ARREST WARRANTS – UNIVERSAL JURISDICTION

NOTE BY THE MINISTRY OF JUSTICE

Background: The problem

It was reported last year that a warrant had been issued in London for the arrest of a prominent Israeli politician on suspicion of war crimes. The news caused a stir which did not entirely die down when it emerged that the politician had not in fact left Israel. There had been earlier attempts to obtain such warrants in similar circumstances.

Generally speaking, the courts in England and Wales deal only with offences committed here. But there are exceptions: one is murder, which has long been capable of being tried in an English court wherever the murder was committed, if the defendant is British. Another, and wider, exception relates to a few extremely grave offences (including war crimes under the Geneva Conventions Act 1957) which can be tried here even if they were committed outside the UK, and whatever the defendant's nationality. This is known as 'universal jurisdiction', and its purpose is to ensure that there is no hiding place for people accused of these most serious crimes.

Most offences are prosecuted in England and Wales by the Crown Prosecution Service, but it is open to any private individual to bring what is called a 'private prosecution' by applying to a magistrate. Normally the application would be for a summons to the defendant to attend court, but there is the alternative of issuing an arrest

warrant if the offence is serious, or if the suspect might not answer to a summons.

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. The court merely ascertains that it has jurisdiction, and looks to see if there is some *prima facie* evidence that an offence known to the law has been committed by the person named. The court certainly does not need to decide there is a realistic prospect of the prosecution succeeding.

The right to bring a private prosecution applies to all offences. Some very serious offences, including almost all universal jurisdiction offences, are subject to a safeguard in that the consent of the Attorney General is required before a prosecution can go ahead. For this reason a summons will not be issued until the necessary consent to the prosecution has been given. But section 25 of the Prosecution of Offences Act 1985 provides that absence of consent does *not* prevent the issue of a warrant.

The result of all this is that a private individual can secure the arrest, on suspicion of the gravest of offences, of a foreign visitor to this country, on the basis of evidence that might well be insufficient to gain the Attorney General's consent to a prosecution, let alone secure a conviction by a jury.

This position, although unusual, is not unique to England: the attached table, drawing on research by FCO, illustrates that the

comparable common law jurisdictions in Australia and New Zealand also allow a person to be arrested in connection with one of these offences at the instance of a private individual, and before the necessary consent has been given. But the position does appear anomalous; and, in the Government's view, it is unsatisfactory. 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.

Possible solutions

It is clear that the problem can be solved only by primary legislation.

The Government remains absolutely committed to upholding the principles of universal jurisdiction, so that there is no impunity for those suspected of grave offences such as those under the Geneva Conventions Act. None of the options discussed below would reduce the scope or effectiveness of universal jurisdiction.

Rather, the approach is to limit the availability of arrest warrants in respect of universal jurisdiction offences. Where applications for such warrants have been made, it has been in respect of war crimes under the Geneva Conventions Act 1957; but as the same mischief would result from arrest warrants being sought in respect of other offences where there is universal jurisdiction, including torture and hostage-taking, any solution would arguably need to extend to those crimes too.

The possible options are as follows:

i) *To require the Attorney General's consent to the prosecution to have been notified before an arrest warrant could be issued in respect of universal jurisdiction offences*.

This would bring the issue of a warrant into line with the issue of a summons, in that consent to the prosecution would be a prerequisite.

The fact that it would remain open to a private prosecutor to obtain an arrest warrant is a superficial attraction. But that advantage is more apparent than real, because consent is not a simple rubber-stamping exercise – it requires the Attorney General to consider the sufficiency of admissible evidence as well as relevant public interest factors; and if the case were meritorious the Attorney would no doubt consider with the Crown Prosecution Service whether the public prosecutor should conduct the case. The time pressures associated with emergency applications for an arrest warrant do not allow for the careful consideration that should accompany a decision to prosecute such a grave crime. Where it is obvious that the Attorney General could not grant consent based on the material provided (for example if no admissible evidence is provided), an application for consent with a view to making an emergency application to the court would be pointless (other than for the sake of any publicity gained). A case which may have merit, but which would require investigation before any prosecution could be considered, should be drawn to the attention of the police.

ii) *To prohibit the issue of an arrest warrant on the application of a private prosecutor in respect of universal jurisdiction offences, while leaving the summons route available*.

This is a variation on i) above. It is the option that would most directly cure the problem, which relates to arrests, not the issue of summonses. But whilst it could be seen as an advantage that private prosecutors would continue to have the right to apply for a summons, the ability to do so would be of little practical utility in this sort of case, since a summons could not be issued until the Attorney General had consented to the prosecution, which might well be too late where the suspect was a visitor from overseas.

iii) To restrict to the Crown Prosecution Service (CPS) the right to initiate proceedings in respect of universal jurisdiction offences.

This option involves the removal of the right of private prosecution for a universal jurisdiction offence. It would no longer be possible for a private individual, or indeed anyone other than the CPS (or a Law Officer), to initiate proceedings for this very limited category of offences. It is arguable that decisions to pursue criminal investigations and prosecutions for these grave crimes should be undertaken by the independent investigating and prosecuting authorities with the powers and expertise to undertake them successfully.

The Government's proposal

The Government considers that the most straightforward solution, and the best, would be to restrict the right to prosecute universal

jurisdiction offences to the CPS. But, in order to confine the restriction as closely as possible to the circumstances that have caused concern, we propose that it should be limited to cases where the universal jurisdiction offence is alleged to have been committed *outside the United Kingdom*, and by a *person who is not a British national or* (in order to avoid anomalies in the treatment of members of the Armed Forces) *a person subject to Service law*. This would mean that a private individual would continue to be able to apply for the issue of a summons or warrant in respect of a universal jurisdiction offence if it was committed in the UK, or if the suspect was a British national or a member of the UK Armed Forces.

A clause has been drafted to give effect to this proposal, and is annexed to this paper.

Invitation

The Government would welcome views on this paper and on what is proposed. Comments, to arrive no later than 6 April 2010, should be addressed to –

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Crimes of universal jurisdiction - Comparative Criminal Procedure

Country	Can a private individual initiate a criminal prosecution for international crimes which leads to the arrest of a suspect?	Are there procedural requirements for prosecuting international crimes?	Jurisdictional requirements for prosecuting international crimes
Australia	Yes. Section 13 of the Crimes Act 1914 protects the right of a person to bring a private prosecution and is expressly preserved under section 10(2) of the DPP Act.	Yes, section 268.121 of the Criminal Code Act 1995 provides that war crimes, crime against humanity and genocide can only be commenced with the Attorney-General's written consent. However, pursuant to s268.122 a person may be arrested, charged, remanded in custody, or released on bail, in connection with an international crime before the necessary consent has been given.	Absolute universality - ss 268.117 and 15.4 of the Criminal Code Act 1995.
New Zealand	Yes. However, police have refused to act on an arrest warrant against a foreign national before seeking the advice of the Solicitor General and the Attorney-General.	Yes, under article 13 of International Crimes and International Criminal Court Act 2000 the Attorney General's consent must be sought for a prosecution to be instituted.	Absolute universality – International Crimes and International Criminal Court Act 2000, ss 8,9,10,11.
France	Yes. A private individual (who is a victim of the crime) could report an allegation to an investigating judge without the concurrence of the public prosecutor and an investigating judges can pursue sensitive investigations (but their autonomy is not unlimited and there are defined, restrictive mandates and practical limits).	No specified procedural requirements for international crimes.	The French courts have taken quite a restrictive approach with regards to universal jurisdiction. While the Criminal Procedure Code (at article 689, read together with article 55 of the Constitution) would appear to

	A victim can instigate a prosecution known as 'instigation by civil party' (*constitution de partie civile a titre principal*) which occurs where either there has been no prosecution at all or the prosecutor has simply declined to proceed. In these circumstances it is always open to the victim to force a prosecution by intervening by means either of a direct summons (*citation directe*) before the trial court itself or, for more weighty offences or whether the offender is unknown, by a complaint outlining the facts with an application for civil party status directed to the examining magistrate. An investigating Magistrate is brought into the case either by the issue of a warrant by the prosecutor (*requisitoire afin d'informer*) or by the receipt of a complaint from the victim (*complainte avec constitution de partie civile*). In rare cases an examining Magistrate may be involved at an early stage in an EIF (Flagrant Offence Enquiry). However an 'instruction' will not be formally opened without one of the two steps above occurring. Instructions must be opened in all cases of grave offences. Nevertheless, the French authorities are concerned about the impact of some investigations. Reforms are currently being pushed through Parliament which will phase out the role of the investigative judges generally – powers will pass to the public prosecutor.		suggest that an individual who is in France may be tried for any offence which they have committed under the Geneva Conventions; the court held that the offences were not prescribed in French law and were drawn too widely to be relied on for prosecution. As a result, no universal jurisdiction is available for breaches of the Geneva Conventions and its Protocols. Jurisdiction is generally limited in the French Penal Code to where the perpetrator or the victim is French (article 113-6) or where the act is committed in France. This would also include a person who was not a French national when they committed the offence but had subsequently become one. Genocide and other crimes against humanity are felonies by virtue of the Penal Code. (There is a currently a proposed Bill dealing with universal jurisdiction what will set additional conditions for the prosecution of such crimes).

			There are, however, limited opportunities for the exercise of universal jurisdiction which relate to crimes committed in Rwanda and the former Yugoslavia which were based on the Security Council Resolutions which established the ICTY and ICTR.
Spain	Yes. It appears that all citizens can instigate a prosecution, however persons not connected with the offence (ie are not victims) must comply with a series of requirements.	Could not indentify any relevant provisions.	The Spanish have now amended their laws so that there must now be a clear link to Spain, or Spanish victims or the presence of the alleged perpetrators on Spanish territory for an international crime to be prosecuted.
Canada	Yes. There is the opportunity for private prosecutions to be brought under section 507.1 of the Criminal Code. However, where an individual has presented information regarding an offence to the court it must be notified to the Attorney General who has a right to appear, to cross-examine and call witnesses and to present any relevant evidence at the hearing.	Yes. Under section 9 of the Crimes Against Humanity and War Crimes Act 2000 no proceedings may be commenced without the written consent of the Attorney General, or Deputy Attorney General (this will often be the DPP acting as the Deputy Attorney General for criminal matters).	Under section 8 Crimes Against Humanity and War Crimes Act 2000 an individual may only be prosecuted if there is a link to Canada or that individual is actually in Canada.

Ireland	Yes, it is possible although unlikely. There is a law from 1851 (section 11(1) of the Petty Sessions (Ireland) Act 1851) which, although unused to date, would allow a private citizen to ask the District Court to issue an arrest warrant for minor breaches of the Geneva Conventions under section 4 of the 1962 Act.1 Section 3(5) of the Prosecution of Offences Act 1974 (functions of the Director) would appear to suggest that a court could remand an individual without the Attorney General's consent. It states: " Notwithstanding anything in this section, where a person is charged with an offence under section 3 of the Geneva Conventions Act, 1962 , the Official Secrets Act, 1963, or the Genocide Act, 1973, no further proceedings in the matter except such remand or remands in custody or on bail as the court may think necessary shall be taken without the consent of the Attorney General." This appears to give the courts discretion to remand an individual prior to the Attorney General consenting to their prosecution. It is, however, unclear as to whether this would allow a private individual to seek a warrant as provided for the in the Petty Sessions (Ireland) Act 1851 or whether this would solely apply to the actions of the DPP (who by virtue of the Prosecution of Offences Act 1974 took over many of the Attorney General's functions). It is also possible that a Magistrate may overlook this necessity, at least initially, and could therefore issue a warrant.	Prosecutions under section 3 of the Geneva Conventions Act 1962 (grave violations of the Conventions) "shall not be instituted except by, or on behalf of, or with the consent of the Attorney General". Prosecutions for minor violations, however, under section 4 do not need the Attorney General's consent.	Under sections 3 and 4 of the Geneva Conventions Act 1962 (as amended) allows for the prosecution of any individual, of whatever nationality, for grave breaches of the Conventions and the offences are to be treated as if they were commissioned in Ireland. For minor offences committed outside the territory of Ireland, the person must be a citizen of Ireland.

Germany	No. Private prosecutions cannot be brought for serious crimes. The Federal prosecutor applies to the pre-trial judge at the Federal High Court of Justice for the issuing of an arrest warrant. An arrest warrant can only be issued where there is an urgent suspicion of a criminal act and a reason for arrest (e.g. risk of flight, collusion, re-offending, specific serious criminal act). If the public prosecution service decides not to prosecute a victim may challenge this in court by virtue of section 172 of the German Criminal Procedure Code.	Could not indentify any relevant provisions.	In Germany, in the case of crimes falling under the German Code of Crimes against International Law, i.e. genocide, crimes against humanity and war crimes, German criminal law applies, even if the offence was committed outside jurisdiction and there is no connection to Germany. The Prosecutor is however entitled to dismiss the case if there is no linking point to Germany or it is being investigated by a more closely related state or an international criminal court - Code of Crimes Against International Law s.1, Criminal Code, s 153f.
Belgium	No. Only the police and Prosecution Service in Belgium may now initiate proceedings and can only do so on the basis of substantial evidence and a high probability of a successful prosecution. In 2003 Belgium removed the right of victims to initiate a universal jurisdiction prosecution. In 2003 Belgium widened the prosecutor's discretion as to whether a complaint is investigated. The Prosecutor	No specified procedural requirements for international crimes. As with other crimes, the prosecutor refers the complaint to the investigative judge.	As of August 2003, Belgian authorities can exercise jurisdiction over alleged perpetrators of genocide, crimes against humanity and war crimes who are either Belgian nationals or Belgian residents, including perpetrators who became residents or citizens after the

	can decide not to investigate a complaint if the complaint is obviously unfounded, the crimes referred to in the complaint do not qualify as serious violations of international humanitarian law, or if an admissible public action cannot result from the complaint. The prosecutor can further reject a complaint if facts of the case indicate that the case should be heard by the courts of the state where the crimes were committed or by an international court. The decision about whether to investigate a complaint now lies solely at the prosecutor's discretion, and public prosecutors play an increasingly important role in the exercise of universal jurisdiction in Belgium. The police and the investigative judge are only consulted by the prosecution. In exceptional cases, the minister of justice can order the federal prosecutor to initiate an investigation (*droit d'injonction positive*). The investigation is carried out by the special police department in charge of the investigation of international crimes under the supervision of the investigative judge, who acts as a judicial official and police investigator. In a complaint brought against the modified universal jurisdiction law, the Cour d'Arbitrage decided on March 23, 2005, that judicial review of a prosecutor's decision not to open an investigation was permissible to some extent. If the prosecutor decides not to further proceed with a case, the Indicting Chamber (*Chambres des mises an accusation*) will take the decision whether to		crime was committed. Courts can also exercise jurisdiction over international crimes if the victims are Belgian nationals or had lived in Belgium for at least three years at the time the crime was committed. Courts therefore exercise a form of passive or active nationality jurisdiction, unless Belgium has an obligation to prosecute under treaty law. The principle of subsidiarity was introduced by the changes to the legislation in April 2003. The prosecutor may refrain from referring the complaint to the investigative judge if, taking into consideration the interests of justice and Belgium's international obligations, the particular complaint should be brought before an international tribunal or before a court in the territorial state or the state of nationality of the alleged perpetrator. If the prosecutor determines that the ICC is the appropriate forum, the minister of justice may, after

	continue with a case. However, at no stage of the review are private parties filing the complaint allowed to intervene to present their case, and the chamber will base its decision on the reasons set out by the prosecutor only. No such judicial review is possible where the prosecutor decides not to investigate because the facts of the case indicate that the case should be heard by the courts of the territorial state or by an international court.		consultations with the Council of Ministers, refer the case to the ICC. If the ICC decides not to exercise its competence over the matter, Belgian courts will have jurisdiction. It is then once again up to the federal prosecutor to decide how to proceed with the complaint.
Italy, The Netherlands, Denmark, Sweden and Norway.	No.		

This table provides an analysis of three specific aspects of criminal procedure which relate to the prosecution of crimes of universal jurisdiction. First, the capacity of a private individual to initiate a criminal prosecution for international crimes and second, what specific procedural steps are involved in prosecuting international crimes and finally, what are the jurisdictional requirements for prosecuting international crimes. It should be noted that the information in this table reflects the situation as at 19 February 2010 and may be subject to change as states enact new legislative provisions.

It should also be noted that Italy, The Netherlands, Denmark, Sweden and Norway do not allow private individuals to initiate criminal prosecutions.