International Crimes in United Kingdom and Japanese Law and Practice

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Introduction

The incorporation and application of international criminal law by states is critical if the gravest acts are to be deterred and punished. International law and institutions cannot alone meet the challenge of addressing these crimes. That the principle of complementarity is central to the operation of the International Criminal Court (ICC) supports this fact. As does customary international law, which permits states to assume universal jurisdiction over genocide, war crimes and crimes against humanity. The UK and Japan, as relatively powerful states, members of the G7, and parties of to the Rome Statute of the International Criminal Court (Rome Statute) can play a meaningful role in ensuring that international criminal law is applied and enforced. They can set an example to other states of the commitment to further global criminal justice. Whilst both countries have in general terms acted in accordance with the aim of pursuing global criminal justice more can, and should, be done. Indeed, as regards the UK Baroness Helena Kennedy in late 2023 has written "…despite its robust judicial system, top-tier law schools, and an abundance of highly skilled legal professionals, the UK has done little in the last decade to deliver meaningful accountability for international crimes in its own courts".[1)] This article describes the approaches taken by the UK and Japan to the core international crimes and considers why the law and practice in both countries is not as effective as it should be.

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1) Kennedy, H., Forward to Global Britain – Global Justice, Strengthening Accountability for International Crimes in England and Wales, Redress and the Clooney Foundation, 2023, cited at https://redress.org/wp-content/uploads/2023/10/Global-Britain-Global-Justice-report.pdf (accessed 11 December 2023) 2.

The Core International Crimes

Public international law criminalises certain acts.[2] Whilst perhaps taken for granted in modern times, this fact is exceptional. It is also relatively modern, becoming generally accepted only after the end of the Second World War (WWII).[3] The legal basis for this criminalisation is today both customary international law and treaty obligation. The customary international legal position was affected by treaties, including the four 1949 Geneva Conventions,[4] and state practice and *opinio juris*. In turn, customary international law formed the basis of the original acts included within the jurisdiction of the ICC. This is not to suggest that those crimes did not find a place in the domestic law prior to the creation of the ICC. They did. Perhaps the most famous relatively early example being found in Israeli law as applied against Adolf Eichmann.[5] The conclusion of the Rome Statute, however, gave new impetus to the movement to hold accountable those who commit the most serious crimes wherever they may take place.

Whilst the ICC has existed from 1 July 2002, the effectiveness of action against international core crimes relies upon the actions of states. This is in part evidenced by the principle of complementarity playing a prominent role in the Rome Statute creating and governing the ICC.[6] Article 1 of the Rome Statute *inter alia* provides that the ICC's jurisdiction "shall be complementary to national criminal jurisdictions". Notably generally and

2) There is a wealth of writing and authority on this point. See, for example, Schwarzenberger, G., The Problem of an International Criminal Law, (1950) 3(1) Current Legal Problems 263, Parsons, S., The Individual under International Criminal Law: Pt 1, (2023) 173 New Law Journal 13, Parsons, S., The Individual under International Criminal Law: Pt 2, (2023) 173 New Law Journal 17, and Cassese, A. and Gaeta, P., *Cassese's International Criminal Law*, Third Edition, Oxford University Press, Oxford, 2013.

3) Related to but distinct from this point is the emergence of universal jurisdiction. Crimes subject to universal jurisdiction pre-date those prescribed by international law itself by some measure. Piracy is perhaps the paradigmatic example. See Arnell, P., International Criminal Law and Universal Jurisdiction, (1999) 11 International Legal Perspectives 53.

4) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

5) *Attorney- General of the Government of Israel v. Adolf Eichmann*, (1962) 36 ILR 5.

6) See Nsereko, D., The ICC and Complementarity in Principle, (2013) 26(2) Leiden Journal of International Law 427, Jackson, M., Regional Complementarity: the Rome Statute and Public International Law, (2016) 14(5) Journal of International Criminal Justice 1061, and Cowell, F., Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court, (2017) 15(4) Journal of International Criminal Justice 667.

as regards the discussion below, article 1 does not also provide, as might be expected, that there is a positive obligation on states to exercise that jurisdiction. This is indicative of a discordance of practice more generally between international and national law providing for the possibility of the prosecution of persons for international crimes within the territory of states and the actual fact of a prosecution. The questions presently addressed are whether the UK and Japan follow this general international pattern, and if so whether they do so in a similar manner.

The UK Legislative Position

Pre-Rome Statute

Prior to 2001, the year that the UK and Scottish Parliaments incorporated aspects of the Rome Statute, the law and practice within the UK as regards the core international crimes primarily took the form of the enactment of the Geneva Conventions Act 1957, the Genocide Act 1969 and the War Crimes Act 1991.[7] The Geneva Conventions Act 1957, by section 1, originally criminalised the commission of a grave breach of articles 50, 51, 130 and 147 of the four Geneva Conventions respectively.[8] The Geneva Convention (Amendment) Act 1995 added a grave breach of Protocol 1 to the list in the 1957 Act. The Geneva Conventions and United Nations Personnel (Protocols) Act 2009 added crimes covered by Protocol 3 to the 1957 Act. The grave breaches, in general, prohibit various forms of mistreatment of persons *hors de combat*, certain forms of damage and destruction of property and the perfidious use of the Red Cross and related emblems.[9] The 1957 Act applies to all persons whatever their nationality and regardless of the locus of the act.[10] The terms of the Conventions are such that they estab-

7) See as regards England and Wales Grady, K., International Crimes in the Courts of England and Wales, (2014) 10 Criminal Law Review 683. For a discussion of the UK's and Canada's practice up to 1996 see Arnell, P., War Crimes - A Comparative Opportunity, (1996) 13(3) International Relations 29.

8) Those Conventions are cited in footnote 4 above. The Geneva Conventions Act 1957 has been amended following the UK's ratification of the two 1977 Protocols, by the Geneva Conventions (Amendment) Act 1995. Those Protocols being Protocol Additional to the 1949 Conventions on the Protection of Victims of International Armed Conflicts 1977 (Protocol 1), 1125 UNTS 3, and Protocol Additional to the 1949 Conventions on the Protection of Victims of Non-International Armed Conflicts 1977 (Protocol 2), 1125 UNTS 609. See generally Rowe, P., and Meyers, M. A., The Geneva Conventions (Amendment) Act 1995: a Generally Minimalist Approach, (1996) 45(2) International and Comparative Law Quarterly 476.

9) Grady, *supra* note 7, 710.

10) See O'Keefe, R., The Grave Breaches Regime and Universal Jurisdiction, (2009) 7 Journal of International Criminal Justice 811.

lish a duty to exercise jurisdiction over persons alleged to have committed grave breaches of the relevant Convention.

The Genocide Act 1969 was enacted to give domestic force in the UK to the Convention on the Prevention and Punishment of the Crime of Genocide 1948.[11] It brought into UK domestic criminal law (the Act applied throughout the UK) the crime of genocide as defined in article 2 of the Genocide Convention. Article 2 is repeated verbatim in paragraph 1 of schedule 1 to the Act. Jurisdictionally, the crime was not limited by any temporal, territorial or relationship-based conditions. Section 1 merely provides that a person commits an offence of genocide if he commits any act falling within the definition found in article 2 of the Genocide Convention. The Genocide Act 1969 was repealed by the International Criminal Court Act 2001 as regards England and Northern Ireland and the International Criminal Court (Scotland) Act 2001 as regards Scotland. This was, of course, because the crime of genocide is amongst those coming within the jurisdiction of the ICC, mentioned below.

The War Crimes Act 1991 criminalised murder, manslaughter and culpable homicide which violated the laws and customs of war committed during WWII in German-held territory. The preamble to the Act *inter alia* provides that the statute confers jurisdiction on UK courts in respect of certain grave violations of the laws and customs of war. It does not, however, define or explain what those laws and customs are. Jurisdictionally, the operative section is s 1(1) which gives jurisdiction to UK courts for the above offences irrespective of the accused's nationality at the time of the offence if that offence was committed between 1 September 1939 and 5 June 1945 in a place which was at the time part of Germany or under German occupation and it constituted a violation of the laws and customs of war. Section 1(2) limits this provision to persons who were or became British citizens or residents on 8 March 1990. Clearly this Act has limited scope, substantively, temporally and geographically. This is in part a consequence of objections to its passage though the UK Parliament.[12]

11) (1948) UNTS 78.

12) Indeed, the Act is one of the few that was enacted without the consent of the House of Lords, with the Parliament Acts 1911-1939 being invoked to allow that to happen. See Richardson, A.T., War Crimes Act 1991, (1992) 55 Modern Law Review 72. Richardson identifies the main substantive objection of principle being the 'rule of law' argument, viz. that the Act was "retrospective, selective and that no appropriate purpose for mounting a prosecution existed, apart from a desire for revenge, 76.

Incorporation of Rome Statute

The Rome Statute creating the International Criminal Court was adopted on 17 July 1998. The UK signed the treaty on 4 October 2001. The vast majority of the English, Welsh and Northern Irish incorporating legislation, the International Criminal Court Act 2001 (the ICCA), entered into force one month previously, on 1 September 2001. It created 61 substantive offences in English criminal law.[13] Due to the particular constitutional design of the UK, with Scottish criminal law being a responsibility of the Scottish Parliament, a separate statute was enacted in Scotland, the International Criminal Court (Scotland) Act 2001.[14] The offences under the ICCA comprise genocide, and certain crimes against humanity and war crimes.[15] Also criminalised are a number of ancillary acts relating to the substantive crimes, including conspiracy, incitement and attempt. As alluded to above, the operation of the ICC is based "… on the premise that states will share the burden of the investigation, prosecution and adjudication of core international crimes by undertaking proceedings at the national level".[16] According to the complementarity principle, then, the ICC will only become seized of a specific case where the state with jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution, under article 17(1) of the Rome Statute.

Jurisdictionally, the crimes under the ICCA apply to UK nationals, residents and persons subject to service jurisdiction. This has been termed 'enhanced' nationality jurisdiction.[17] The definition of 'residence' under the ICCA was clarified by an amendment made by the Coroners and Justice Act 2009, to include a number of categories of individual including those with indefinite leave to remain in the country, those with leave to remain for the purposes of work or study and those who have made a human rights to asylum claim which has been granted, in s 67A. Apart from the listed categories, in considering whether an individual is a resident for the purposes of the ICCA, a court must have regard to the period and purpose the individual has been or intends to be in the UK, their family and other connections, and any residential property interests.

13) Grady, *supra* note 7, 694.
14) The ICCA contains iterations of the offences applicable to Northern Ireland, in ss 58-59.
15) As noted, the ICCA repealed the Genocide Act 1969, by para 1 of schedule 10.
16) Grady, K., *supra* note 7 at 695, citing Bekou, O., Crimes at Crossroads: Incorporating International Crimes at the National Level, (2012) 10 Journal of International Criminal Justice 677, 677.
17) Williams, S., Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, (2012) 75 Modern Law Review 368, 374-375.

The Japanese Legislative Position

Pre-Rome Statute

The pre-Rome Statute position in Japan is very different from the UK. In general terms, this follows from the result and consequences of WWII. Specifically, Japan adopted two contradictory policies following WWII. War as a national policy was renounced by the Constitution, and accordingly Japan has not had armed forces. It has not been involved in armed conflict. On the other hand, Japan has been allied with the United States and has maintained its Self-Defense Forces (SDF). For decades, the introduction of a domestic law relating to war crimes was unlikely to happen, it was almost taboo. It was not until the 21st century that relevant legislation was introduced.

More particularly, in August 1945 Japan accepted the Potsdam Declaration, and thus unconditionally surrendered to the Allied Powers. Under their military occupation, both the Japanese Houses of Representatives and Peers overwhelmingly voted for the Bill to revise the Imperial Constitution in August and October 1946 respectively. The Constitution of Japan was promulgated by the Emperor in November 1946 and enacted in May 1947. The Constitution introduced pacifism as one of the three basic principles.[18] Paragraph 1 of article 9 of the Constitution "renounces war as a sovereign right of the nation" and "[i]n order to accomplish the aim of the preceding paragraph", paragraph 2 provides, "land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized".[19] In addition, paragraph 2 of article 76 provides that "[n]o extraordinary tribunal shall be established", which excludes the possibility of establishing a military tribunal. Article 96 provides a procedure to amend the Constitution, but it has not been amended since its enactment, and pacifism has become deeply rooted in Japan.

In spite of its pacifism, Japan was not immune from the effects of the Cold War. The Korean War broke out in June 1950, which accelerated the processes of ending the Allied occupation and the rearmament of Japan. Of importance is the formal end of the war, in September 1951, when the Peace Treaty Conference was held in San Francisco, and the Treaty of Peace with

18) The other two principles are the sovereignty of the people and respect for human rights.
19) The Constitution of Japan, Constitution November 3, 1946. The English translation of the Constitution is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/174 (accessed 7 December 2023)

Japan was signed.[20] According to article 1, peace was restored between Japan and the Allied Powers, and Japan regained its full sovereignty. Of note is that the Peace Treaty had a declaration in which the Japanese Government stated its intention to formally accede to international instruments, including the 1949 Geneva Conventions "within the shortest practical time, not to exceed one year from the first coming force of the Treaty of Peace". Accordingly, Japan acceded to the conventions in April 1953.[21] It did not, however, enact legislation giving effect to any of the terms in the Conventions, including the grave breach provisions.[22]

At the same time as the conclusion of the Peace Treaty, Japan and the United States signed the Security Treaty. According to its preamble the United States would maintain its armed forces in Japan "to deter armed attack upon Japan" which did not possess "the effective means to exercise its inherent right of self-defense because it has been disarmed".[23] Both the Peace and Security Treaties entered into force on 21 August 1952. Regarding the rearmament of Japan, soon after the outbreak of the Korean War, under the directive of General Douglas MacArthur, Japan created a National Police Reserve with 75,000 men in August 1950.[24] The Reserve was then transformed into National Safety Forces in October 1952, which later became SDF in July 1954.[25]

Incorporation of Rome Statute

The Rome Statute creating the ICC was adopted on 17 July 1998, as noted above. Japan did not sign the Statute at that point because it was not legally ready to deal with war crimes.[26] In 2004, however, Japan adopted legisla-

20) Treaty of Peace with Japan (with two declarations) (signed at San Francisco, on 8 September 1951, entered into force on 21 August 1952) 136 UNTS 45.

21) ICRC, States Party to the Following International Humanitarian Law and Other Related Treaties as of 25 September 2023, available at https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf (accessed 7 December 2023).

22) See Kurosaki, M., Sakamoto, S., Nishimura, Y., Ishigaki, T., Mori, T., Mayama, A. and Sakai, H., *Law of Armed Conflict and International Security: A Practitioners' Manual*, (Koubundou, 2021), 1571.

23) Security Treaty Between the United States and Japan (signed at San Francisco, on 8 September 1951, entered into force on 21 August 1952) 136 UNTS 211.

24) Chapter 5 (d), Modern Japan in archives, National Diet Library, Japan, available at https://www.ndl.go.jp/modern/e/cha5/description13.html (accessed 8 December 2023).

25) A concise history of the Self-Defense Forces can be found in Japan Ministry of Defense, About Ministry, available at https://www.mod.go.jp/en/about/index.html (accessed 8 December 2023).

26) See Nakauchi, Y., Kokusai shakai ni okeru hou no kakuritsu ni mukete ~ Kokusai keiji saibansho roma kitei・kokusai keiji saibansho kyoryoku houan no kokkai giron [Towards establishing the rule of law in international community: Debates in the Diet about the Rome Statute of the International Criminal Court and a bill on Cooperation with the International Criminal Court], (2007) No. 207 Rippo to chosa (Legislation and Research) 3, 3-4.

tion to cope with emergency situations. That legislation was influenced by international relations at that time. Situations included growing concerns over terrorism, missile threats from North Korea and the Iraq War. The legislation included the Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations[27] and the Act on Penal Sanctions against Grave Breaches of the International Humanitarian Law.[28] In addition, Japan acceded to the 1977 Protocols additional to the 1949 Geneva Conventions on 31 August 2004.[29] At this point Japan finally introduced penal sanctions criminalising war crimes, but it should be pointed out that the Act on Penal Sanctions against Grave Breaches contained only four crimes; that of destroying important cultural heritage (article 3), delaying the returning of prisoners of war (article 4), transporting to occupied territories (article 5) and precluding civilians from leaving Japan (article 6).[30] This limited form of incorporation was founded on the view of the Japanese Government that the existing laws, including the Penal Code, could deal with most of the grave breaches of the Geneva Conventions. Only a limited number of new crimes were therefore introduced.[31] Yasushi Masaki, official of the Ministry of Foreign Affairs who was then involved in the enactment of the legislation, stated that the introduction of emergency legislation "promoted the general understanding of international humanitarian law in a broad sense" and that Japan would become a member of the ICC sooner or later.[32]

Japan did not accede to the Rome Statute for another three years. The Rome Statute was eventually submitted to the Diet for approval in February 2007. Four reasons were given at the Diet by the then Prime Foreign Minister, Taro Aso, for the delay. First, he noted that the Government had to consider the consistency between the crimes within the Rome Statute and the relevant crimes in Japanese law; second, new law to suppress crimes which hampered the activities of the ICC had to be introduced; third, the Government had undertook research into the implementation of the Rome Statute in foreign countries; and fourth, it had to prepare for paying its contribution

27) Act No. 117 of June 18, 2004. The English translation of the Act is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3801 (accessed 12 December 2023).
28) Act No. 115 of June 18, 2004. Only the English translation of the title of the Act is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/1590 (accessed 8 December 2023).
29) See ICRC, *supra* note 21.
30) The author's translation.
31) See Kurosaki *et al*, *supra* note 22, 1571.
32) Masaki, Y., Nippon to kokusai keiji saibanjo [Japan and International Criminal Court], Murase, S. and Ko, K. (eds), *International Criminal Court,* Second Edition, Tokyo, Toshindo, 2014, 355-384, 359.

to the ICC.[33] Regarding the first three legal points, the Government did not find it necessary to introduce new domestic law to suppress the crimes provided by the Rome Statute, because the crimes provided by the Penal Code, such as crimes of homicide and injury could deal with the crimes under the Statute.[34] Whilst countries, such as Canada, Germany, the Netherlands and, as seen, the UK, introduced new domestic measures to incorporate the Rome Statute, the Japanese Government considered that the treaty did not oblige state parties to criminalise the specific crimes under the Statute and so found it unnecessary to introduce new crimes.[35]

The Rome Statute was approved by the Diet on 27 April 2007[36], the instrument of accession was deposited to the UN Secretary-General on 17 July and the treaty came into force for Japan on 1 October. In spite of it being considered unnecessary to create substantive new crimes, the Japanese Government did feel it needed to introduce law concerning investigative, procedural and cooperative matters and crimes against the administration of the ICC.[37] The Act on Cooperation with the International Criminal Court was promulgated on 11 May 2007[38], and entered into force 1 October. Article 1 of the Act states:

> The purpose of this Act is to ensure the proper implementation of the Rome Statute of the International Criminal Court (hereinafter referred to as the "Statute") by prescribing procedures concerning the cooperation necessary for investigations, trials, execution of a sentence, etc. by the International Criminal Court (hereinafter referred to as the "ICC")

33) Nakauchi, *supra* note 26, 3. Regarding the original statement of the Foreign Minister, see The House of Representatives, Japan, 166th Session of the Diet, Committee on Foreign Affairs, Minute No. 5, 28 March 2007, available at https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/000516620070328005.htm#p_honbun (accessed 11 December 2023) (available in Japanese).

34) Nakauchi, *ibid*., at 4. Regarding the original statement of the Minister of Foreign Affairs, see The House of Representatives, Japan, 166th Session of the Diet, Plenary Sitting, Minute No. 15, 20 March 2007, available at https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/000116620070320015.htm (accessed 11 December 2023) (available in Japanese).

35) *Ibid*. Regarding the original statement of the Deputy Assistant Minister of Foreign Affairs, see House of Councillors, 166th Session of the Diet, Committee on Foreign Affairs and Defense, Minute No. 8, 26 April 2007, 11, available at https://kokkai.ndl.go.jp/simple/dispPDF?minId=116613950X00820070426#page=2 (accessed 11 December 2023) (available in Japanese).

36) Treaties are required to be approved by the Diet under article 73, paragraph 3 of the Constitution.

37) Nakauchi, *supra* note 26, 6.

38) Act No. 37 of May 11, 2007. The English translation of the Act is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3989#je_s1 (accessed 11 December 2023).

> with regard to the crime of genocide and other most serious crimes of concern to the international community as a whole that are specified in the Statute, and by providing penal provisions for acts that obstruct the administration of the ICC.[39)]

In order to facilitate cooperation with the ICC, the Act provides for the provision of evidence (articles 6 to 13), the surrender of an accused person (articles 19 to 33) and cooperation with enforcement (articles 38 to 48). In addition, the Act creates offences related to the administration of the ICC (articles 53 to 65), such as destruction of evidence (article 53), intimidation of a witness (article 54), bribery of a witness (article 55), destruction of evidence related to organized crime (article 56), perjury (article 57), acceptance of a bribe (article 58), and offering of a bribe (article 63).[40)]

Analysis – the Prosecution of International Crimes

There is no doubt that there is a considerable disconnect between incorporated core international crimes, instances of egregious criminal behaviour across the planet, and their prosecution in both the UK and Japan. In the UK, there have only been two persons convicted of crimes within the legislation outlined above. In 1999 Anthony Sawoniuk was convicted under the War Crimes Act 1991 of two counts of murder which occurred in Belorussia under Nazi occupation in 1942.[41)] In 2006 Donald Payne was convicted of a crime under the International Criminal Court Act 2001, namely the war crime of inhuman treatment in relation to individuals detained in Iraq.[42)] There have been no prosecutions under the relevant legislation in Japan. The reasons for these facts are, in general terms, similar in the UK and Japan. There are, however, differences between the countries that further

39) *Ibid*.

40) *Ibid*. Regarding the Japanese accession to the Rome Statute and the introduction of the Act on the Cooperation with the ICC, see Kurosaki *et al*, *supra* note 22, 1687.

41) Sawoniuk unsuccessfully challenged his conviction in R v Sawoniuk, [2000] 2 Cr App R 220. See generally Hirsh, D., The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination, (2001) 10 Social and Legal Studies 529.

42) See First British Soldier to be Convicted of a War Crime is Jailed for Ill-treatment of Iraqi Civilians, 1 May 2007, The Guardian, cited at https://www.theguardian.com/uk/2007/may/01/military.iraq (accessed 12 December 2012). See also Rasiah, N., The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice, (2009) 7 Journal of International Criminal Justice 177. One person has also been convicted of conspiracy to torture under s 134 of the Criminal Justice Act 1998. That is of Faryadi Zardad in 2005, his conduct relating to his conduct in Afghanistan in the 1990s. See Zardad unsuccessfully appealed against his conviction, reported as R v Zardad [2007] EWHC Crim 279. See also Metcalfe, E., Torture and the Boundaries of English Law, (2005) 2(2) Justice Journal 79.

explain the situation.

There are undoubted practical obstacles to prosecuting international core crimes domestically, including those under the Rome Statute.[43] Illustrating this fact is that, in the UK, the War Crimes Unit investigated 1863 people for genocide, war crimes and crimes against humanity between 2004-2008[44] and, as noted, there was only one prosecution leading to a conviction over that period. While this fact does not in itself support any particular reason or reasons for the dearth of prosecutions, it is not unreasonable to conclude that in certain of the cases at least evidential and procedural difficulties were germane. In England and Wales a prosecution can only proceed if there is sufficient evidence such that there would be a realistic prospect of conviction and that the public interest test is met.[45] As Grady notes, "The challenge of obtaining evidence in cases where the conduct occurred abroad, and therefore much (or perhaps all) of the documentary evidence and witnesses are overseas, is formidable and expensive".[46] Mutual legal assistance treaties may or may not exist between the UK, Japan and the country where the alleged acts have occurred. The use of technology such as video links, and the use of interpreters may cause further hurdles in the way of the institution of a prosecution.[47]

A further relevant consideration is that countries which have had international crimes committed in their territory may be unwilling to provide evidence to third countries where the crimes may have been "perpetrated by state officials with the acquiescence, tolerance or support of" those in

43) See as regards England and Wales, but applying to a degree in other jurisdictions Grady, *supra* note 7. See also See Cryer, R. and Bekou, O., International Crimes and ICC Cooperation in England and Wales, (2007) Journal of International Criminal Justice 441. And Williams, S., Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, (2012) 75 Modern Law Review 368. And Cryer, R. and Mora, P.D., Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future (2010) 59 International and Comparative Law Quarterly 803.

44) Cryer, *ibid*, 813 footnote 73.

45) The *Code for Crown Prosecutors* sets out the general principles that should be followed when coming to a decision to prosecute, at https://www.cps.gov.uk/publication/code-crown-prosecutors, (accessed 11 December 2023). The public interest test provides that where there is sufficient evidence a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour, para 4.10.

46) Grady, *supra* note 7, 717.

47) Here the question of witness protection and intimidation comes to the fore. With international crimes normally emerging from conflict situations, there are almost certainly continuing political animosities within the countries where the alleged crimes occurred. See further Grady, *supra* note 7, 719. The context of such crimes also gives rise to significant amounts of evidence, *ibid*, 720.

positions of power.[48] This fact raises the need for a considerable degree of political will for prosecutions to take place, not only by those in power in the situs of the alleged crimes but also by those authorising and undertaking a prosecution. As Meron notes, reasons for the rarity of national prosecutions include a "lack of resources, evidence and, above all, political will".[49] Nserko adds to this list "… the undue homage that states have tended to accord to national sovereignty and to the principle of non-interference in each other's internal affairs".[50] Overall, there is no doubt that there are considerable hurdles in the way of prosecution of international core crimes in the UK and Japan, and indeed all countries. Additionally as regards Japan, the country's general military disengagement following WWII has meant that there have not been situations where Japanese nationals have been involved in hostilities where international crimes could be committed.[51] This fact, in itself, explains to a not-inconsiderable degree the lack of Japanese prosecutions.

Cooperation with the ICC

A question issue arising in light of the very small number UK prosecutions and the complete lack of proceedings in Japan as regards core international crimes is whether the two countries are, apart from enacting domestic legislation, cooperating in good faith in the fight against international crimes. The answer appears to be mixed. One avenue of cooperation is through putting forward judges for election to the ICC. In this respect both the UK and Japan have been active. Indeed, both countries have had a judge at the ICC for some time. As regards the UK, Sir Adrian Fulford sat as a judge from 2003 to 2012, Howard Morrison sat from 2012 to 2021, and Joanna Korner is sitting as a judge presently. Her term started in March 2021. As regards Japan, similarly, three judges have been elected to the ICC since it became a state party to the Rome Statute in 2007. There was a by-election of ICC judges in November 2007, and Fumiko Saiga was elected as an ICC judge,

48) Grady, *supra* note 7, 718, citing Cassese *et al*, *supra* note 2, 271.
49) Meron, T., International Criminalization of Internal Atrocities, (1995) 89 American Journal of International Law 554, 555.
50) Nserko, *supra* note 6 at p 428-429.
51) It should be noted that Japan has participated in peacekeeping activities since the 1990s, so Japanese nationals have been present in conflict zones outside its territory in that capacity. See Fujishige, H.N., Uesugi, Y., and Honda, T., *Japan's Peacekeeping at a Crossroads: Taking a Robust Stance or Remaining Hesitant*, Springer, Cham, 2022, at https://library.oapen.org/handle/20.500.12657/52836 (accessed 12 December 2023).

as she won 82 votes out of 105, "the largest number among all candidates".[52] According to Masaki, the Japanese Government was of the opinion that "Japan should send a judge to the ICC as soon as possible" rather than waiting for a normal election of 2009.[53] In November 2009, Kuniko Ozaki was elected as a judge[54], and later in March 2015 she was elected as the Second Vice President of the ICC.[55] In December 2017, Tomoko Akane, Ambassador for International Judicial Cooperation was elected as a judge.[56] In this respect both the UK and Japan have contributed to the goal of preventing and punishing the core international crimes.

In a different vein are the positions of the UK and Japan as regards amendments to the Rome Statute following the Kampala Review Conference in 2010. State Parties to the Statute adopted by consensus two resolutions amending the crimes under the jurisdiction of the ICC. Of the most general relevance is Resolution 6, which provided a definition and a procedure for the jurisdiction of the ICC over the crime of aggression.[57] Whilst both the UK and Japan took part in the conference, neither has ratified the amendments on the crime of aggression.[58] Nor have they amended their law to reflect the Resolution. It may be seen, however, that Japan's willingness to amend the Statute as regards aggression was notable since Japanese leaders were tried for such a crime by the International Military Tribunal for the

52) Ministry of Foreign Affairs of Japan, Election of Ms. Fumiko Saiga, Ambassador in Charge of Human Rights and Member of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), as Judge of the International Criminal Court (ICC), December 1, 2007, available at https://www.mofa.go.jp/announce/announce/2007/12/1176491_840.html (accessed 12 December 2023).

53) Masaki, *supra* note 32, 369.

54) Ministry of Foreign Affairs of Japan, Statement by Mr. Katsuya Okada, Minister for Foreign Affairs, on the Election of Ms. Kuniko Ozaki, Professor at the National Graduate Institute for Policy Studies and Special Assistant to the Ministry of Foreign Affairs of Japan, to the International Criminal Court (ICC), November 19, 2009, available at https://www.mofa.go.jp/announce/announce/2009/11/1197505_1146.html (accessed 12 December 2023).

55) Ministry of Foreign Affairs of Japan, Statement by Foreign Press Secretary Yasuhisa Kawamura on the Election of Judge Kuniko Ozaki of the International Criminal Court (ICC), as the Second Vice President of the Court, March 12, 2015, available at https://www.mofa.go.jp/press/release/press4e_000672.html (accessed 12 December 2023).

56) Ministry of Foreign Affairs of Japan, The Election of Ms. Tomoko Akane, Ambassador for International Judicial Cooperation and Public Prosecutor of Supreme Public Prosecutors Office of Japan as Judge of the International Criminal Court (ICC) (Statement by Foreign Minister Taro Kono), December 5, 2017, available at https://www.mofa.go.jp/press/release/press4e_001824.html (accessed 12 December 2023).

57) See https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf (accessed 12 December 2023).

58) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (accessed 11 December 2023). See also Kurosaki et al, *supra* note 22, Chapter 13, note 128.

Far East. The San Francisco Peace Treaty, noted above, provided that Japan accept the judgments of the Military Tribunal (article 11). This led to strong criticism in Japan that the judgments were the result of *ex post facto* law, and therefore Japan should not be actively involved in the debates about the crime of aggression.[59] However, Japan emphasized the importance of the ICC's jurisdiction over the crime of aggression since its leaders were judged at the Tribunal held in Tokyo.[60] Thus, at the Kampala Review Conference, Ambassador Ichiro Komatsu of Japan made a statement, part of which was as follows:

> Let me, instead, emphasize once again how much Japan considers it important for the ICC to become able to exercise its jurisdiction over the crime of aggression. There is a historical for this. Japanese nationals were convicted of crime against peace and of war crimes by the International Military Tribunal for the Far East. Japan solemnly accepted its judgments by virtue of the San Francisco Peace Treaty. As a country with an ingrained memory of the history and lessons learned therefrom, Japan firmly believes that ICC should be able to exercise its jurisdiction over the crime of aggression. And international criminal tribunals should not be operated on the basis of ex post facto law. Any criminal suspect should be prosecuted and punished based on the principle of legality including due process of law.[61]

There is, in both the UK and Japan, a recognition that international law and the ICC in particular are important in the fight against the most egregious crimes committed by mankind. There are, however, undoubted and significant hurdles in the national prosecution of them.

59) Okano, M., Shinryaku hanzai kitei saitaku he no koken [Contribution to the adoption of provisions relating to the crime of aggression], Yanai, S. and Murase, S. (eds), *Putting International Law into Practice: In Memory of Ambassador Ichiro Komatsu*, (Shinzansha, 2015), 249-268, at 255. Okano was Director of Policy Coordination Division, Ministry of Foreign Affairs of Japan, at the time of writing the article.

60) Ministry of Foreign Affairs of Japan, Kokusai keiji saibansho (ICC) roma kitei kento kaigi (kekka no gaiyo) [The summary of the result of the Review Conference of the ICC Rome Statute], 11 June 2010, available at https://www.mofa.go.jp/mofaj/gaiko/icc/rome_kitei1006.html (accessed 12 December 2023); Okano, *ibid*.

61) Ministry of Foreign Affairs of Japan, Statement by H.E. Mr. Ichiro Komatsu Special Envoy of the Government of Japan Ambassador Extraordinary and Plenipotentiary of Japan at the Review Conference of the Rome Statute of the International Criminal Court (ICC) 4 June 2010, Kampala, available at https://www.mofa.go.jp/policy/i_crime/icc/pdfs/statement_1006.pdf (accessed 12 December 2003). The statement was reprinted in Okano, *supra* note 59, 257-260.

Conclusion

The UK and Japan, with very different histories over the past 75 years, have both become party to many of the leading international criminal treaties including those which are designed to prevent and punish those who commit or participate in the core international crimes of genocide, crimes against humanity and war crimes. They have enacted domestic legislation in furtherance of their obligations under certain of those agreements. Domestic prosecutions, however, have been very rare or indeed non-existent. This is a function of history, politics, geography, evidence and procedure. It is clear that both the UK and Japan should seek to prosecute such crimes where the circumstances arise. Doing so would send important signals to the international community. Through the passage of domestic legislation and the participation of judges at the ICC both countries can be said to be acting to the minimum level required.[62] Ratifying the crime of aggression protocol would send a further positive signal. In the absence of the United States, India, Russia and China both the UK and Japan have the opportunity, some might say moral obligation, to play a leading role in the global effort to prevent and punish the world's most serious crimes.

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62) That noted, Japan was the largest contributor to the ICC's budget to the year ending 2020 (contributing 24,311,100 euros), with the UK fourth, after Germany and France, (contributing 12,143,931 euros), see Financial statements of the International Criminal Court for the year ended 31 December 2020, at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-12-ENG.pdf (accessed 12 December 2023) 46.