Law across borders: the extraterritorial application of United Kingdom law.

ARNELL, P.

2012

Chapter 1 – Introduction

Introduction

Increased international intercourse by persons and states has given rise to an enhanced desire to apply law across borders. The United Kingdom is amongst the states acting on this desire. UK law is increasingly applied to persons and circumstances that in some way exist or occur outside its territory. Not only does it occur more frequently than in the past it also relates to a wider range of legal fields. Traditionally the criminal law was the sole field of non-private law that was applied across borders. Today human rights law is also not uncommonly considered to relate to persons or circumstances outside the UK. The position is complicated further by distinct institutions and component parts of the UK acting in the area with the UK and Scottish Parliaments, domestic and European courts and the UK executive all playing a part. The increased frequency of law being applied across borders, human rights law joining the criminal law in being applied in this way and the number of actors involved heightens the necessity for clarity and consistency. This is in part because those possibly subject to UK law whilst outside it, be that a criminal sanction or human rights protection, deserve to be aware of that fact. Indeed, those persons possibly subject to the criminal law whilst outside the UK may have their right to be free from the non-retroactivity of the criminal law violated where the law is unclear.[1] Further, the need for consistency and clarity results from the degree of commonality between the criminal law and human rights law to the extent that they are being related to persons and events outside the UK. It is desirable that where the law operates in a similar way in different fields it does so, as far as possible, in a kindred manner based upon common principles. Where the law does not apply in a like manner, this should be for clear and defensible reasons. There is undoubtedly a need for principle to run through the application of all UK law applied across borders. The law should as far as possible be predictable. Finally, clarity and consistency are called for because in most cases the locus of the person or circumstance to which UK law is applied across borders is within a third state. That state will almost certainly be entitled under international law to apply its own law in the circumstances and so the issue of concurrent jurisdiction arises. A clear, consistent and principled approach within UK law can not only assist it in deciding whether to proceed and apply its law, but can also be used in coming to a decision as to where proceedings should take place in the face of concurrent jurisdiction. The factors supporting clarity and consistency in the law will become further evident throughout *Law Across Borders*.

Investigation into the application of UK law across borders not only serves to meet the demand for clarity and consistency. It also addresses the basic question of why it is felt necessary by the UK Parliament, courts or executive to apply the law across borders in the first instance. Related to this is why a line is drawn at any particular point and why does the UK not take a more expansive approach to that it presently does. The answer to these questions is found in the notion of the national interest. The UK largely applies its law across its borders in an effort to protect or secure its interests. As Jennings noted over a half-century ago in regard to why states act and the limits of international law:

> 'States claim extraterritorial jurisdiction in cases where they believe their legitimate interests to be concerned; whether that assumption be rationalized and expressed by means of the nationality claim, the objective territorial claim, the security claim, the passive personality claim or the universality claim. It is reasonable to say, therefore, that international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved... [A] State has a right to extraterritorial jurisdiction where its legitimate interests are concerned...'.[2]

---

[1] Found in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter the Convention).

[2] Jennings, R.Y., Extraterritorial Jurisdiction and U.S. Antitrust Laws, (1957) 33 BYIL 146 at pp 152- 53.

A related comment is that the application of law across borders is '… as a matter of law… presented as an issue of jurisdiction, the underlying problem is one of State interests'.[3] Whilst this simple fact – that the UK applies its law across borders where it deems its national interest requires – may seem axiomatic there are instances where the law is applied in the absence of readily apparent interests. Indeed it may at times be thought the application of law is inimical to such interests. Examples here include the crime of torture abroad by non-UK nationals and residents under section 134 of the Criminal Justice Act 1988, the criminalisation of various child-sex offences committed abroad under the Sex Offenders Act 1997 and the application of article 2 of the Convention to the death in Iraq of an Iraqi national.[4] In these instances it is not wholly unreasonable to argue that the application of UK law is at odds with its national interest for reasons including that the victims are almost certainly non-nationals, the *locus delicti* or human rights violation was outside the UK and doing so would entail a not-insubstantial financial cost.

Discussion of the question of why the UK does not take an even more expansive approach to the application of its law across borders is perhaps even more illuminating than why it does in specific cases. The answer is found in the interests of, and limits imposed by, international law and third states and practical difficulties. Public international law, whilst arguably vague and lacking in the provision of a clear and immediate legal deterrent, places limits on the range and nature of applicability of domestic law. Related to this in that the practice of states gives rise to rules of public international law is the fact that the UK is one of approximately 200 equal and sovereign states. In order to be able to legitimately defend its own sovereignty and lawful ability to apply its law within and exceptionally outside its territory it must act in a relatively limited and restrained manner. Perhaps as effective in limiting the scope of UK law is the fact that the enforcement of law across borders is inherently problematic. Procedural and evidential difficulties often conspire to affect its enforcement. Indeed, there exist indubitable legal and practical barriers to the application of law of UK law across borders The law applied in too wide a sense, even if lawful, may be ineffective and prohibitively expensive. These limitations upon the application of UK law across borders raise an important underlying point. This is that the application of law across borders is and should be exceptional. The UK has traditionally and correctly taken a relatively narrow and conservative approach – generally only applying its law where there are material links between it and the crime, criminal, human rights victim or violation. As will be argued in Chapter 5 there are strong and numerous reasons why this approach should be retained.

The fact that the application of UK law has been noteworthy in recent times because of its increasing frequency and breadth should not be construed to suggest that the phenomenon is novel. Indeed the application of law across borders is almost as old as law itself. For example the law has been applied across UK borders for as long as there have been diplomacy and piracy. The application of UK law to diplomats abroad, a concomitant of their immunity to host state jurisdiction, dates from 1698-99. An Act to Punish Governors of Plantations in this Kingdom for Crimes by them Committed in the Plantations, extended the reach of English criminal law to Crown servants abroad.[5] Today section 31(1) of the Criminal Justice Act 1948 provides for the extension of the criminal law to Crown servants abroad. Article 31(4) of the Vienna Convention on Diplomatic Relations 1961 confirms the legality of such practice, providing that 'The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State'. In regard to piracy, Viscount Sankey begins his narrative of the crime in *In Re Piracy Jure Gentium* with the Act of Henry VIII., cap. 15, enacted in 1536, entitled 'An Act for the punishment of pirates and robbers of the sea', after noting the previous deficiencies in the law as applied to pirates.[6] Law and society, in many senses, have

---

[3] Roth, P.M., Reasonable Extraterritoriality: Correcting the 'Balance of Interests'"[1992] ICLQ 245 at p 273. The statement is made in the context of competition law.
[4] Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant), [2007] UKHL 26.
[5] 11 Will.3, c.12.
[6] In Re Piracy Jure Gentium, [1934] AC 586 at 589.

evolved considerably since 1536 – although piracy and diplomacy remain relevant subjects in the area. Over the centuries the state has chosen to regulate an ever wider range of behaviour, and individuals have become considerably more active in a number of diverse ways internationally. Recent examples of situations in regard to which UK law has been applied include a meeting of representatives of private companies in Houston Texas[7], a murder in Guyana twenty years after it was committed[8], and an individual's possible medical treatment in Estonia.[9] As these different examples illustrate the historical scope of the law applied across borders has been widened considerably.

General Subject Matter

The subject matter of this book is UK non-private law applied across borders. In broad terms this entails the UK executive, legislature or judiciary acting in regard to, providing for, or taking cognisance of a person, event or circumstance occurring at least in part outside UK territory. It is here useful to give several concrete examples. 'Acting in regard to' can include treatment meted out, or possibly meted out, by those acting on behalf of the UK as in the case of *R v Secretary of State for the Foreign and Commonwealth Office, ex parte B and Others*.[10] Here the question was whether human rights law applied to the behaviour of consular officials in Australia. 'Providing for' denotes the enactment or issuance of legislative rules. Amongst the numerous examples in the criminal law are those crimes created under the International Criminal Court Act 2001 and the International Criminal Court (Scotland) Act 2001. Section 51(2)(b) of the International Criminal Court Act 2001 extends the application of the crimes of genocide, war crimes and crimes against humanity to acts committed '… outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction'. A further example is the Export Control Order 2008, which prescribes the shipment of a number of weapons and other goods between two states outside the United Kingdom, where done by 'United Kingdom persons'.[11] 'Taking cognisance of' signifies instances where courts or tribunals within the UK recognise and consider persons, events or circumstances not wholly within it. An example of this is the conviction and sentence in Southwark Crown Court of the 'Dunlop Three' for offences under section 188 of the Enterprise Act 2002, in part for cartel-related activity in the United States.[12] The provision giving the court ability to act was section 190(3) which states 'No proceedings may be brought for an offence under section 188 in respect of an agreement outside the United Kingdom, unless it has been implemented in whole or in part in the United Kingdom'.[13] All of these examples are instances where UK law has been applied in some sense applied across its border. An important preliminary point to note is that what has happened in these cases is that the law has been extended geographically. This is distinct from the question of whether a court has the lawful ability to take cognisance or the person, event or circumstance. This distinction is described by Hirst as being between the ambit of the law and the jurisdiction of courts.[14]

---

[7] The so-called Dunlop Three were sentenced 10 June 2008 for an offence under the Enterprise Act 2002.
[8] Michael Cheong was convicted under s 10 of the Offences Against the Person Act 1861 at the Old Bailey on 8 August 2005 for a murder committed in Guyana in 1982, see <http://news.bbc.co.uk/1/hi/uk/4132374.stm>, accessed 20 May 2011.
[9] Wright v Scottish Ministers, (No. 2), 2005 1 SC 453.
[10] [2005] QB 643.
[11] 2008 SI 3231. "United Kingdom person" is defined as a United Kingdom national, a Scottish partnership or a body incorporated under the law of any part of the United Kingdom by s 11(1) of the Export Control Act 2002.
[12] See Office of Fair Trading Press Release, 11 June 2008, at <http://www.oft.gov.uk/news-and-updates/press/2008/72-08>, accessed 20 May 2011, and Lucraft, M., et al, The Dunlop Three – the Cartel Offence Makes its Debut, 2009 Archbold News 7.
[13] See MacCulloch, A., The Cartel Offence and the Criminalisation of United Kingdom Competition Law, [2003] Journal of Business Law 616.
[14] Hirst, H., *Jurisdiction and the Ambit of the Criminal Law,* Oxford University Press, Oxford, 2003, Chp. 1 esp. pp 9 - 15.

Law Across Borders is not immediately and generally concerned with the lawful ability of a court (or the executive or legislature) to act in regard to a person or circumstance abroad according to UK law. Instead its focus is upon the geographical scope or range of the law as applied to persons or circumstances in whole or part outside the UK. The two subjects, however, cannot be fully isolated from each other. They are often conflated by academic writers and courts, with the question of whether a court can lawfully take cognisance of an issue being indistinct from the question of whether the law applies at all. Part of the explanation for the confusion over this basic point is the usage of the term 'jurisdiction' to denote both subjects, and indeed more. 'Jurisdiction' is used in the sense the lawful ability of a court to act, in regard to the Crown Court, by s 46(2) of the Senior Courts Act 1981, which provides:

> 'The jurisdiction of the Crown Court with respect to proceedings on indictment shall include jurisdiction in proceedings on indictment for offences wherever committed, and in particular proceedings on indictment for offences within the jurisdiction of the Admiralty of England'.

'Jurisdiction' here denotes a lawful ability, competence or power. Indeed, section 151 of the Senior Courts Act 1981 states that 'jurisdiction' includes 'powers'. The second main meaning of jurisdiction relates to the geographical or territorial range of the law. This sense, more often than not, includes the legislature and executive and indeed the UK as a state itself as well as courts. It originates and still largely remains in the realm of public international law. As will be discussed in Chapter 2 there is a somewhat well-developed body of rules which govern the application of a state's law to persons and circumstances outside its territory. This issue is often phrased in terms of whether the UK has 'jurisdiction' over a certain situation, for example such as torture committed by a foreign national on the high seas. The word within article 1 of the Convention appears to have this sense. Article 1 provides 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Because of the different meanings of 'jurisdiction', *Law Across Borders* generally eschews the word. Instead 'application' is used. This more accurately describes the subject matter of the book – UK criminal and human rights law related to persons and circumstances in some sense outside the UK border.

Exclusions

The application of UK law across borders is the subject of this book. Particularly, *Law Across Borders* addresses the criminal law and human rights law. Excluded – at least directly – is private law. There are two reasons for this. The first is that non-private law applied across borders itself merits examination and analysis. Whilst there have been a number of works looking at the criminal law and human rights law in isolation, there is not a single source which examines them together and searches for commonalities between them. There is a gap in the literature in this regard. The second reason is that private law is fundamentally different than non-private law, both in general and in its application across borders. Private law applied across borders by and large fails to engender the same basic concerns and issues as the application of non-private law. Private law axiomatically affects directly natural and legal persons in areas that are not public. Here the state itself has relatively little direct and tangible interest. For example the content of a standard UK private international law text covers the law of obligations, family law and property law.[15] A contractual dispute between two parties domiciled in different countries, for example, is not necessarily in the immediate interest of either state. The difference between private and non-private law in regard to the interest and role of the state is significant. It underlines the logic of separate analysis. For example, questions relating to state sovereignty are not central to the application of private law across borders whilst they are in non-private areas. It must be noted, however, that the exclusion of private international law from direct exposition in *Law Across Borders* does not mean that it finds no presence in the book. As will be seen below, one of the

[15] Fawcett, J., and Carruthers, J.M., *Cheshire, North and Fawcett Private International Law*, Fourteenth Edition, Oxford University Press, Oxford, 2008.

recurring themes in *Law Across Borders* is that a proper law approach is emerging and discernable where the criminal law and human rights law are applied across borders. The proper law approach has its origins in private international law. It is argued below that this private international law doctrine is beginning to play a role, and rightfully so, in the application of UK non-private law across borders.

Forms of Application – Judicial, Legislative, and Executive

The application of law across borders can be carried out by different arms of the UK – the judiciary, legislature and executive. In some cases one of these will act alone and in others two or even all three will jointly apply the law. A well-known example where the law is applied across borders by the judiciary, legislature and executive in regard to the same situation is found in the case of Baha Mousa. Judicially, the case at its most authoritative level to-date is found in the House of Lords decision of R (on the application of Al-Skeini) v Secretary of State for Defence.[16] The main issue here was whether the human rights of the father of Baha Mousa were violated following the death of his son in the course of being restrained in Iraq by British soldiers. Legislatively, it was argued and in part accepted by the Secretary of State that the Human Rights Act 1998 (HRA) applied to the locus of the incident, with the question also being whether the circumstances of the death were 'within the jurisdiction' of the UK under the Convention. The executive branch of the UK was centrally involved in the case in the form of its armed forces acting within Iraq and exercising therein a degree of control and being responsible for the death of Mousa. As a result of differing arms of the UK being involved in the application of the law across borders it is necessary to discuss how in fact the law is so applied.

The different forms of the application of UK law across borders can be described and analysed in a number of ways. Most analyses come from the perspective of public international law. One well-known statement on the subject is found in the *Restatement of the Law (Third), Foreign Relations Law of the United States*.[17] Section 402 of which, entitled Categories of Jurisdiction, states:

> 'Under International law, a state is subject to limitations on
> (a) jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
> (b) jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to those proceedings;
> (c) jurisdiction to enforce, i.e., to induce or compel compliance or punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action'.[18]

This iteration does two things. It illustrates the difference ways in which law can be applied across borders and it provides authority for the point that international law places limits on that application – something discussed in Chapter 2.

In line with the American Law Institute in identifying three distinct areas of state competence is Akehurst, who designated them legislative, judicial and executive jurisdiction defined as the 'power of a State to apply its laws to cases involving a foreign element', 'power of a State's courts to try cases involving a foreign element' and 'power of one State to perform acts in the

[16] [2008] 1 AC 153. A decision of the European Court of Human Rights in the case is pending. The case in general is discussed further below.
[17] American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States*, American Law Institute Publishers, St Paul Minn., 1987.

[18] Ibid. at p. 232.

territory of another State' respectively.[19] Brownlie, in contrast, proffered only two areas, stating that 'Distinct from the power to make decisions or rules (the prescriptive or legislative jurisdiction) is the power to take executive action in pursuance of or consequent on the making of decisions or rules (the enforcement or prerogative jurisdiction)'.[20] This approach is logical in that the legislative and judicial application of the law can sit together, with the enforcement of that law apart. This follows the simple fact that the UK can in the first instance freely enact law and apply it judicially within its borders in regard to persons or circumstances outside it, but it cannot enforce that law in the territory of another state without that state's consent. In regard to the criminal law, for example, the UK cannot generally arrest, try or imprison a person outside its territory. The presence of the accused within it is required. The executive enforcement of the criminal law outside the UK *i.e.* the exercise of UK power in regard to criminal matters in an area within the area of legitimate territorial control of another state without its consent is unanimously regarded as contrary to international law.[21] Conflating the application of the law legislatively and judicially in no way suggests they are in fact one and the same. Clearly they are not. As noted, Hirst distinguishes between 'jurisdiction' and the 'ambit' of the law because of the very point that they are different. Hirst's view is that '[J]urisdiction is procedural, relating to the powers vested in the criminal courts, whereas ambit is substantive, an integral element of the *actus reus* of an offence. In other words, whatever the courts' competence, there can be no offence under English law unless the impugned acts take place within the ambit, or geographical scope of application, of that law to begin with'.[22] Practically, however, in most cases where the law is extended beyond the UK border legislatively that statute has included a provision that allows courts to act in regard to it. For example, section 3(6) of the Landmines Act 1998 provides that in regard to the offences contained in section 2:

> 'Proceedings for an offence under section 2 committed outside the United Kingdom may be taken, and the offence may for incidental purposes be treated as having been committed, in any place in the United Kingdom'.

Here the law is extended legislatively, and as a necessary concomitant, courts are enabled to deem the conduct outside the UK as having occurred within it. As noted above, it is the extension of UK law across borders that forms the main subject matter of this book – not the lawful ability of courts within the UK to take cognisance of a crime or human rights violation. However it is necessary to comprehend the different ways in which the law can be applied, and the relationship between them. This latter point comes to the fore in particular, but not exclusively, in the area of human rights, where the application of law judicially and legislatively in some cases requires prior executive action. Indeed, in certain cases executive action is a *sine qua non* of the application of the other forms of UK law.

The largely unified or singular examination of 'UK law' applied across borders – legislative, judicial and executive are referred to jointly – must not detract from the relationship between them. Helpful here is the position in public international law. The *Restatement* (Third) stated in regard to the relationship:

---

[19] Akehurst, M., Jurisdiction in International Law, (1972- 73) 43 BYIL 145, at p. 145.

[20] Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press, Fourth Edition, 1991 at p. 298. This distinction is followed by both Jennings, R.Y., The Limits of State Jurisdiction, (1962) 32 NTIR 209 at p. 212, and Mann, F.A., The Doctrine of Jurisdiction in International Law, (1964- I) RdC 1 at p. 13-14. The *Restatement* (Third), supra note 17, in its Introductory Note states that '... it has become clear that the identification of prescription with legislation and of enforcement with adjudication is too simple.', at p 230. It argues that substantive regulation (prescription) and enforcement are carried out by means additional to legislation and adjudication, such as administrative rules and executive acts in regard to both regulation and enforcement.

[21] The European Committee on Crime Problems states '… it is widely agreed that in the context of enforcement the sovereign powers of the state may not be exercised within the territory of another state, save with its consent.., in European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe, Strasbourg, 1990, at p. 25.

[22] O'Keefe, R., Review of Hirst, M., Jurisdiction and the Ambit of English Criminal Law, [2004] Criminal Law Review 869 at p. 869.

> 'These categories of jurisdiction are often interdependent, and their scope and limitations are shaped by similar considerations. Jurisdiction to prescribe may be more acceptable where jurisdiction to adjudicate or enforce is plainly available; jurisdiction to adjudicate may be more acceptable where the state of the forum also has jurisdiction to prescribe by virtue of its links to the persons, interests, relations or activities involved. However, the purposes and consequences of the different categories of jurisdiction are not necessarily congruent, and balancing the competing interests in the different contexts can lead to different results'.[23]

Brownlie suggested that there was not a significant distinction between them, writing that there:

> '... is no essential distinction between the legal bases for and limits upon substantive (or legislative) jurisdiction, on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other. If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful'.[24]

Bowett took a largely similar view, averring that there were two forms of law applied across borders and that 'The relationship between the two kinds of jurisdiction is reasonably clear. There can be no enforcement jurisdiction unless there is prescriptive jurisdiction; yet there may be a prescriptive jurisdiction without the possibility of an enforcement jurisdiction, as, for example, where the accused is outside the territory of the prescribing State and not amenable to extradition'.[25] He then states that '... jurisdiction hinges, fundamentally, on the power to prescribe...'.[26] From a different perspective Lowe notes that discussion of the forms of law being applied extraterritorially '... draws attention to the underlying policy issue. Extraterritorial claims are more likely to be acceptable when used in service of legislation upholding generally-held values, such as personal safety and perhaps the prevention of corrupt practices, than when used to advance more parochial policies, as is the case in much competition, tax and export administration legislation'.[27] This brings to the fore the important point of the motivation for the application of the law – in whatever form – in the first instance.

Substance of Application - Criminal and Human Rights Law

Two areas or fields of UK law comprise the central focus of this book – criminal law and human rights law. They are, of course, very different in nature and function. They are similar however in the important respect of being applied across the UK border. An underlying theme of this book is that a degree of commonality can be identified in manner they are applied to persons and circumstances outside the UK. In order to set the stage, as it were, for the description and analysis below the criminal law and human rights law must be briefly explained in terms of their nature and function – it is beyond the scope of this book to do more than that. Prior to this however, it is interesting to note that the criminal law and human rights law are not uncommonly across borders jointly. In HMA v Vervuren[28], for example, the accused had been charged with the importation and supply of amphetamines from Portugal to Scotland. His extradition was sought from Portugal. He *inter alia* argued that an irregularity in his extradition from Portugal should vitiate the case against him on the basis of a breach of his human rights.[29] The case, therefore, entailed both the application of both the criminal law and human rights law across borders in that the crimes he was charged with commenced in Portugal and the alleged violation of human rights included his removal therefrom. A further example applying the criminal law (including the criminal aspects of competition law) and human rights law to a single incident are the cases involving Ian Norris, the former chief executive officer of the Morgan Crucible group of

---

[23] *Restatement* (Third), supra note 17, at p 231.
[24] Brownlie, supra note 10, at p 310.
[25] Bowett, supra note 4, at p 1.
[26] Ibid.
[27] Lowe, A.V., The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution , (1985) 34 ICLQ 734.
[28] 2002 SLT 555, [2002] SCCR 481.
[29] See Arnell, P., Male Captus Bene Detentus in Scotland, [2004] Juridical Review 252.

companies. In Norris v Government of the United States of America[30] the House of Lords held that Norris could not be extradited to the United States for criminal cartel related offences occurring from 1989 to 2000 because at that time the acts were not criminal in England. Norris had argued that the double criminality requirement in section 137(3) of the Extradition Act 2003 was not met. Sections 137(3) and (4) entail, in effect, the application of UK criminal law across borders in a hypothetical sense because they provide that the double criminality requirement can be met in regard to extraterritorial offences where UK criminal law is applied in such a way. In a later case, Norris v Government of United States of America,[31] it was argued that the extradition of Norris would give rise to an unjustified interference with his article 8 right to family life. He was unsuccessful and was extradited, tried and sentenced to 18 months imprisonment in the United States.[32]

Criminal Law – Nature and Function

The criminal law within the jurisdictions of the UK is, almost exclusively, prosecuted by public agencies[33], be it the Crown Prosecution Service in England, Crown Office and Procurator Fiscals Service in Scotland or Public Prosecution Service in Northern Ireland. This prosecution entails the imposition of coercive rules upon legal persons by these agencies where it is considered that a rule has been broken and it is appropriate to do so. It is, in its simplest form, the forcible, vertical, application of law by the state upon legal persons. Whilst general and basic this definition of the criminal law, referring to the procedure under which it is applied, is the best to adopt. Other possible criteria upon which to centre a definition, such as the morality of the act in question and the nature or level of harm done raise more questions than they answer. As Glanville Williams concluded on the point '... a crime is an act capable of being followed by criminal proceedings have a criminal outcome, and a proceeding or outcome is criminal if it has certain characteristics which mark it as criminal'.[34] As alluded to above in addition to imposing rules upon legal persons the criminal justice systems within the UK provide for the lawful ability of courts to take cognisance of certain acts, generally on the basis of geography and seriousness of the offence. Geographically, this power is normally exercised territorially. Indeed courts lower down the judicial hierarchy – where crimes are tried summarily – act on a territorial basis alone. More senior courts have a wider range of competence. As noted, the Crown Court in England and Wales is competent to hear cases proceeding on indictment, under section 46(2) Supreme Court Act 1981, wherever committed. That noted, the geographical extension of the criminal law to areas outside the UK is clearly exceptional. As Viscount Simons stated in Cox v Army Council '... apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England'.[35] O'Brien has stated that 'The United Kingdom has, from the 19th century, been a strong supporter of the territorial system: (a) because in criminal law matters it is for the people of the relevant territory to determine the rules they wish to live under; (b) it is practical in that English criminal procedure places considerable reliance on the testing of oral

[30] [2008] 1 AC 920.
[31] [2010] UKSC 9.
[32] It should be noted that the human rights argument was 'domestic' in that the argument was that his right enjoyed within the UK would be unjustifiably infringed, this contrasts with 'foreign' cases where the argument is that a human rights violation will take place in the third state. Only the latter entail the application of UK law across borders. See further Chapter 4 below.
[33] Private criminal prosecution, for our purposes, can be ignored. Whilst, in England, it has been protected by s 6(1) of the Prosecution of Offences Act 1985 it is unlikely to take place in regard to most crimes applied across borders on the account of a specific consent requirement on the part of the Attorney General. In regard to torture, for example, this requirement is found in section 135 of the Criminal Justice Act 1988. For our purposes it is generally sufficient to refer to 'UK criminal law', although this is generally inaccurate. This follows the extent of the criminal law within the UK's jurisdictions being similar.
[34] Williams, G., The Definition of Crime, [1955] Current Legal Problems 107.
[35] [1967] AC 48 at p. 67.

testimony by cross-examination. That is best achieved in the relevant territory'.[36] From a different perspective Lew writes the criminal law's historical link to territory '... was based on the fiction that innocence or gilt was determined by the empanelment of a jury who had personal knowledge of the accused and his culpability'[37], and that over the years the connection has become '… justified on the grounds of 'convenience of the forum and the presumed involvement of the interests where the crime is committed'.[38]

Reference to the 'presumed involvement of the interests where the crime is committed' as a justification for the application of the law, the last point mentioned by Lew, raises the simple yet almost intractable issue of the function or purpose of the criminal law. It is necessary to broach this subject, though, even if in general and basic terms, in order to understand why the criminal law is applied across borders. The motivations for the application of the law in this manner can in turn be used to begin to develop a framework for understanding – including comprehension of the interests served by the law and its reliance on particular connections between the UK and the crime or criminal as justifying and limiting that application. Commonly cited in discussions of the functions of the criminal law is the American Law Institute's Model Penal Code. It provides the purposes of the substantive criminal law are:

> '(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
> (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
> (c) to safeguard conduct that is without fault from condemnation as criminal;
> (d) to give fair warning of the nature of the conduct declared to be an offense;
> (e) to differentiate on reasonable grounds between serious and minor offences'.[39]

The Labour Government's White Paper, Justice for All, published in 2002 provides as the purpose of the criminal justice system – indivisible from the substantive criminal law for our present purposes – '... fighting and reducing crime and delivering justice on behalf of victims, defendants and the community'.[40] The Crown Office and Procurator Fiscal Service's Prosecution Code provides that the purpose of the criminal justice system in Scotland is the maintenance of the security and confidence of Scots by providing a just and effective means by which crimes may be investigated and offenders brought to justice.[41] The reforms made to the criminal law over the past several years have been criticised, in part, because they appear to fail to thoroughly consider the nature of, and limitation to, the criminal law. Ashworth writes of reform of the criminal law in England and Wales "Searching questions need to be asked rather than avoided. What is the nature of the threat to public safety presented by crime?... If it is the Government's task to increase public protection, are its policies directed at the most appropriate ways of doing this?... Should there be any limitations on the measures that the Government may properly take in the name of public protection, or is the situation so urgent that human rights considerations should be set on one side?".[42] Explicit or implicit in these and other discussions of the function of the criminal law is that the prevention of harm and 'public protection' are central. This is not to exclude as other purposes of the criminal law that of upholding morality and fairness, retribution and rehabilitation. All of these various functions of the criminal law are either prospective or retrospective. As Cryer notes, there are two broad approaches to justifying

---

[36] O'Brien, J., *International Law*, Cavendish Publishing Limited, London, 2001, at p. 237.
[37] Lew, J.D.M., The Extraterritorial Criminal Jurisdiction of English Courts, (1978) 27 ICLQ 168 at p 168, citing Lord Diplock in Treacy v. DPP, [1971] 1 All ER 110 at p. 119.
[38] Ibid, citing Brownlie, I., *General Principles of Public International Law, Second Edition*, 1973 at p. 293.
[39] American Law Institute, *Model Penal Code*, American Law Institute Publishers, St Paul Minn., 1962, Art 1, 1.02 (1).
[40] Cm 5563, 2002, at p. 13.
[41] May 2001, cited at <http://www.copfs.gov.uk/publications/2001/05/prosecutioncode>, accessed 20 May 2011.
[42] Ashworth, A., Criminal Justice Act 2003 Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection, [2004] Criminal Law Review 516 at p. 517.

punishment – those which look forward (termed teleological) aiming at protection and deterrence etcetera and those that which look back, focusing on the crime itself (termed deontological).[43]

Whilst academic analysis of the criminal law and criminal justice system undoubtedly assist in the process of coming to an understanding of the function and purpose of the criminal law more authoritative is judicial dicta. In a relatively early leading case on the application of the law to circumstances abroad under the Theft Act 1968, Treacy v DPP, Lord Diplock stated '... criminal law is about the right of the state to punish persons for their conduct – generally where that conduct is undertaken with a wicked intent or without justifactory excuse', he continued '[T]he state is under a correlative duty to those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by deterring by threat of punishment conduct by other persons which is calculated to harm those interests'.[44] In Board of Trade v Owen Lord Tucker stated in regard to the crime of conspiracy '… it is necessary to recognize the offence to aid in the preservation of the Queen's peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned'.[45] A leading modern statement upon the function of the criminal law and its application outside the UK is from Lord Griffiths in Liangsiriprasert v Government of the United States:

> 'As a broad general statement it is true to say that English criminal law is local in its effect and that the common law does not concern itself with crimes committed abroad. The reason for this is obvious; the criminal law is developed to protect English society and not that of other nations which must be left to make and enforce such laws as they see fit to protect their own societies. To put the matter bluntly it is no direct concern of English society if a crime is committed in another country. It was for this reason that the law of extradition was introduced between civilised nations so that fugitive offenders might be returned for trial in the country against whose laws they had offended'.[46]

The protection of the interests of those who owe obedience to English law, the maintenance of law and order within the realm and the protection of English society are the stated purposes of the law from these cases. Clearly these remain central today. The relevant and interesting questions arising are whether and how these purposes inform the application of criminal law across borders and whether they can assist in its comprehension. As will be seen in Chapters 3 and 5, those purposes undoubtedly do affect the application of the criminal law across borders, aid in understanding why the law is so applied and shed light upon the limits of that application.

Human Rights Law – Nature and Function

Human rights law is of course very different than the criminal law. It is akin to it, however, in that it is almost exclusively applies in a vertical manner – between the state and the citizen. It entails the bestowal of entitlements by the state upon private individuals which may be enforced against it in certain circumstances. Unlike the criminal law, however, under human rights law the state is the subject of the application or respondent – not the instigator of the application.

---

[43] Cryer, R , et al (eds), International Criminal Law and Procedure, Cambridge University Press, Cambridge, Second Edition, 2010 at p. 23. Cryer refers to Garland, D., and Duff, A., *A Reader on Punishment*, Oxford 1 Criminal Punishment, (1981-1982) 27 McGill Law Journal 73, and Hart, H.L.A., *Punishment and Responsibility*, Oxford University Press, Oxford, 1968.

[44] [1971] AC 537 at pp. 560 – 562.

[45] [1957] AC 602 at p. 625. Michael Wood, Legal Advisor to the Foreign Office, in giving the Secretary of State advice leading up to the invasion of Iraq discussed the Ministry of Defence's view of the crime of murder and the necessity for it to be within the Queen's peace, and concluded that the law is uncertain in the area as it is not laid down, at <http://www.iraqinquiry.org.uk/media/43502/doc_2010_01_26_11_03_00_737.pdf>, accessed 20 May 2011. For a discussion of the meaning and present relevance of the term "Queen's peace" see Hirst, M., Murder Under the Queen's Peace, [2008] Criminal Law Review 541.

[46] [1991] 1 AC 225 at p. 244.

Whilst these basic facts are indubitably true practice is not so simple. Firstly, the state is comprised of numerous and distinct 'public authorities', that being what is explicitly subject to the application of UK human rights law. Section 6(1) of the HRA provides 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. 'Public authorities' are defined by section 6(3) as including '(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament'. Public authorities in the context of the application of human rights law across borders have included the Secretary of State for the Home Office, the armed forces and members of the diplomatic service. All of these emanations of the state are clearly public in nature. The question arising, therefore, in the course of the application of human rights law across borders is not whether they must act compatibly with human rights in general but whether they must act compatibly in light of the geographical location of the past or future human rights violation. The first question, whether a body must act compatible *per se,* though, requires mention. This is because of the uncertainty and debate surrounding the issue of whether and if so how human rights obligations fall on private actors.

The HRA is silent upon the application of human rights law in a horizontal sense. It is the fact that courts are public authorities and so must act compatibly with human rights which has, in part, led to courts and numerous commentators to conclude that human rights obligations can indeed be placed upon private individuals and concerns. A further factor is the wide nature of the definition of public authority. In YL v Birmingham City Council Lord Mance cited with approval the passage by Lord Rodger in Parochial Church Council of the Parish of Aston Cantlow, Wilmcote with Billesley, Warwickshire v Wallbank and Another[47]:

> 'Prima facie… when Parliament enacted the 1998 Act… the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for 'a public authority' to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs'.[48]

In this case the House of Lords held that certain actions of a private care home acting under the direction of a local authority were not functions of a public nature under section 6(3)(b) of the HRA.[49] The courts, and academics, continue to grapple with the horizontal nature of human rights obligations in UK law. However, as noted above, in so far as the application of UK law across borders is concerned the debate is of little relevance. To date the jurisprudence and debate has not been concerned with what particular body or person is subject to the law as applied across borders but whether in fact that body is so subject in light of the particular circumstances.

It is considerably easier – as with the criminal law – to describe the nature of human rights law than its function or purpose. In an applied and practical vein the Labour Government's explanation and justification for enacting the HRA, *Bring Rights Home: The Human Rights Bill*, stated:

> 'We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their

[47] [2003] UKHL 37 at para. 160.
[48] 2004 1 AC 546 at para. 87.
[49] A decision that has engendered much criticism, for example Williams, A., YL v Birmingham City Council: contracting out and 'functions of a public nature, [2008] European Human Rights Law Review 524.

> rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom'.[50]

Lord Irving has written that the HRA would engender '… a constitutional change of major significance: protecting the individual citizen against the erosion of liberties, either deliberate or gradual. It will also help develop a process of justice based on the promotion of positive rights'.[51] The effects of the HRA, he noted, could be categorised under four heads the domestication of freedom, the prioritisation of human rights, the imposition of substantive rights and principled decision making.[52]

Reflecting the function of the HRA as 'domesticating freedom' is the preamble of the Act itself. It provides that the HRA is 'An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes'. The preamble of the European Convention of Human Rights 1950 firstly refers to the Universal Declaration of Human Rights 1948 and then *inter alia* states 'Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend'. Here human rights are conceived as the 'foundation of justice and peace'.[53] As is clear, it is relatively easy in general terms to state the function and purpose of human rights law and the main human rights instruments and to descend into superficiality, circular reasoning and tautology. This is both understandable and unfortunate. It is understandable because the rationale for protecting persons from ill-treatment is largely intuitive – a narrative of why seems hardly necessary. As stated in the 1776 US Declaration of Independence '…we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness'. [54] It is unfortunate because a detailed and clear picture of the function and purpose of human rights law can enable understanding of the application of UK law across borders. It can do this by aiding in the comprehension of what is the goal sought to be attained through the application of the law in such a way. This is particularly relevant when contrasting the application of human rights law to that of the criminal law – where the interests of the UK may be materially distinct. However, a general statement of the purpose and function of human rights law as being to hold the UK, in all its public manifestations, accountable the violation of a number of entitlements of persons with which it is in a certain relationship takes us some way towards understanding. Indeed, as will be seen in Chapter 4, the explicit question at issue in courts is often not why the law applies but whether it does in the particular circumstances. Of course it is a different question altogether whether this should be the case.

---

[50] 1997 Cmnd 3782. para. 1.18.

[51] Irving, D., The Development of Human Rights in Britain under an Incorporated Convention on Human Rights, [1998] Public Law 221 at p 221. On a more general level Lord Irvine cites as the reasons for the development of human rights in international law, in the form of provisions within the Charter of the United Nations, the removal of the threat of a return of conflict and genocide and "… as common justice [and] part of the process of guaranteeing peace", at p. 222.

[52] Ibid. pp. 226 – 230.

[53] A Working Party from the 10 founding states of the Council of Europe concerned in the negotiations noted 'The original purpose of the Council of Europe Convention on Human Rights was to enable public attention to be drawn to any revival of totalitarian methods of government and to provide a forum in which the appropriate action could be discussed and decided', as noted in Hoffman, L., The Universality of Human Rights, [2009] Law Quarterly Review 416 citing Simpson, A.W.B., *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press, Oxford, 2001, at p 777.

[54] As discussed in Hoffman, ibid.

Issues and Criticisms

A number of issues and criticisms underlie the application of UK non-private law across borders. They will emerge throughout *Law Across Borders*, and be discussed specifically at points in Chapters 3, 4, and 5. It is useful, though, to briefly mention them here. The specific issues or concerns arising from the application of law across borders arise from, and return to, the point that it is generally undesirable for the UK, or any state, to act in such a manner. Effectiveness, cost, state sovereignty, conflict with extant national and international norms, perceived legal imperialism and chauvinism and human rights are amongst the reasons for this. Undoubtedly, the application of law across borders is often less effective than it could be – certainly in comparison with the law as applied within the UK. Issues of enforcement and evidence come to the fore here. Following on from debatable effectiveness is the question of cost. Expenditure incurred in a largely ineffective application of law across borders begs the question of whether those resources should be directed towards the application and enforcement of the law intra-territorially or indeed another purpose altogether. State sovereignty militates against the application of law across borders in that in the vast majority of cases the *situs* of the alleged crime or human rights violation will be within the territory of a foreign state. The exception to this being the high seas and areas *terra nullis*. The position of the rules protecting state sovereignty and territorial integrity in international law lead, in most cases, to the strongest entitlement to act being held by the state where the crime or violation took place. Indeed, the application of the law by a non-territorial state may well contravene the territorial state's sovereignty. In circumstances where it contravenes the sovereignty of a third state the application of law across borders may give rise to disquiet and claims of legal imperialism or chauvinism. Finally, the application of law across borders may give rise to claims of human rights violations itself – for example on the basis of article 7 of the ECHR relating to the non-retroactivity of criminal law. UK law and practice largely heed these factors. The UK generally retains a reliance on territory and the relationship between it and persons associated to it.[55] UK law is rarely applied across borders in an egregious manner – it is, though, generally applied on an *ad hoc* and reactive basis. This fact evidences the further problem of a lack of coherence to the application of the law. A lack of central focus or principle applies to both the criminal law and human rights law. Whilst specific cases, novel circumstances and the differences between human rights law and the criminal law make the existence of a complete, coherent, principled approach in practice very difficult indeed clarity and principle are undoubtedly needed. It is suggested below that such a principled approach may in fact be beginning to emerge – based upon the concept of the proper law.

Themes

Description and analysis of the application of UK law across borders evinces two related themes. The first is that non-UK law and practice, including that coming from the two pre-eminent European bodies, public international law, and the law of third states has had, and is having, a material effect upon UK law in the area. Treaties, foreign cases and international guidelines, for

---

[55] This has led to the minimisation of inter-state conflict. Lowe includes self-restraint as the second of four factors that can address the problems arising from law applied across borders, he states that they can be addressed through '… consultation procedures, unilateral restraint, harmonisation of laws, and agreed allocations of extraterritorial competence. Of these, the first two are of the greatest practical significance at present in the search for a solution. None of them, however, seems to offer a satisfactory basis for a general solution to the problem'. Lowe, A.V., The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution, [1985] 34 ICLQ 724 at p 728. This statement was made in the context of competition law being applied across borders. The generally limited approach the UK takes to applying its law across borders is, of course, not beyond criticism. In regard to the criminal law, for example, the former Director of Public Prosecutions, Ken Macdonald, has argued for an amendment to the law so as to include as a ground for applying the crime of genocide mere presence in the UK, extending the law from its present residence requirement. See Macdonald, K., Britain: A Refuge for the Unspeakably Evil, The Times, 6 July 2009.

example, have all played a role in conditioning the shape of the law. The second theme is that emerging from UK law and practice is a proper law approach to the application of its non-private law across borders. This generally entails reliance upon certain defined factors existing between the UK and crime, criminal or violation as justifying the application and, in some cases, consideration of the factors that exist in relation to third states. The two themes are related in that non-UK law and practice has, to an extent, contributed to the emerging proper law approach.

Non-United Kingdom Influence on Law Across Borders

The impact of European, international and foreign law upon UK law has been increasingly notable in affecting its application of law across borders. Of course external influence in general is not new. The law in England and Wales, Scotland and Northern Ireland have all been influenced to a greater or lesser extent by developments outside them. In Scotland, for example, the influence of the 'Institutional Writers' was such that a notable civilian element within Scots law has come to exist.[56] Of course in recent times the effect of the EU and Council of Europe has been very significant – as will be discussed below in Chapter 2 and seen throughout *Law Across Borders*. For our present purposes however, it is not this inward effect alone that it germane, but rather how the effect has led to and conditioned the application of UK law outside its territory – the outward effect of the non-UK influence. In addition to the influences of the EU and the Council of Europe are those of the United Nations and the Organisation of Economic Co-operation and Development, for example. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 and the UN Convention Against Torture and other Inhuman and Degrading Treatment and Punishment 1984 are two prominent instances. There is also a not inconsiderable reference in UK case law in the area to decisions of the judiciaries of Commonwealth and other states. Cases from Canada, the United States and Israel, amongst others countries, have been mentioned in consideration of the application of UK law across borders. These include the Canadian case of United States v Cotroni[57] and the Israeli case of Attorney-General v Eichmann.[58] A notable example of an international instrument affecting the application of UK law across borders is the Attorney General and Lord Advocate's Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America,[59], which will be discussed in Chapter 3. More generally and widely applicable are the numerous substantive criminal conventions and those relating to mutual criminal assistance and extradition to which the UK is party.

In addition to noting the fact that an increasing amount of extrinsic authority, be it guidelines, treaties, judicial decisions or otherwise, affects the application of UK law across borders it is necessary to discuss the particular type of affect or influence. Non-UK law may, for example merely act as an example or provide guidance. Here a UK court may examine a foreign judicial decision to ascertain what was held on a particular point. The UK court can, of course, choose to follow that example or not. Reference to the Canadian Supreme Court case of United States v Cobb[60] by the House of Lords in McKinnon v Government of the United States[61] is such an example. A second type of affect that non-UK law may have is a permissive one. Here the authority allows the UK to apply its law across borders if it decides to do so. An example can be

---

[56] See for example Cairns, J.W., The Civil Law Tradition in Scottish Legal Thought, ' in Carey Miller, D., and Zimmermann, R., (eds) *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, Duncker and Humblot, Berlin, 1997, pp.191-223, and Gordon, W., (ed) *Roman Law, Scots Law and Legal History*, Edinburgh University Press, Edinburgh, 2007.

[57] [1989] 1 SCR 1469.

[58] (1962) 36 I.L.R. 5.

[59] The Guidance is available online at <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>, accessed 20 May 2011.

[60] [2001] 1 SCR 587.

[61] [2008] UKHL 59.

found in criminally-related conventions where state parties are permitted to apply a criminal sanction to an act where its national was a victim of that crime – so-called passive personality jurisdiction. An example of this is article 6(2)(b) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988. It provides that state parties may establish jurisdiction over an offence defined by the Convention where 'during its commission a national of that state is seized, threatened, killed or injured'. A third type of affect or influence is where the foreign authority obliges the UK to act. Here one may cite as an example article 1 of the Convention, providing that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The word 'shall' denotes that state parties must act on the obligation, it is not merely permissible. Of course the question arising is the correct and definitive meaning of the term 'within their jurisdiction'. This is in fact not settled, as will be discussed in Chapter 4. A further example from a criminally-related convention is article 9 of the Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and on their Destruction 1997. It *inter alia* provides 'Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention…'. There are, then, differing ways in which the variety of non-UK can have upon the extent and nature of the application of UK law across borders.

The Proper Law Approach to Jurisdiction

The second theme evinced in *Law Across Borders* is that the application of UK law across borders is seeing the emergence of a proper law approach where the law is applied in an international or transnational sense. The term 'proper law approach' is here used to denote the process whereby the law is applied only in the presence of a material linkage or connection between the alleged criminal act or human rights violation and the UK. It can go further and entail awareness on the part of the UK of the existence of connections with third states as well as the weighing-up of those linkages with the connections that exist with the UK. The proper law approach to the application of law originated in areas of private law, and came to hold a firm place in private international law. In regard to English contract law the proper law doctrine was said to '… localise the contract by looking for the system of law with which the transaction was most closely connected'.[62] *Law Across Borders* argues that the proper law approach has began to emerge in the application of non-private law across borders.[63] This development contrasts with what has happened in private international law. There, the proper law approach is no longer applied in the law of contract in the UK, following the Contracts (Applicable Law) Act 1990, which implemented the EEC Convention on the Law Applicable to Contractual Obligations 1980 (The Rome Convention). Therefore whilst the proper law approach is having lesser relevance in the sphere of private law, it is seeing a greater impact in non-private law. An important caveat, though, must be made when transposing the approach from the private to non-private sphere. This is that in the area of private law the application of a proper law approach may lead to a state applying the law of a third state in its courts – something the approach accepted as possible and in certain instances reasonable. However, of course, states do not apply the non-private law of other states. The distinction made in private international law between 'jurisdiction' and 'applicable law' is not made in non-private law. In the private international law sense these terms denote the legitimate ability of a forum to hear a dispute (jurisdiction) and the issue of which set of rules are to govern (applicable law). This distinction is not made and has no direct relevance in the non-private area. In regard to the criminal law and human rights law the two issues of the legitimate (and indeed optimal) forum to hear a case and the set of rules that are to be applied are fused. In the non-private sphere the approach solely concerns the application of a state's law

[62] Fawcett, J., and Carruthers, J., *Cheshire, North and Fawcett: Private International Law*, 14th Edition, Oxford University Press, Oxford, 2008, p 666.
[63] It has also found a place in the area of competition law. Amongst the voluminous literature see Roth, P.M., Reasonable Extraterritoriality: Correcting the 'Balance of Interests' [1992] ICLQ 245.

which, if it is to be effective, necessarily entails the institutions and machinery – its courts, prosecutorial authorities and if applicable prison service – that operate to impose it.

The proper law approach can be seen to assume a greater relevance in the non-private sphere than the private sphere when one appreciates that a state's overall judicial and executive competence and the applicability of its law are conjoined. It in effect entails a process whereby two choices are made, to apply or not apply a particular body of law and to engage a particular state's legal system. The relevance of the proper law approach can be seen from three different perspectives, states, the individual and the rule of law. From the perspective of states its operation legitimises the application of law. States may point to the linkages between themselves and the alleged crime or human rights violation as substantiating the legitimacy and legality of their behaviour. Where there may be competing claims to apply the law or protest by the subject of application the approach can be wielded as a defence. From the perspective of individuals the proper law approach is relevant in providing a basis for ascertaining possible liability or protection. Individuals should as far as possible know what laws and legal systems apply to them for the purpose of the applicability of criminal sanction as well as human rights protection. From the perspective of the rule of law the approach forms part of a system of allocation of competencies of states where crime and human rights violations occur in international or transnational senses. In almost every such case there will be differing relationships and linkages between the crime, accused, and human rights violation and two or more states. Both states and the individuals concerned will have expectations as to what law and legal system will govern. The rule of law militates in favour of a transparent, predictable and defensible system of allocation of competencies and the proper law approach goes some way in addressing this need.