuted for such an offence in the English courts.

(iv) *Offence committed by a non-U.K. national outside the U.K.*

The provisions of the ICCA do *not* apply to acts committed by non-U.K. nationals outside the U.K. *unless*:

- a) they are U.K. residents or subject to U.K. service jurisdiction; or
- b) they later become resident in the U.K. and at such time proceedings are brought in respect of acts that would have constituted offences under the ICCA at the time they were committed if they had been committed in the U.K. (section 68 of the ICCA).

Section 68 of the ICCA represents a significant extension of the jurisdiction of English courts over non-U.K. nationals who commit offences outside the U.K.

The provisions of the SICC do not allow any State to enjoy sovereign immunity in respect of proceedings brought before the International Criminal Court. Similarly the ICCA (by virtue of section 78) binds the Crown and applies to all persons in the public service of the Crown.

The ICCA also makes it an offence to commit acts ancillary to the offences of genocide, war crimes and crimes against humanity (section 52 of the ICCA). These are defined in section 55 of the ICCA as aiding, abetting, counselling, procuring, inciting, attempting, conspiring, assisting and concealing the commission of an offence under section 51 of the ICCA.

It is also worth noting that the U.K. has jurisdiction, under section 1 of the War Crimes Act 1991, for war crimes amounting to murder, manslaughter or culpable homicide committed in Europe during the Second World War by persons who subsequently become U.K. residents or citizens.

⁸⁴ Definitions of these various categories of persons can be found in the British Nationality Act 1981.

⁸⁵ Section 67(2) of the ICCA.

⁸⁶ Section 67 of the ICCA provides that a person subject to U.K. service jurisdiction includes a person subject to military law, air force law or the Naval Discipline Act 1957, any person mentioned in sections 208A or 209(1) or (2) of the Army Act 1955 or the Air Force Act 1955 or any person mentioned in sections 117-8 of the Naval Discipline Act 1957 (Section 67 of the ICCA)

Forced labour and enslavement

The law governing forced labour and enslavement in England and Wales is set out in a number of statutes: the Human Rights Act 1998 (*HRA*), the ICCA and the Slave Trade Acts of 1824 and 1843 (*STA 1824* and *STA 1843*).

The HRA makes a number of rights set out in the European Convention of Human Rights (*ECHR*) part of domestic law. However, the HRA does not create any criminal offences but rather provides for civil remedies for its breach.⁸⁷ It binds public authorities and the Crown who must act in a way that is compatible with the ECHR rights set out in Schedule 1.⁸⁸ Article 4 of the ECHR provides that no person shall be held in slavery or servitude or be required to perform forced or compulsory labour. Part I of Schedule 1 of the HRA provides that forced and compulsory labour shall *not* include:

- a) any work required to be done in the ordinary course of detention or during conditional release from such detention...*
 - b) any service of a military character or... service exacted instead of compulsory military service...*
 - c) any service exacted in the case of an emergency or calamity threatening the life or well-being of the community.*
 - d) any work or service which forms part of normal civic obligations.*
- (i) *Offence committed by a U.K. national in the U.K.*

The HRA imposes civil liability on all public authorities in the U.K. who must comply with the provisions of the ECHR found in Schedule 1 to the HRA. By necessity therefore, and as expressly provided in the Statute, the HRA will bind the Crown.⁸⁹

- (ii) *Offence committed by a U.K. national outside the U.K.*

In a case before the European Court of Human Rights it was held that where a breach of the ECHR does not occur within the jurisdiction of a State and the State's authorities do not have any causal connection with that breach, a State is not under a duty to provide a civil remedy for that breach.⁹⁰ It would therefore appear that, by implication, a U.K. public authority who breaches the HRA outside the U.K. *may* be liable for such a breach.

- (iii) *Offence committed by a non-U.K. national in the U.K.*

It is unlikely that a non-U.K. national could be sued in the English courts for a breach of the HRA. This is due to the fact that in order for an action to be brought the

⁸⁷ Section 7(8) of the HRA.

⁸⁸ Section 6 of the HRA and section 22(5) of the HRA.

⁸⁹ Section 22(5) of the HRA.

⁹⁰ *Al-Adsani v United Kingdom (No 2)* (2002) 34 EHRR 11 (*Al-Adsani*).

defendant must be a public authority. A foreign public authority acting within the U.K. may enjoy state immunity.⁹¹

(iv) *Offence committed by a non-U.K. national outside the U.K.*

It is highly unlikely that proceedings could be brought against a non-U.K. national in the English courts for breaches of the HRA.⁹²

Enslavement and enforced prostitution also fall within the definition of a crime against humanity as set out in Schedule 8 to the ICCA. Accordingly, the analysis of the ICCA above will also apply to this offence. It is difficult to envisage a situation where forced labour does not also involve enslavement.

STA 1824 and STA 1843

Criminal offences in relation to slavery can also be found in the STA 1824 and STA 1843.

(i) *Offence committed by a U.K. national in the U.K.*

The STA 1824 makes it a criminal offence for a person to, *inter alia*, deal, trade, purchase, sell, barter, transfer or transport slaves.⁹³ Any person found doing so within the jurisdiction of the U.K. would be guilty of a criminal offence.

(ii) *Offence committed by a U.K. national outside the U.K.*

The STA 1843 extends the jurisdiction of the English courts for offences under the STA 1824 to all such offences committed by British subjects, wherever they are in the world.⁹⁴

(iii) *Offence committed by a non-U.K. national in the U.K.*

Any breach of the STA 1824 by a non-U.K. national in the U.K. can be prosecuted in the English courts by virtue of the presumption that an Act of Parliament will bind all persons within the territory.

(iv) *Offence committed by a non-U.K. national outside the U.K.*

Although the STA 1843 extends the jurisdiction of the courts to acts committed by British subjects wheresoever in the world they may be, it does not extend the courts' jurisdiction to acts committed outside the U.K. by persons other than British subjects.

Other legislation relating to criminal offences committed outside the U.K.

⁹¹ See our answer to question 12 below for a discussion on sovereign immunity. Note however that an offence under the HRA would be a civil offence and the State Immunity Act 1978 might apply, possibly to the extent of denying the authority immunity (especially where the conduct complained of relates to a commercial contract).

⁹² *Al-Adsani*, supra note 90.

⁹³ Section 1 of the STA 1824

⁹⁴ Section 1 of the STA 1843. For a definition of British subject see the British Nationality Act 1981.

There are a number of other statutes that extend the jurisdiction of the English courts to include acts committed outside of the jurisdiction by both U.K. and non-U.K. nationals that fall outside the scope of this discussion.⁹⁵ Many of these offences relate to murder, manslaughter and culpable homicide. There is no universal rule in English law concerning jurisdiction for violations of international law and therefore one must look at each individual statute for the relevant position.

6. May a business entity be prosecuted for violations of international law in the courts of your country?

Insofar as a legal entity can be charged with such offences domestically, they can also be charged in respect of those offences which statute has made punishable irrespective of where the offence was committed (for example, corruption under the Terrorism Act 2002).

As discussed above, unless the contrary intention appears in a U.K. statute, the word “person” includes a “body of persons corporate or unincorporated.”⁹⁶ Therefore, business entities (whether a company, unincorporated association or partnership) can be prosecuted in England and Wales for International Law offences in as much as individuals can under the relevant statutes (as set out in our answer to question five above).⁹⁷ This is of course subject to the normal difficulties in attributing to the relevant entity the knowledge of its servants (whether employees, directors, members or partners) who actually physically commit the offence.

In addition, in relation to genocide, war crimes and crimes against humanity, section 65 of the ICCA provides that a superior is responsible for such crimes committed by subordinates under his effective authority and control. A business entity could conceivably constitute a superior under the ICCA.

A superior will only be responsible for these offences if: (a) he fails to exercise proper control where he knew or disregarded information that his subordinates were committing or about to commit the offences; (b) the offences were within his effective responsibility and control; and (c) he failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such offences (section 65(3) of the ICCA).

III. Alternative Mechanisms: Civil Law/Tort:

7. Are there any bases in your country's tort law (civil law) for suing individuals and/or business entities for violations of international law?

⁹⁵ For example, Terrorism Act 2000, Internationally Protected Persons Act 1987, Taking of Hostages Act 1982, Criminal Law Act 1977 and the United Nations Personnel Act 1997.

⁹⁶ Section 5 of and Schedule 1 to the IA. The courts have held that the use of the word “person” in a statute made subsequent to the IA would include “a body corporate” as Parliament would have had the IA in mind whilst drafting the later statute (*M v Vincent* [1998] ICR 73).

⁹⁷ As the STA 1824 and STA 1843 were passed before the introduction of the Interpretation Act 1889, it is not clear whether the definition of person in these Acts extends to bodies corporate and unincorporate. It is highly unlikely that a person for the purposes of the STA will not include bodies corporate and unincorporate.

At present there is no tort available in England & Wales (Scotland and N. Ireland have separate legal systems but for ease of reference will be referred to as “U.K.” law) for breaches of international law *per se*. English courts have long resisted being drawn into deciding what constitutes a breach of international law: such issues being treated as “inherently” outside the scope of judicial determination by an English court (see *Buttes Gas & Oil Co v Hammer and Occidental Petroleum* [1981]). The decision in *Pinochet (No3)* [2000] AC 147 witnessed the high water mark of the Courts willingness to engage with the canon of international human rights law (including the relationship between *jus cogens* and domestic law), but this was confined to its criminal sphere in the context of the Torture Convention which “domesticated” the offence, and where the House of Lords seemingly endorsed the *Buttes* ruling.

Most breaches of international human rights law would however amount to tortious conduct within our existing legal paradigms. For example, whilst no distinct tort of torture exists, any claim would fall within the pre-existing tort of trespass to the person (assault & battery) and would be plainly actionable. Existing domestic examples of claims brought under this tort include actions brought against sex abusers by their victims and many claims by individuals against police forces. Similarly, forced labour would fall within the boundaries of a claim for false imprisonment. Existing examples of such cases within the domestic context are claims made by foreign domestic workers against their U.K.-based employers. It is difficult to conceive of a breach of international human rights law that could not be defined within the framework of existing tort law.

There is no equivalent in English law (or U.K. statutes) of the Alien Tort Claims Act (ATCA).

There is a long standing, but very seldom used, remedy of “Act of State” under English law, where British officials or government entities can under certain circumstances be sued in England for acts committed abroad, eg. for tortious damage inflicted by British forces in Cyprus [*citation*]. Essentially, these are wrongs that would be actionable if committed within the jurisdiction; and the court assumes that if committed abroad by an agent of the State, they are deemed to have taken place within the jurisdiction. This “Act of State” should not be confused with the “act of state doctrine,” which derived from English law (*D.U.K.e of Brunswick -v- King of Hanover*), became part of U.S. law in *Underhill -v- Hernandez*, and was reaffirmed as part of English law in *Buttes Gas & Oil -v- Hammer*). The act of state doctrine usually operates as a defense to a claim where the Court declines to decide an issue within the domestic competence of a foreign state, or an issue of international law.

Tort law has demonstrated itself to be a flexible and developing concept and it is certainly possible that in the future the Court might recognize a breach of an international human rights norm as amount to a tort in itself, certainly in respect of European Community Law and European Human Rights law we have seen the emergence of the beginnings of “constitutional torts.” Section 7 of the Human Rights Act 1998 expressly provides for damages claims where an individual’s rights under the European Convention of Human Rights have been infringed. In the light of the broad scope of existing tort law however, it is not clear that a “freestanding” tort would provide any greater scope for claims.

In theory at least there is little difference in the ability to attach liability to the individual as opposed to the corporate body. A practical difficulty is in establishing that the corporate body should be liable for the acts of its individual employees who have committed grave breaches of international law. Whilst the principle of “vicarious liability” holds companies liable for the acts and omissions of their employees, this only applies when the complaint arises from “the scope of their employment.” In practice this has meant liability for the *negligence* of an employee but not for intentional criminal acts. This would obviously not apply where it can be demonstrated that the behaviour was proved to be sanctioned by officials in the company, but defences of “we never knew” can plainly be anticipated in human rights type claims. There are two main ways to defeat such defences: the first is to frame a case not on an intentional tort of infliction of harm but rather in negligence, ie that the company failed to have in place systems that would have detected and prevented abuses; the second is to rely upon the distinction to the general rule developed by the House of Lords in a recent case of *Lister v Helsey Hall* [2002] 1 AC 215 in which liability was attached to the owners of a children’s home for sexual abuse committed by an employee. Here the Court held that the nature of the job, i.e. working with children, was so bound up with their safety, that they should be held vicariously liable even though they knew nothing of the abuse. This is a principle that could well be developed to attach vicarious liability to multinationals for the acts of their employees.

There is no requirement in our legal system for civil claims to be tied to criminal cases.

With regards to standing – in order to bring a tort-based claim the claimant must themselves have suffered damage. Claims cannot be brought on behalf of an anonymous class nor by interest groups. The only exceptions to the requirement for the victim is where they have died; in such circumstances claims can be brought on behalf of their estate [under the Law Reform (Miscellaneous Provisions) Act 1934] or by their family members who had a financial dependency [under the Fatal Accidents Act 1976]. The only scope for challenging actions outside the tort realm is through public law (i.e. by judicial review) – the rules for sufficient “standing” are slightly more generous than in the private law realm but claims can only be brought against government and its agencies and other public bodies (it is though possible to argue that state-run enterprises and former state-run enterprises are public bodies and thus amenable to judicial review).

8. What types of causes of action might be asserted against a business entity with respect to actions committed outside of your country but which involve a business entity that is domiciled in your jurisdiction?

There are now an increasing number of tort based claims of such a nature although few as yet concerning violations of international human rights law. There is no substantive difficulty in pursuing a claim for a tort committed overseas but there are a multitude of potential procedural difficulties. The “long-arm,” or exorbitant, jurisdiction of the English courts is exceptionally wide. Thus, jurisdiction can be asserted in civil proceedings over a foreign corporation (or individual) under a variety

of circumstances where the connection with the United Kingdom is tenuous, or non-existent. The bases of jurisdiction are set out in the Rules of the Supreme Court. The number of cases in which foreign entities have been sued (often successfully) in England is almost countless, although the majority of such cases will have involved some contractual nexus. Tortious liability can be asserted under certain circumstances, including economic harm, conspiracy, fraud, and even defamation.

The most well-known for the case cited in your example was that of *Lubbe v Cape plc* [2000] 1 WLR 1545, which concerned claims on behalf of several thousand Southern African asbestos miners against a U.K.-based multinational arising out of the operation of local mines.⁹⁸ This case itself followed a decision by the House of Lords in the claim of *Connelly v RTZ Mining* (1997) 3 WLR 373 in which a single Scottish claimant obtained damages for injuries sustained whilst working in the Defendant's uranium mines in Namibia.

In both these cases the issue was not that one could not sue for a tort committed overseas *per se* but rather arguments over forum (see answers to question 11 below).

What was an important factor in the South Africa cases was satisfying the Court that the heart of the complaint centered upon acts and omissions committed by the headquarters in the U.K. Great care was taken to ensure that the claim was based not so much on vicarious liability for acts committed overseas but rather on the negligent omissions of the HQ to ensure safety measures were imposed by the subsidiaries. It is very difficult indeed at present to conceive of a claim which has no connection with the U.K. proceeding through our Courts.

The recent successful claims in *Kenyan Bomb Victims v Ministry of Defence* concerned damages claims based on the tort of negligence brought by 230 Maasai Kenyans killed or injured by weaponry discarded by U.K. troops during military exercises in rural Kenya. Although the Defendants pleaded a "forum" defence this was ultimately abandoned, probably because of the impact of *Lubbe*.

Two further claims against the British Government are likely to be launched in London for acts committed in Kenya. The first is against the Foreign Office in respect of the torture of Mau Mau fighters during the battle for independence and the second is against the Ministry of Defense on behalf of 120 women raped by British soldiers over the past 20 years.

There is no theoretical reason why these claims against the government would be any different to a multinational domiciled in the U.K. At present a claim is being fought between a large group of Bangladeshi claimants against an geological agency whom it is alleged negligently failed to conduct a proper water survey that would otherwise have identified arsenic in the water system (*Begum & others v British Geological Society*). The Defendants in this case chose not even to plead a forum defense.

At present none of the *concluded* claims have concerned "classic" human rights abuses but rather have been primarily based on the tort of negligence. The Mau Mau

⁹⁸ There is disagreement about the accuracy of the *Lubbe* case, with some believing that the plaintiff being domiciled in the U.K. was not a reason that impacted upon the conclusion of the case.

case is likely to be the first case premised on a breach of international human rights law but here again this is likely to be framed primarily as a negligence claim.

It is highly likely, however, that in the short- to medium-term, future claims against multinationals arising out of breaches of international law will be issued in the U.K., building upon the principles developed in the cases touched upon above. Although it is likely that arguments will be made that the breaches are actionable in and of themselves, the claims will primarily be brought within the pre-existing tort framework and will seek to link the incidents overseas with acts and omissions occurring in the U.K.

IV. Jurisdiction:

9. On what bases do the courts of your country assert jurisdiction over criminal and civil defendants?

English courts assert jurisdiction over individuals and business entities for civil and criminal offences on various bases. It is important to note that our discussion in relation to question 12 below restricts the extent to which certain categories of persons or bodies corporate may be sued or prosecuted in the U.K.

Civil jurisdiction

Under English common law, the fundamental principle of jurisdiction in relation to civil matters is that a defendant who is liable to be served with proceedings, whether he is within, or outside of, the jurisdiction is subject to the jurisdiction of the court. Civil proceedings may be served on a person who is physically present within the jurisdiction, even if only temporarily. Proceedings may also be served outside the jurisdiction with the permission of the court. Such permission will be granted if one of the grounds set out in the Civil Procedure Rules⁹⁹ is met. These grounds include, *inter alia*, domicile, the place of performance of contract, the place where a tort was committed and the location of the property subject of a claim. Where a claim has been served on a defendant, that defendant may apply for the proceedings to be stayed on the grounds that the courts do not have jurisdiction.

However, the courts will only consider the common law if they are unable to take jurisdiction pursuant to the Brussels Regulation¹⁰⁰ (the *Regulation*) or the Brussels Conventions or the Lugano Convention¹⁰¹ (together the *Jurisdiction Conventions*). The U.K. is a party to these and they are enacted as part of national legislation in the Civil Jurisdiction and Judgments Act 1982 (*CJJA*).

⁹⁹ Rule 6.20 of the Civil Procedure Rules

¹⁰⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁰¹ The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed on 27 September 1968 in Brussels and its protocols, the Accession Convention, the 1982 Accession Convention and the 1989 Accession Convention, the 1989 Accession Convention and the 1996 Accession Convention (the *Brussels Conventions* as defined in section 1(1) of the *CJJA*) and the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters opened for signature at Lugano on 16 September 1988 (the *Lugano Convention*).

The Regulation and the Jurisdiction Conventions govern jurisdiction for civil and commercial matters between the contracting parties. Broadly speaking, the contracting parties to the Jurisdiction Conventions are the member states of the European Union (EU).¹⁰² The Regulation replaces the Brussels Conventions and contains broadly the same provisions. All previous State parties to the Brussels Conventions have adopted the Regulation apart from Denmark. The contracting parties to the Lugano Convention are the member states of the EU plus the member states of the European Free Trade Association¹⁰³.

The basic rule under the Regulation and the Jurisdiction Conventions is that a person shall be sued in the courts of his domicile, whatever his nationality. However, there are a number of situations in which special rules apply including, *inter alia*, in relation to proceedings in respect of land, consumer contracts, contracts where the place of performance is not the place of domicile, torts and multi-party proceedings. In these cases the courts of the defendant's domicile may not have jurisdiction.

The Jurisdiction Conventions state that domicile is to be interpreted in line with national legislation. The Regulation states that the internal laws of a contracting party to the Regulation shall be referred to in order to determine an individual's domicile.¹⁰⁴ For the U.K., domicile is defined in sections 41 and 42 of the CJJA for individuals and businesses respectively.

The CJJA provides that an individual is domiciled in the U.K. if he is resident in the U.K. and the nature and circumstances of his residence indicate he has a substantial connection with the U.K.

In the case of a corporation or association, the CJJA provides that its seat shall be its domicile. A corporation or association's seat will be in the U.K. if: (a) the corporation or association was incorporated or formed under the law of the U.K. and has its registered office or some other official address in the U.K.; or (b) its central management or control is exercised in the U.K. The Regulation provides that a company's domicile will be the place where it has its statutory seat (which shall be its registered office for the purposes of the U.K.), its central administration or its principal place of business.¹⁰⁵

If a defendant is not domiciled in a State party to the Jurisdiction Conventions or the Regulation the courts will look to the common law in order to determine whether or not the English courts have jurisdiction (see above).

Criminal jurisdiction

¹⁰² The contracting parties to the Brussels Conventions are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

¹⁰³ The contracting parties to the Lugano Convention are therefore those that have adopted the Regulation, Denmark, Iceland, Norway, and Switzerland.

¹⁰⁴ Article 59 of the Regulation.

¹⁰⁵ The courts have recently considered a company's domicile in *Douglas King v (1) Crown Energy Trading AG (2) Crown Resources AG*, TLR 14/3/2003. It was held that a company's central administration and principal place of business may not necessarily be in the same place but have considerable overlap. The courts held that despite the fact most of the company's business came from Switzerland, its central administration was in London and accordingly the English courts could take jurisdiction.

The criminal jurisdiction of English courts is primarily based upon the location of the accused within the jurisdiction. Furthermore, criminal enactments are also presumed, in the absence of express contrary intention, to apply only to acts committed within the geographical extent of the jurisdiction.¹⁰⁶ The nationality of the offender is usually irrelevant.

However, as discussed above in our answer to question five, there are a number of statutes that impose criminal liability on U.K. and/or non-U.K. nationals who commit particular acts outside the jurisdiction. Jurisdiction over these persons however can only be actually exercised where the individual is present or visits the U.K. - otherwise the U.K. government would need to seek that individual's extradition from the State in which he is located.

Another assessment of the question, perhaps in need of a re-evaluation, is that criminal jurisdiction is based on the commission of the offence within the jurisdiction, for which purpose the offender is usually physically present within the jurisdiction.¹⁰⁷ Certain statutes have made the commission of certain acts abroad into crimes, which can be prosecuted in the United Kingdom. In those cases, jurisdiction is confined to U.K. citizens/nationals and U.K. incorporated bodies

Moreover, in relation to conspiracy, under section 1A of the Criminal Law Act 1977, in certain circumstances, an agreement in the U.K. to commit a crime abroad is indictable in the U.K.

A conspiracy formed outside of the U.K. to commit a crime indictable in the U.K. is triable in the U.K.: *Somchai Liangsiriprasert v Government of the USA* [1991] 1 AC 225.

10. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

There are varying viewpoints about the jurisdictional and procedural obstacles that plaintiffs may face if they wish to sue a business entity. According to one lawyer, it is relatively easy to commence proceedings in England against a foreign corporation, provided that a "good arguable case" can be made out in respect of the merits of the claim (*Vitkovice -v- Korner*), and the jurisdictional base under the Rules of the Supreme Court (see answer to question eight above) can be demonstrated. The claimant must prepare the appropriate claim form to initiate the proceedings and make an application to the court for permission to serve the claim on the defendant outside the jurisdiction. Such applications are made on paper (seldom requiring a hearing), with the judge deciding whether permission is given. If it is, the court will assume jurisdiction until the defendant can demonstrate otherwise, i.e. the foreign defendant cannot ignore the proceedings, particularly if it has assets susceptible to execution of an English court judgment.

¹⁰⁶ The courts will not extend the geographical extent of a statute imposing criminal liability if no intention is clearly expressed: *Guyer v R* (1889) 23 QBD 100 at 107. The U.K. does consist of a number of different jurisdictions/territories and many statutes only legislate for a part of the U.K. In such cases, the intention is made clear in the words of the statute.

¹⁰⁷ There is a general feeling that this statement is not valid and thus needs to be reconciled with the previous answer to the question.

However, according to another lawyer working on the survey, the process is a more arduous task.¹⁰⁸ Where the proposed Defendant is not domiciled in the U.K. and service cannot be affected in the U.K. then the first major hurdle is obtaining permission to serve outside the jurisdiction. In cases involving personal injury (as most human rights claims are) the rules are particularly onerous (Civil Procedure Rules Part 6.25) and require that it be established that “damage” was sustained within the jurisdiction.

This is more problematic where the case concerns an individual perpetrator as most business entities have sufficient presence in the U.K. to at least effect service.

The next main issue is forum. The U.K. Courts have traditionally shown a willingness to accede to applications to force claims to proceed in the countries in which the action arose and have deprecated attempts to “forum shop.” They have however taken a far more liberal approach in respect of personal injury claims against multinationals, the prime example of course being *Lubbe*. This established that even though another country might be the more convenient forum, if that would mean shutting the claimants out from justice (there because of high improbabilities of the South African legal system being able to fund and litigate the mass tort claim) the U.K. Courts will, in their discretion, accept jurisdiction. What is particularly remarkable about this decision is that it concerned South Africa where the legal system is fairly developed (indeed two of the House of Lords were former South African barristers). Applied to the rest of the developing world, its effect is likely to be that similar arguments will be compelling and indeed, as noted above, no effective forum arguments have been raised in Kenyan and Bangladeshi claims.

The next main issue is choice of law. Prior to 1995 claims could only proceed under the “double actionability” rule, where it needed to be established that the claim in the U.K. mirrored the law in the other country. This obviously would apply only where the Court was *not* convinced that the actual tortious conduct took place in the U.K. (e.g. in the South African mining cases the point was never dealt with but the argument was that U.K. law must apply because the claim was postulated on negligent failures in London).

The Private International Law (Miscellaneous Provisions) Act 1995 now provides as a general rule (s.10) that the applicable law governing substantive issues is the country in which the tort was committed, although it provides the Court with discretion (ss.11&12) to displace the general rule where it sees fit. Recent cases have established that the award of damages is a procedural issue and is governed by the laws of the domestic courts. In the recent Kenyan claims, there was no dispute that the awards of damages would be on the English scale.

Limitation is also likely to be an issue. The Foreign Limitation Periods Act 1984 provides that the law governing substantive issue applies to limitation periods. Limitation provides a further problem in that intentional torts such as assault and false imprisonment have a six-year time period that is non-extendable, even in claims based on vicarious liability (*Bryn Alyn v Royal Sun Alliance* [2003] EWCA Civ 85). Claims for personal injuries arising from negligence, however, have a three-year limitation

¹⁰⁸ In the elaboration offered by this lawyer, questions 10 and 11 are somewhat melded together.

period that is retrospectively extendable at the discretion of the Court (ss 11, 14 & 33 of the Limitation Act 1980).

11. Do the courts in your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

The doctrine of *forum no conveniens* was developed in the English (and related) courts partly in response to the wide scope of exorbitant jurisdiction, which led to conflicts of jurisdictions with courts in different countries trying the same or substantially similar issues in parallel. The test essentially applied by the English court is to decide which of competing jurisdiction is the “more appropriate” for the prompt and efficient resolution of the case. Applying the rule, the English courts have largely answered a complaint from earlier times that the English Court was prone to treat foreign courts disparagingly. Additionally, the rule was created by judges without statutory basis.

12. Would the doctrine of sovereign immunity be applicable to protect a state-owned enterprise?

There is a basic presumption in English law that the Sovereign (U.K. Queen) is immune from legal proceedings, whether or a criminal or civil nature. There is a further presumption that Crown immunity extends to all officers and servants of the Crown, all public bodies and organs of government and the executive. Where the Crown is immune, so too are these persons. It is thus conceivable for a state-owned enterprise to constitute a “servant of the Crown,” “public body” or “organ of the government.”¹⁰⁹

Such immunity does not extend to deposed or exiled sovereigns who happen to be within the jurisdiction: *R v Mary Queen of Scots* (1586) 1 St.Tr. 1161.

Section 20 of the State Immunity Act 1978 grants effective immunity for foreign heads of state in the U.K.. However, case and statute law have eroded this presumption by explicitly providing for situations in which the Crown does not enjoy immunity. In *R v Bow Street Magistrates Court, ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, for example, it was held that a former head of state only enjoys continuing immunity for acts done as part of his official function as head of state. Those functions, it was held, could not include the commission or authorisation or torture, which, as an international crime could not be considered part of the official functions of a former head of state, thus there could be no immunity.

¹⁰⁹ The courts have considered the status of various public bodies in, *inter alia*, *International Rly Co v Niagara Parks Commission* [1941] AC 328 where Lord Denning held that the test as to whether a public body should enjoy Crown immunity would depend upon “whether it is properly to be regarded as the servant or agent of the Crown.” Anyone applying this test should have regard to the public body’s functions and independence.

The Crown Proceedings Act 1947 (*CPA*) attempts to consolidate these exceptions. There are two situations in which the Crown will be bound by the provisions of an English Statute:

- (a) where a statute contains an express provision to the effect that the Crown is bound by its provisions; and
- (b) where the Crown is bound by necessary implication. This will occur where the intention of Parliament in legislating must have been to bind the Crown, else the Statute's purpose would be frustrated. The courts apply this exception very restrictively.¹¹⁰

For the purposes of International Law offences it would appear that, apart from offences under the STA 1824 and STA 1843, the Crown could be prosecuted for such offences as the relevant domestic legislation expressly binds the Crown. The ICCA binds the Crown¹¹¹ and therefore all state enterprises, public bodies and officials would be bound by its provisions and could be found guilty of genocide, war crimes and crimes against humanity. In addition the provisions of section 134 of the CJA refer only to persons acting in their official capacity or public officials. It would seem that this would act to remove any Crown immunity enjoyed by these persons.¹¹² The HRA, in legislating against, *inter alia*, forced labour, also binds the Crown.¹¹³

Diverse answers arose over the interpretation of the doctrine of sovereign immunity in relation to a state-owned enterprise. One interpretation claimed that immunity would not apply to claims against enterprises owned by the U.K. In this opinion, according to the Sovereign Immunity Act of 1978,¹¹⁴ claims made against foreign governments are extremely difficult, if not impossible. This Act sets out when circumstances allow for the immunity of a foreign state to be lost for jurisdictional purposes. An example is shown in the recent attempt to challenge the doctrine before the European Court of Human Rights in a human rights case against Kuwait that failed (but only just). The case, *Al-adsani v U.K.*, maintains that although the claims are against individual torturers, members of the ruling family were included and were allowed to continue by the Court of Appeals.

A varying opinion claimed that the doctrine of sovereign immunity would be applicable to protect a state-owned enterprise, but only to the extent that the state-controlled entity was being sued in respect of its “sovereign” conduct. Therefore, a foreign central bank may be sued in England in respect of its debts owed to other banks, but not in respect of its function in deciding currency or fiscal policy. Whereas when suing a state the burden lies on the claimant to show that the exception to immunity is satisfied, in the case of a state-controlled entity, the entity has the burden

¹¹⁰ See *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58 and *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580. In both cases the intention of Parliament to bind the Crown had to be clear. The courts would not interpret legislation to bind the Crown merely for convenience to make the provisions of a statute easier to comply with.

¹¹¹ Section 78 of the ICCA.

¹¹² Note that in the Pinochet Case immunity was removed from a former head of state in respect of acts of torture committed during his tenure as head of state. However, this precedent only deals with foreign persons and their state immunity and does not directly address the issue of Crown immunity.

¹¹³ Section 22(5) of the HRA.

¹¹⁴ According to some lawyers, the Act is called the Sovereign Immunity Act, and according to others it is called the State Immunity Act.

of demonstrating that it is being sued in respect of its exercise of sovereign immunity. Unlike the Foreign Sovereign Immunities Act in the U.S., the Sovereign Immunity Act does not provide any basis of jurisdiction over a state or state entity. Rather, the Act merely defines the circumstances and procedures where proceedings may be started, and jurisdiction as based under the normal rules applying to private parties. The lawyer in this survey claims that state entities seldom succeed in convincing an English court that the claim should be stopped on the basis of state immunity.

A further opinion focused on the role of the state in regards to foreign state-owned enterprises. Under English common law, foreign states are immune from the jurisdiction of the English Courts. However, the State Immunity Act 1978 (SIA) provides exceptions to this general immunity in respect of certain civil proceedings only.¹¹⁵ The SIA does not apply to criminal proceedings.¹¹⁶ Therefore, *prima facie*, the common law principle applies and foreign states are immune from criminal prosecution in the U.K.

However, the SIA denies immunity from civil proceedings to any entity that is distinct from the organs of the government of the State and capable of suing or being sued, unless the proceedings relate to anything done by that entity in the exercise of sovereign authority and the circumstances are such that a State would have been so immune.¹¹⁷

It appears that no English court has considered whether a foreign state-owned enterprise is entitled to sovereign immunity in criminal proceedings. However, this issue has been considered in relation to civil proceedings, in *Kuwait Airways Corporation v Iraqi Airways Co.*¹¹⁸ (*Kuwait Airways*).

In *Kuwait Airways* it was held that, in order to assess whether immunity is available for a State entity, the courts must enquire as to the nature of the act and not the legal status of the entity. The courts must also examine the nature of the act and not just its purpose. The mere fact that the purpose or motive of carrying out the act was to serve the purposes of the State is not sufficient to attract immunity. The act itself must be of a governmental character and not one of a private person. The courts held that Iraqi Airways Co. could only claim immunity for certain of its acts in relation to the Kuwaiti aircraft removed by Iraq when it was acting as agent for the Minister of Transport and Communications. Once the aircraft formed part of Iraqi Airways' assets, any acts performed in relation to the aircraft were the acts of a private person and therefore did not attract sovereign immunity.

The issue of sovereign immunity in criminal proceedings has also been considered in connection with an individual entitled to immunity. In the Pinochet Case the House of Lords held that in the case of torture, the universal jurisdiction envisaged (perhaps even necessitated) by the Torture Convention and the national regime implemented by section 134 of the CJA should be construed as providing an exception to section 20 of the CJA (which provides that foreign heads of state and foreign sovereigns are immune from criminal proceedings in the U.K.). Accordingly,

¹¹⁵ Part I of the SIA

¹¹⁶ Section 16(5) of the SIA.

¹¹⁷ Section 14 of the SIA.

¹¹⁸ [1995] 1 WLR 1147.

Pinochet did not enjoy immunity for acts of torture committed after the ratification by the U.K. of the Torture Convention in 1988. It seems clear that this exception to the immunity of foreign heads of State is limited to torture, not least because the act of torture under section 134 of the CJA can only be committed by a public official or person acting in an official capacity - to exclude the highest public official in a State from prosecution would frustrate the purpose of the statutory offence.

As stated above, the English courts have not yet considered whether a foreign state-owned enterprise would be immune from criminal proceedings in England. However, in the light of the Pinochet Case and an acknowledgement, albeit limited, by the courts that some International Law offences are so serious that no sovereign should necessarily be immune and that universal jurisdiction should apply in respect of them, it is probable (and, at least in the case of torture, certain) that a foreign state-owned enterprise (which is, after all, further removed from the notion of statehood than a head of State) would not be afforded any immunity from prosecution for International Law offences.¹¹⁹ A foreign state-owned enterprise unable to claim immunity could therefore be prosecuted in the English Courts as discussed above in questions five and six.

¹¹⁹ However, though not implemented as part of the ICCA in relation to foreign States, Article 27 of the SICC makes it clear that sovereign immunity shall not apply to the provisions of the SICC.