Briefing to Parliamentarians by the UK Universal Jurisdiction group

27 January 2010

Reasons to oppose the Attorney General interfering with the arrest warrant procedure in cases of suspected serious international crimes

INTRODUCTION

The organizations that have prepared this briefing paper are gravely concerned that any changes to existing law and procedure will undermine the capacity of victims of serious international crimes to hold accountable alleged perpetrators who come within the UK's jurisdiction by making all arrest decisions in such cases subject to political considerations rather than being based on the legal merits. Suspects may therefore find a safe haven in the UK, and the already considerable barriers to bringing such suspects to justice will be heightened.

Instead of making it more difficult to arrest with a view to prosecuting such suspects, the UK should be seeking to enhance its capacity to do so, and mooted legislative changes are a step entirely in the wrong direction.

This briefing paper answers these questions:

1. **What is the current position?**
2. **Why do victims need to apply for arrest warrants?**
3. **Is the current system being abused?**
4. **Is it regressive and against public policy to transfer more power to the Attorney General?**
5. **Can any change be justified?**

For further information, please contact: Amnesty International (UK): www.amnesty.org.uk; FIDH: www.fidh.org; Global Witness: www.globalwitness.org; Human Rights Watch: www.hrw.org; Justice: www.justice.org.uk; REDRESS: www.redress.org

1. What is the current position?

Universal Jurisdiction

The UK, like other states, is permitted, and, in some cases, as with grave breaches of the Geneva Conventions and torture, *required* to exercise universal jurisdiction over any person suspected of committing these crimes found in its territory, unless it extradites the suspect or surrenders him or her to an international criminal court. Universal jurisdiction is the term that describes the legal power to prosecute foreign nationals regardless of their nationality suspected of committing the most heinous international crimes, such as war crimes, torture, crimes against humanity and genocide, abroad against other foreigners.

In the UK, we have legislated to give our courts jurisdiction to prosecute *all* suspected war criminals and torturers, even where neither the victim nor the suspect has any connection with Britain. This is because, in common with all state parties, we have entered into binding legal obligations commitments (i.e. in the four 1949 Geneva Conventions and Protocol I to those Conventions – which protect civilians and those outside combat - and in the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), where states effectively promised that there will be no safe haven for perpetrators in any country party to the instruments concerned. For example, Article 146 of the Fourth Geneva Convention, ratified by the UK half a century ago on 23 September 1957, expressly states that the UK is

> "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."

There is *no exception whatsoever* to the UK's legal obligation to bring suspects, regardless of nationality, before its own courts on the ground of national interest or potential upsetting of diplomatic relations. Indeed, the *only* exception is

> "that it may, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

Article 6 of UNCAT, ratified by the UK on 8 December 1988 , requires the UK, if it is "satisfied, after an examination of information available to it, that the circumstances so warrant", that a person is present in its territory who is alleged to have committed torture, to have attempted to commit torture or to have been complicit or to have participated in torture to "take him into custody or take other legal measures to ensure his presence . . . for such time as is necessary to enable any criminal or extradition proceedings to be instituted". Article 7 (1) requires the UK, "if it does not extradite him, [t]o submit the case to its competent authorities for the purpose of prosecution." Article 7 (2) declares that "[t]hese authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." As with the Geneva Conventions, there is *no exception whatsoever* to these obligations. Both treaties contain stringent fair trial guarantees (see Article 146 of the Fourth Geneva Convention and Article 7 (3) of UNCAT).

Universal jurisdiction, therefore, recognizes both the degree to which no member of the international community tolerates such crimes and the reality that it is often very difficult, if not impossible, to bring a suspect to justice in the state where the crimes allegedly took place. Without the effective implementation of the powers arising under universal jurisdiction the result is all too often impunity for alleged perpetrators of these worst of all possible crimes.

Arrest warrants

Under s25(2) of the Prosecution of Offences Act 1985, despite the need for the Attorney General to initiate a prosecution for offences contrary to legislation such as the Geneva Conventions Act 1957[1], there is a clear and specific provision entitling a magistrate to issue an arrest warrant if s/he considers that:

1. There are reasonable grounds to suspect that an offence under such legislation has been committed by the named suspect; and
2. Admissible evidence has been presented which (if uncontradicted) establishes the elements of the offence alleged; and
3. S/he has jurisdiction to issue the warrant and has ruled out any immunity of the suspect.

In practice, the most senior district judges at Westminster Magistrates' Court hear these applications and determine whether the high threshold of evidence, liability and jurisdiction are met and that no immunity applies.

It should be noted in this context that most countries around the world permit a victim or other representative body to initiate criminal investigations/arrests, either in the same way as in the UK or via *actions civiles* and/or *actio popularis* as a safety valve when the ordinary system of public prosecution fails to act or acts too slowly.

2. Why do victims need to apply for arrest warrants?

An arrest warrant is an important legal tool used by lawyers acting on behalf of victims of crime in cases of urgency, to ensure that a suspect is apprehended who might otherwise escape from the jurisdiction. Without this power, victims fear that in most cases an effective legal process will never start, for the simple reasons that the suspect will flee abroad – this is obviously a far greater statistical risk in this type of offence than most other (i.e. non-international) offences.

Specifically, in cases of serious international crimes, it has been particularly important to prevent a suspect from escaping while the police and/or Crown Prosecution Service make a fully informed decision whether to devote resources to an investigation. The police are naturally reluctant at relatively short notice to arrest such suspects using their ordinary powers of arrest.

But where victims can secure the suspect's arrest, this ensures that time is available for the Crown Prosecution Service and/or the Attorney General to consider the matter carefully and decide whether they will take over and/or consent to the prosecution of the suspect.

While legislation for such serious international crimes has in some cases been on our statute books for over half a century,[2] only two suspects have ever been prosecuted in the UK.[3] The Attorney General and Solicitor General refused to approve a prosecution of Augusto Pinochet despite extensive submissions on several occasions. It is believed that the prosecuting authorities have considered cases involving suspects from Rwanda, Sri Lanka, Iraq and Afghanistan.

Representatives of victims from such countries and beyond (e.g. Democratic Republic of the Congo, Zimbabwe and Myanmar) fear that investigators within the police and Crown Prosecution Service, which each also have responsibility for anti-terrorism cases, face such competing demands for their resources that work on war crimes, torture, genocide and crimes against humanity is always de-prioritised and under resourced.

[1] The Attorney General must also be involved in charging decisions in respect of torture contrary to section 134 of the Criminal Justice Act 1988, and all the offences created by the War Crimes Act 1991 and the International Criminal Court Act 2001.
[2] Geneva Conventions Act 1957, s134 Criminal Justice Act 1988, International Criminal Court Act 2001
[3] Afghan torturer Faryadi Zardad in July 2005 and Anthony Sawoniuk on 1 April 1999 under the War Crimes Act 1991.

Further, the UK is one of a few leading EU states that screen immigration and asylum applicants for suspicion of involvement in such international crimes. Victims' representatives are concerned that in contrast to other countries, such as the Netherlands, where such persons are screened with the view to possible prosecution, the priority for the UK Border Agency and other authorities is to deport or remove suspects from the country, rather than to bring then to justice. Instead, these agencies should ensure that suspects are investigated with a view to prosecution or extradition to a country which will prosecute them, in accordance with our duties under international law, i.e. 'prosecute or extradite' (i.e. for prosecution elsewhere).

3. Is the current system being abused?

No.

Indeed, no evidence has been cited by the Attorney General, the Justice Secretary or others that senior district judges have abused their powers by exercising their discretion to issue arrest warrants for international crimes (i.e. where the evidence did not justify it).

Arrest warrants for such crimes appear to have only been issued on two occasions, for war crimes under the Geneva Conventions Act 1957. [4] This suggests that the system has not been abused. No evidence has been provided either that these two arrest warrants were issued without reference to or prior knowledge of the police and/or Crown Prosecution Service and/or the Attorney General's office.

A suspected war criminal, torturer, genocidaire, etc, who a judge considers has a *prima facie* evidential case to answer may be inconvenienced by being lawfully detained in the UK for a short period, quite possibly on bail for at least some of that short period, *as is required under Article 6 of the Convention against Torture in cases of suspected torturers*, pending proper consideration by the prosecuting authorities of the decision whether consent will be provided for a private prosecution to proceed or whether the Crown Prosecution Service is to be authorized to charge and prosecute or the suspect is to be extradited. This is an acceptable inconvenience given the seriousness of the issues involved and the alternative of a real risk of impunity.

The public interest to ensure an end to impunity for crimes against the entire international community must surely weigh in favour of ensuring that an arrest occurs and the person is required to remain in the jurisdiction, in custody or on bail, pending a decision whether to proceed with a prosecution or to extradite the suspect. The opposite outcome is that suspects will be free to come and go from this country, knowing that the possibility of arrest has been eliminated.

4. Is it regressive and against public policy to transfer more power to the Attorney General?

Yes.

On 20 July 2009, in accordance with the Government's stated commitment to enhance public confidence and trust in the office of Attorney General, the Justice Secretary/Lord Chancellor announced to Parliament that the Attorney General had reached a new settlement with the Directors of Public Prosecutions, the Serious Fraud Office and Revenue and Customs Prosecutions to improve relationships and guarantee prosecutorial independence, while ensuring an appropriate degree of accountability and transparency about the relationship, as reflected in a new protocol setting out the respective responsibilities of the Attorney General and the Directors. This announcement was said to build on the Prime Minister's statement in July 2007 that the Attorney General had herself decided, except if the law or national security requires it, not to make key prosecution decisions in individual criminal cases.[5]

To legislate now to give the Attorney General power to tell a senior judge whether s/he can issue an arrest warrant in an individual case is regressive and flies in the face of assurances of the 'governance

[4] For the arrest of Doron Almog in 2005 and Tzipi Livni in 2009.
[5] http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm090720/wmstext/90720m0004.htm

of Britain agenda' to reduce the power of the executive. The prospect of the Attorney General having the power to interfere in a criminal case at such an early stage (or at all – see below) and in circumstances of such urgency is contrary to the rule of law and constitutionally unsustainable. The High Court judgment in the BAE case resonates here.[6] In that case, the High Court found that the Director of the Serious Fraud Office had acted unlawfully when he bowed to pressure to drop an investigation into bribery and corruption allegations over a BAE Systems arms deal with Saudi Arabia. (The Serious Fraud Office had been informed by Saudi Arabia that, if the investigation continued, it would withdraw its support for counter-terrorism arrangements.) [7]

Concern about the existing role of the Attorney General was reflected in a resolution adopted in September 2009 by the Parliamentary Assembly of the Council of Europe.[8] The resolution, entitled 'Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states', includes the following:

> 3.2 Prosecutors must be allowed to perform their tasks without interference from the political sphere…
>
> [Specifically as regards the UK, the situation is characterized by the following factors…]
>
> 4.1.4. recent cases (including the British Aerospace and cash-for-honours cases) have shown that the role of the attorney general needs to be changed and clarified; a reform proposal to this effect is currently under discussion.

5. Can any change be justified?

The (previous) Attorney General confirmed to Parliament that the applicable criteria for consenting to a prosecution "are the same as for any other criminal offence. First, there must be sufficient admissible and reliable evidence to afford a realistic prospect of conviction; secondly, the circumstances must be such that it would be in the public interest for there to be a prosecution."[9] These are precisely the criteria applied by the Director of Public Prosecutions (DPP) and the Crown Prosecution Service.

Given the risk that prosecutions for such heinous and universally condemned crimes as war crimes, torture, crimes against humanity and genocide can be vetoed for political reasons in the hands of the Attorney General, the decision should vest in the DPP. ***Thus, the argument for reform goes the other way, namely to transfer charging decisions in these cases from the Attorney General to the DPP.***

Allied to this, if Parliament thought it necessary, provision could be made that the arrest warrants could only be granted where the applicant had given the DPP advance notice of an application in cases of suspected war crimes, torture, crimes against humanity or genocide. Further, Parliament could provide for the DPP to have a right to attend the hearing of any such application.

The involvement of the DPP in charging and arrest decisions does not raise the same constitutional issues as that of the Attorney General – nonetheless, there is no evidence that requiring applicants for arrest warrants to give advance notice of such applications to the DPP is in fact necessary to meet any proven problems with the current procedure.

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[6] See R (on the application of Corner House Research & others) v The Director of the Serious Fraud Office [2008] EWHC 246 (Admin), http://www.onebrickcourt.co.uk/cases_files/100EWHC246.pdf, which was overturned by the House of Lords [2008] UKHL 60, http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldjudgmt/jd080730/corner-1.htm

[7] The High Court found that submission by a prosecutor to a threat is lawful "only when it is demonstrated to a court that there was no alternative course open to the decision maker''. The House of Lords, however, reiterated that the question to be decided was whether the decision was lawful, not whether it was wrong, and concluded that the decision was one which was reasonably open to the Director.

[8] See Resolution 1685 (2009): http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1685.htm

[9] Written answer by the Attorney General to Mr Boateng, Parliamentary question 19/07/93 published in Hansard.

MAGISTRATES' COURTS ACT 1980

1 Issue of summons to accused or warrant for his arrest

(1) Upon an information being laid before a justice of the peace for an area to which this section applies that any person has, or is suspected of having, committed an offence, the justice may, in any of the events mentioned in subsection (2) below, but subject to subsections (3) to (5) below, –

(a) issue a summons directed to that person requiring him to appear before a magistrates' court for the area to answer to the information, or

(b) issue a warrant to arrest that person and bring him before a magistrates' court for the area or such magistrates' court as is provided in subsection (5) below.

(2) A justice of the peace for an area to which this section applies may issue a summons or warrant under this section –

(a) if the offence was committed or is suspected to have been committed within the area, or

(b) if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being proceeded against, within the area, or

(c) if the person charged resides or is, or is believed to reside or be, within the area, or

(d) if under any enactment a magistrates' court for the area has jurisdiction to try the offence, or

(e) if the offence was committed outside England and Wales and, where it is an offence exclusively punishable on summary conviction, if a magistrates' court for the area would have jurisdiction to try the offence if the offender were before it.

(3) No warrant shall be issued under this section unless the information is in writing and substantiated on oath.

(4) No warrant shall be issued under this section for the arrest of any person who has attained the age of eighteen years unless –

(a) the offence to which the warrant relates is an indictable offence or is punishable with imprisonment, or

(b) the person's address is not sufficiently established for a summons to be served on him.

(5) Where the offence charged is not an indictable offence –

(a) no summons shall be issued by virtue only of paragraph (c) of subsection (2) above, and

(b) any warrant issued by virtue only of that paragraph shall require the person charged to be brought before a magistrates' court having jurisdiction to try the offence.

(6) Where the offence charged is an indictable offence, a warrant under this section may be issued at any time notwithstanding that a summons has previously been issued.

(7) A justice of the peace may issue a summons or warrant under this section upon an information being laid before him notwithstanding any enactment requiring the information to be laid before two or more justices.

(8) The areas to which this section applies are commission areas in England or preserved county in Wales.

Prosecution of Offences Act 1985

25 Consents to prosecutions etc.

(1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except –

(a) with the consent (however expressed) of a Law Officer of the Crown or the Director; or

(b) where the proceedings are instituted or carried on by or on behalf of a Law Officer of the Crown or the Director;

and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).

(2) An enactment to which this section applies –

(a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; and

(b) shall be subject to any enactment concerning the apprehension or detention of children or young persons.

(3) In this section "enactment" includes any provision having effect under or by virtue of any Act; and this section applies to enactments whenever passed or made.

FOR FURTHER INFORMATION, PLEASE CONTACT:

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