Police Reform and Social Responsibility Bill
Joint briefing for House of Lords Committee stage
14 June 2011

Clause 154 – Changes to arrest procedure for international crimes

INTRODUCTION

The organisations that have prepared this briefing paper are gravely concerned that Clause 154 of the Police Reform and Social Responsibility Bill – which would require the Director of Public Prosecutions's (DPP's) consent before an arrest warrant could be issued for an international crime such as torture, war crimes or crimes against humanity – will undermine the capacity of the criminal justice system to hold accountable perpetrators of such crimes who live in, or visit, the United Kingdom. Suspects may therefore find a safe haven in the UK, and the already considerable barriers to bringing them to justice will be heightened. Further, the change will send a signal to the international community that the UK is no longer fully committed to bringing international criminals to justice.

We do not believe that any change to the current system is necessary; however, if the House wishes to give the DPP a greater role in the arrest warrant procedure we recommend the amendment to Clause 154 proposed by Baroness D'Souza, Lord Lester of Herne Hill and Baroness Tonge. This would give the DPP the opportunity to advise the court upon the issuing of the warrant but would not require his consent to its being issued.

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. **What effect would Clause 154 have?**
5. **Can any change be justified?**

For further information please contact Aegis Trust (www.aegistrust.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 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 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 then 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.

3. Is the current system being abused?

No.

Two reasons have been cited for this change in the law. The first is that warrants have been sought against officials from states with whom the UK enjoys good diplomatic relations. The Ministry of Justice consultation paper on the topic stated that:[4]

> There is reason to believe that some people, including people with whom the British Government needs to engage in discussion, may not be prepared to visit this country for fear that a private arrest warrant might be sought against them.

Concerns have also been raised at the evidential standard applied on applications for warrants. The consultation stated:[5]

> The issue of a summons or warrant means that criminal proceedings against the suspect have begun, and it can be done on the basis of far less evidence than the CPS would require in order to charge, or than would be needed before a jury could properly convict.

In relation to the 'friendly states' question it should firstly be born in mind that immunity from prosecution for war crimes and crimes against humanity applies in relation to government officials who enjoy state immunity from prosecution for international crimes,[6] including sitting heads of state, and serving heads of government, foreign ministers, defence ministers and diplomats. A private application for the arrest of Israeli Defence Minister General Shaul Mofaz in February 2004 was refused by the Bow Street Magistrates for precisely this reason. Such officials are therefore free to visit the UK without let or hindrance.

In relation to evidence, it should be borne in mind that applications for private arrest warrants are scrutinised by specialist District Judges at the City of Westminster Magistrates' Court (who also deal with terrorism and extradition cases). The court will issue a warrant if persuaded not only that there are reasonable grounds to suspect that an offence has been committed but also that there is admissible evidence which could, if uncontradicted, establish the elements of the offence(s). Warrants are not, therefore, issued frivolously. Indeed, arrest warrants for such crimes appear to have only been issued on two occasions, for war crimes under the Geneva Conventions Act 1957.[7] This suggests that the system has not been abused. No evidence has been provided that either of 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.

4. What effect would clause 154 have?

Clause 154 of the Bill seeks to remove the ability of private individuals to seek and obtain arrest warrants against those accused of international crimes including (inter alia) torture, war crimes, piracy and hijacking, unless the Director of Public Prosecutions gives his consent.

Private parties including solicitors and non-governmental organisations may be in a better position than the Metropolitan police and CPS units responsible for investigating and prosecuting these offences to both receive complaints from victims and build up dossiers of evidence in the first instance. Both the Metropolitan police Anti-Terrorist Unit and the CPS Counter-Terrorism Division responsible for dealing with these offences are, as their names suggest, responsible for investigating and prosecuting terrorist offences and their resources are stretched in attempting also to deal with war crimes, crimes against

[4] *Arrest Warrants – Universal Jurisdiction. Note by the Ministry of Justice* (undated, 2010), p3.
[5] Ibid, p2.
[6] Save where the arrest warrant has been requested by the International Criminal Court: see article 27 of the Rome Statute and sections 2(3) and 23 of the International Criminal Court Act 2001.
[7] For the arrest of Doron Almog in 2005 and Tzipi Livni in 2009.

humanity etc. There is a need to act quickly in some cases and we are concerned that the requirement for the DPP's consent could allow suspects to evade justice in these circumstances. In his evidence to the Public Bill Committee, the DPP said:[8]

> **Q 57 Dr Huppert:** You talked about very fast responses. Realistically, how quickly could you respond? If somebody said, "A plane's landing in a few hours," would it be realistic to expect you to carry out even a threshold test within that time?
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> **Keir Starmer:** It depends, but it is pretty unlikely. In our most recent example we were asked, with 24 hours to go, to look at a file, and we did. We continued to look at it after the various applications began to be made. It is quite a big ask, however, because these are serious offences with serious consequences. Often the evidence that has been gathered will be in lever-arch files rather than envelopes, and technical rules of admissibility must be considered.
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> We are engaging with the main groups who are most concerned and we are encouraging them to come to us early, because if we can avoid the late situation, so much the better. We have agreed to have a live walk-through of a typical case with them, which I hope will be useful, so that they can understand better what the rules of evidence will be and what our constraints are. So, there is a lot of up-front preparation and engagement.
>
> We have lawyers who are—and will be—available to work at short notice. However, if we are put on two hours' notice of somebody landing and are given two or three lever-arch files, it is pretty unlikely that we will be able to get through that exercise.

Further, the right of private citizens to seek arrest warrants for suspected war criminals serves as a valuable corrective against what Lord Wilberforce described as 'inertia or partiality on the part of authority'.[9] A finding by a magistrate that there exists *prima facie* evidence that a suspect has committed an international crime, sufficient to justify the issuance of a warrant for his or her arrest, must never be lightly dismissed. In particular, an independent judicial determination of this kind may serve as a spur to governmental action. More generally, it may also serve to promote the democratic accountability of the executive.

If Clause 154 becomes law, therefore, it will be less likely that suspected international criminals present in the United Kingdom will be arrested and prosecuted. The international community will also be given the signal that the UK is not fully committed to ensuring that suspected international criminals can be arrested before fleeing the jurisdiction, thus weakening the UK's stance in the struggle against war crimes, torture and crime against humanity and its reputation for upholding the rule of law.

5. Can any change be justified?

We do not believe that further safeguards are needed in the process for seeking a private arrest warrant against a person suspected of an international crime. However, if the House wishes to give the Crown

[8] Public Bill Committee, 4th sitting, 20 January 2011, columns 125-126.

[9] Lord Wilberforce, *Gouriet v Union of Post Office Workers* [1978] AC 435: 'Enforcement of the law means that any person who commits the relevant offence is prosecuted. The individual … who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. *This historical right … goes right back to the earliest days of our legal system…*' [emphasis added]. See also at 497 per Lord Diplock: 'In English public law every citizen still has the right, as he once had a duty (though of imperfect obligation), to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law by this procedure'.

Prosecution Service more of a role in the process we would have no objection to a clause in the amended form proposed by Baroness D'Souza, Lord Lester of Herne Hill and Baroness Tonge, whose proposed amendment is reproduced below, provided that it is clear that a warrant can be issued as a matter of urgency where the case requires it. The clause would then provide that the DPP is given notice of an application and can appear before the court to advise, but that his consent is not required to the issuing of the warrant.

BARONESS D'SOUZA

LORD LESTER OF HERNE HILL

BARONESS TONGE

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Page 102, leave out line 20 and insert "unless the Director of Public Prosecutions has been given prior notice that an information has been laid.

(4AA) The Director of Public Prosecutions may submit to the Court advice concerning the issuing of a warrant or summons and shall be allowed to appear before the Court in respect of this."

FOR FURTHER INFORMATION, PLEASE CONTACT:

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