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BRIEFING ON UNIVERSAL JURISDICTION ("UJ") AND ARREST WARRANTS

UJ is the legal power which allows suspected perpetrators of crimes such as war crimes, torture and genocide to be prosecuted in the national courts of countries other than those where the alleged crimes were committed. As a signatory to the four 1949 Geneva Conventions and the 1984 UN Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT), Britain has not only the capacity, but also the duty, to arrest and prosecute those suspected of such crimes.

Article 146 of the Fourth Geneva Convention, states that the UK is:

....under an 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.

It is often difficult, if not impossible, to bring a suspect to justice in the state where the crimes allegedly took place. The purpose of UJ is to ensure that there is no hiding place for suspected war criminals.

Arrest Warrants for war crimes and crimes against humanity

The current position is that a private individual may apply to a magistrate for an arrest warrant if the war crimes suspect is visiting the country or a visit is anticipated. The Attorney General's consent is needed for the prosecution to go ahead. But under Section 25 of the Prosecution of Offences Act 1985, absence of consent does not prevent the issue of a warrant, if the magistrate considers that:

1. there are reasonable grounds to suspect that an offence under such legislation has been committed;

2. admissible evidence has been presented which (if uncontradicted) establishes the elements of the offence alleged;

3. s/he has jurisdiction to issue the warrant and has ruled out the immunity of the suspect.

The policy of the previous Government was based on a fundamental misconception

Before the election, the Government wished to remove the power of the magistrate to issue arrest warrants in universal jurisdiction cases. In coming to this view, it seems to have allowed itself to be convinced that the making of applications for warrants had become a form of political protest and a misuse of the courts. As the Labour MP Andrew Dismore, who lost his seat in the election, put it in a parliamentary debate in January:

"I would like to see our courts protected from being used as campaign forums by politically motivated groups that are not interested in justice, but are interested in scoring party political or other political points in this long running conflict in the Middle East...Our courts have been left dangerously open to political manipulation and are being brought into disrepute."

This view was echoed by Gordon Brown. In March, he wrote in *The Daily Telegraph* that

"an arrest warrant for the gravest of crimes can be issued on the slightest of evidence...As we have seen, there is now significant danger of such a provision being exploited by politically motivated organisations or individuals who set out only to grab headlines knowing their case has no realistic chance of a successful prosecution. Britain cannot afford to have its standing in the world compromised for the sake of tolerating such gestures."

But these assertions, like the other statements made by those arguing for a change in the law, are based on a fundamental misconception. There has not been one successful attempt to procure the issue of a warrant in a manner that was an abuse of process. Significantly, none was cited by the last Government when it proposed to change the law. Indeed, Gordon Brown's generalised assertions are an insult to our judicial system and the victims of some of the most heinous crimes. Proposals by the last Government to change the system attracted criticism from NGOs such as Amnesty International, Human Rights Watch, Liberty, Redress, Global Witness, FIDH (the International Federation for Human Rights), and Justice (the British section of the International Commission of Jurists), as well as practising lawyers.

The risk in changing the Law

The issue of the arrest warrant for a war crime is decided only by specialist legally qualified magistrates such as the most senior district judge at Westminster Magistrates' Court. They are well qualified to decide whether the high threshold of evidence, liability and jurisdiction has been met and that no immunity applies. If the issue of the warrant has to wait until a decision whether to prosecute had been taken, whether by the Crown Prosecution Service (the "CPS") – as was advocated in a paper produced by the Ministry of Justice for the last Government - or by the Attorney General, the suspected war criminal will long since have fled the jurisdiction. Suspects should not escape before the police and/or CPS have had the opportunity to make a considered decision whether to investigate the allegations. The removal of the right of public prosecution in such cases would have the effect of turning our country into a safe transit point for war criminals, torturers and those guilty of genocide from all over the world.

Tzipi Livni and other Israeli suspects

In the case of visiting Israeli ministers or military leaders, the UN mandated Goldstone Report which investigated Operation Cast Lead, the assault on Gaza in December/January 2009 – 2010, contains ample prima facie evidence of attacks which deliberately targeted civilians and civilian infrastructure. It thus concluded that war crimes had been committed and that these needed investigation. Ms Tzipi Livni, as Israeli Foreign Minister, was one of those responsible for authorising these attacks and made public statements that appeared to encourage the Israeli military to use disproportionate force and engage in deliberate destruction with no legitimate military objective. Prima facie evidence of both the factual and mental elements of her committing war crimes would therefore seem to exist, and it is scarcely surprising that a senior magistrate found there to be sufficient evidence for her arrest if she visited the UK.

The argument that banning Israeli ministers from visiting the UK hinders the 'peace process' is specious. There is nothing to prevent British ministers from visiting suspects in their own country where they enjoy immunity. Furthermore, the serving prime minister, foreign minister and minister of defence of any sovereign state can visit this country without fear of prosecution under the principle of sovereign immunity.

A regressive and retrograde step

Any attempt to involve the Attorney General in the decision to issue the warrant would be regressive. It would be a retrograde step with regard to the independence of prosecutors. If any revision to the law is contemplated, then it should be to reduce the role of the Attorney General in favour of that of the Director of Public Prosecutions who should become the official who decides on the public interest requirement of

whether the prosecution should go ahead, once a warrant has been issued. If desired, the DPP could also be given the right to advance notice of the application and the right to attend the hearing of the application.

The right to bring a private prosecution is an ancient, common law right with which the Executive tampers at its peril. Over the centuries, Parliament has been persuaded of its desirability. This is reinforced by the views of highly respected law lords. As Lord Simon of Glaisdale put it, the right is founded on the "fundamental constitutional principle of individual liberty based on the rule of law", while Lord Wilberforce noted that the right remains "a valuable constitutional safeguard against inertia or partiality on the part of authority" and Lord Diplock stated that it was "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of [the] authorities to prosecute offenders against the criminal law". As recently as 2006, Lord Mance stated that the right is "a safeguard against wrongful refusal or failure by prosecuting authorities to institute proceedings". Furthermore, private individuals who put together the necessary admissible evidence to secure the issue of an arrest warrant do so at their own expense. At a time of economic austerity, it would be wrong in principle to amend the law in a way that might necessitate additional public expenditure.

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Note: The above applies to the position under the law of England and Wales. The position in Scotland and N. Ireland may be different.

Further reading:

Briefing to Parliamentarians by the UK Universal Jurisdiction Group (Amnesty International, FIDH, JUSTICE and REDRESS), 27 January 2010

available at: http://www.hrw.org

Arrest Warrants – Universal Jurisdiction Response to Ministry of Justice Communication, JUSTICE, March 2010

available at: http://www.justice.org.uk

Liberty's response to the Government's proposals on Arrest Warrants for crimes subject to universal jurisdiction, April 2010

available at: http://www.liberty-human-rights.org.uk