

**MEMO**   
**MIDDLE EAST MONITOR**   
*Creating New Perspectives*

**Arrest Warrants-Universal Jurisdiction**

**MEMO Response to Ministry of Justice Consultation**

**April 2010**

**[www.middleeastmonitor.org.uk](http://www.middleeastmonitor.org.uk)**

419-421 Crown House, North Circular Road, London, NW10 7PN  
T: 020 8838 0231 F: 020 8838 0705 E: [info@memonitor.org.uk](mailto:info@memonitor.org.uk)

## **Introduction**

The Middle East Monitor (MEMO) is an independent media research institution founded in the United Kingdom to foster a fair and accurate coverage in the Western media of Middle Eastern issues and in particular the Palestine Question.

We have conducted in-depth research on arrest warrant and universal jurisdiction developments on different levels, both in the United Kingdom and in other European countries. In December 2009, we organised an international conference on universal jurisdiction at the British Institute of International and Comparative Law, which was attended by prominent lawyers, academics and journalists working in the field. We have traced how, further to Israeli pressure, several European countries have reformed their universal jurisdiction legislation in order to make it harder to prosecute alleged war criminals. We regard universal jurisdiction as a very powerful tool in the context of the Israel/Palestine conflict, since the Israeli Supreme Court does not adequately conduct investigations of violations of international law.

We welcome the Ministry of Justice consultation and are responding to it in the hope that the United Kingdom remains committed to the rule of law and to its international legal obligations and that the Government's proposals do not go ahead.

## **Summary Points**

- The right of an individual citizen to ask the court for a private prosecution is a well established constitutional right in the United Kingdom, and to remove this right in the context of war crimes would deprive citizens of an ability to address the failure of the Crown Prosecution Service or the Attorney General to prosecute an alleged war criminal.
- Instead of making it harder to prosecute alleged war criminals, the United Kingdom should remain committed to its commitments under the Geneva Conventions. Allowing a private citizen to ask the court for an arrest warrant allows a suspect of war crimes to remain in the country before the Attorney General decides whether or not the prosecution is to go ahead. Failure to provide the private individual with this right, the suspect could easily stay in the United Kingdom for a short visit and escape justice.



- Contrary to what the government suggests, these cases are conducted in a very serious manner and on behalf of victims who have been subject to war crimes or crimes against humanity. The evidence is gathered very carefully and there is no suggestion that these cases are politically motivated.

**The right of an individual to seek private prosecution, a “constitutional safeguard”**

Historically, all prosecutions were private. The right of private prosecution is a fundamental constitutional right in our common law tradition. In what follows, it will be argued that this right is not a mere constitutional anomaly which has remained in the United Kingdom and which should have been extinguished with the new role of the Crown Prosecution Service and that of the Attorney General. This right still represents an ultimate safeguard for the citizen against inaction, inertia, capriciousness, incompetence, bias, or corruption on the part of the public authorities.

The right to seek a private prosecution is a fundamental check against a failure by the executive to enforce the criminal law. The government’s option for amending section 25 (2) of the Prosecution of Offences Act 1985 will severely undermine the effectiveness of the current law on universal jurisdiction. Failure or refusal by the authorities to prosecute a suspect of war crimes could lead to impunity of the most heinous crimes, and allowing a private citizen to commence a private prosecution, if followed by prosecution, could deter this occurrence.

The right to bring a private prosecution for a criminal offence is one of the oldest rights known to common law. The right remains “a valuable constitutional safeguard against inertia or partiality on the part of the authority”.<sup>1</sup> It is “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law”<sup>2</sup>

Private prosecutions in the context of universal jurisdiction are often initiated by lawyers with specialist knowledge of the particular area of criminal law concerned. In a complex area like war crimes, it is perfectly reasonable that special lawyers and NGOs on behalf of victims are able to commence these proceedings.

---

<sup>1</sup> Lord Wilberforce, *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477

<sup>2</sup> Lord Diplock, *Gouriet v Union of Post Office Workers* [1978] AC 435 at 498



Contrary to what the government is suggesting, these cases are not politically motivated and do not reflect an anti-Israeli agenda. Furthermore, it must be taken into account that there are already safeguards in the law as it stands which prevent an individual from abusing the right of private prosecutions. Heads of state enjoy immunity from being prosecuted for war crimes. Hence the decision last September of a magistrate not to issue an arrest warrant against Mr Ehud Barak on his visit to the United Kingdom. Due to his capacity as Ministry of Defence and Deputy Prime Minister, he would enjoy immunity from prosecution for war crimes and crimes against humanity during any *official* visit and would be able to conduct visits to the UK without hindrance. Ms Tzipi Livni on the contrary, no longer serves as Foreign Minister, and should no longer be afforded this immunity.

The special magistrates sitting in Westminster Magistrates' Courts which deal with these complex cases also serve as a safeguard so that the process is not abused, since they reject any unfounded applications where there is not enough evidence to suggest the applicant is not guilty of war crimes. The government should respect the separation of powers between the executive and the judiciary and should trust the judiciary and leave it up to them to determine when to issue an arrest warrant. What occurred last December further to Ms Livni's arrest warrant was a clear interference with their independent judicial activity, something which constitutes a threat to any democratic legal system.

As for the government's suggestion that the recent arrest warrants against Israeli diplomats is preventing the UK from engaging in discussions with Israeli officials who are not subject to immunity, the Middle East Monitor regards this as a false pretext for many Israeli ex-officials to travel freely. Not only can these meetings with British politicians take place overseas, but there is no hint that any credible "*peace process*" is taking place on behalf of the Israeli government, in light of the new decision to construct more settlements, the recent wave of airstrikes in Gaza and the continuing house demolition policies in occupied Jerusalem.

Furthermore, the United Kingdom is under a duty to ensure the prosecution of such suspects, and this should be taken with utmost seriousness. Consideration about the impact on bilateral relations should not impede the ability of sovereign states to fulfil their international duties. Already, adequate provisions are made for the granting of immunity to certain actors, including serving presidents and foreign ministers.



The Goldstone Report, conscious of the exclusion of Palestinians from the framework of international criminal law, stressed in its recommendations that:

***“States Parties to the Geneva Conventions of 1949 should start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognised standards of justice”<sup>3</sup>***

In its latest Law Commission consultation report on the Right to Private Prosecution, the Law Commission adopts the right as a “fundamental principle” that the right of private prosecution should be unrestricted unless some very good reason to the contrary exists. In recognition of the particular sensitivity of the subject matter of offences such as war crimes, the Commission explains how the Act itself makes provision for various safeguards, including the requirement that any proceedings brought by virtue of the Act should be by or with the consent of the Attorney-General. The latter does not exclude the right of a private individual to obtain an arrest warrant against an alleged war criminal, and later on if agreed by the Attorney General, to commence prosecution and a fair trial against him/her.<sup>4</sup>

The [Law Commission](#) notes that on the subject of war crimes and in recognition of the particular sensitivity of the subject matter of the offences and the particular difficulty of ensuring fairness, the 1991 Act makes provision for various safeguards, including the requirement that any proceedings brought by virtue of the Act should be by or with the consent of the Attorney-General.

The abolition of the private prosecution was not recommended by the Law Commission in its previous report either<sup>5</sup>, nor in the Auld Report in 2001.<sup>6</sup> The latter recommended that any court in which a private prosecution is commenced should have a duty to alert the Director of Public Prosecutions. The DPP should then apply the evidential and public interest tests in deciding whether to discontinue any case taken over (Auld Report, Ch.10, paras 47-49).

---

<sup>3</sup> Report of UN Fact-Finding Mission, para 1772

<sup>4</sup> <http://www.lawcom.gov.uk/docs/cp149.pdf>

<sup>5</sup> <http://www.lawcom.gov.uk/docs/lc255-1.pdf> para 5.3

<sup>6</sup> <http://www.criminal-courts-review.org.uk/auldconts.htm>



**The UK should remain committed to Universal Jurisdiction**

UK Geneva Conventions Act 1957, Article 1 states that: “Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or prosecutes the commission by any other person of a grave breach of any of the [four Geneva Conventions of 1949] or the first protocol shall be guilty of an offence.”

Obligations under Articles 146 and 147 of the Fourth Geneva Convention require the United Kingdom, as a High Contracting Party to the Geneva Conventions, ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article’

The UK has long celebrated its engagement with international humanitarian law and the Geneva Conventions, and should continue doing so. On 1 April 2009, while moving a Bill in the House of Commons to amend the 1957 Act to allow for incorporation of the Third Protocol Additional to the Geneva Conventions into UK domestic law, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs (Gillian Merron) stated that: *“this is a fitting moment to seek support for improvements to the Geneva conventions as it is this year that the conventions celebrate their 60<sup>th</sup> anniversary. They are universally recognised as enshrining the main principles of international humanitarian law. They oblige every state in the world to abide by the rules of war in order to limit the effects of armed conflict [...] The UK has, of course, always been at the forefront of developing and promoting the rules in the Geneva conventions and, by enacting this Bill, we will show the UK’s support for the latest improvements to these rules and our continuing commitment to the development to international humanitarian law”*<sup>7</sup>

As mentioned above, any change in the law to ensure the Attorney General’s involvement at the arrest warrant stage would be detrimental to the effective application of universal jurisdiction. Requiring the Attorney General to consider each application at the arrest stage not only allows for political prejudices to impact upon the decision, but delays proceedings, and will inevitably hamper the work of the police in executing an effective arrest.

---

<sup>7</sup> House of Commons Hansard Debates 1 April 2009



The obligation to enact legislation necessary to provide effective penal sanctions in relation to grave breaches lies at the heart of any meaningful prosecution of grave breaches of the Geneva Convention. Yet, despite its importance, in the 60 years that have passed since the adoption of the Geneva Conventions, the national implementation of the grave breaches regime has received relatively little attention. Grave breaches should not be left unpunished and the United Kingdom should remain at the forefront of its commitment to ensuring accountability for international humanitarian law violations.

MEMO rejects the suggestions made by some that the creation of international tribunals such as the International Criminal Court should shift the role of domestic jurisdictions to prosecute alleged war criminals.<sup>8</sup> We would like to direct the government to the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal in the International Court of Justice *Arrest Warrant of 11 April 2000* case.<sup>9</sup> (*Democratic Republic of the Congo v. Belgium*), ICJ, Judgment, 14 February 2002, § 32; R. van Elst, 'Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions', 13 *Leiden Journal of International Law* (2000) 815-854, at 836. The judges noted how domestic legislation has been overly cautious to comply with their international law duties and in relying on universal jurisdiction to prosecute alleged war criminals.

At MEMO we deplore the Israeli efforts to delegitimize the use of universal jurisdiction. President Shimon Peres said the arrest warrant was one of Britain's biggest political mistakes in recent years.<sup>10</sup> Binyamin Netanyahu, Israel's prime minister, labelled it an "absurdity"; Ron Prosor, Israel's ambassador to Britain, referred to the British courts as a 'playground for anti-Israel extremists'; and Israel's Foreign Ministry criticised the 'cynical legal move' taken 'at the behest of radical elements'.

After Operation Cast Lead, there have also been indications of a concerted effort by Israeli officials and military lawyers to promote changes in international law to ensure a reduction in the protection afforded to civilians in armed conflicts. The rejection of the Goldstone Report by Israel also shows a disregard of the rule of law and of any accountability methods.

---

<sup>8</sup> <http://www.jcpa.org/text/universal-jurisdiction.pdf> "Curbing the Manipulation of Universal Jurisdiction", Jerusalem Centre for Public Affairs

<sup>9</sup> Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), ICJ, Judgment, 14 February 2002, § 32

<sup>10</sup> "Barak David Brown tells Llyni: You're always welcome in Britain" Haaretz, 16 December 2009.



Accordingly, close political ties with another government must not over-ride the UK's proper duty to enforce the rule of law, nor must Israeli efforts to subvert the law itself be given any support.

**Recommendations**

- The Government should not succumb to foreign pressure to change the UK's universal jurisdiction laws and should remain committed to its international obligations.
- The right of a private citizen to petition the court to issue an arrest warrant against a suspected war criminal, is a constitutional safeguard, and Britain should not follow the change in laws which has taken place in Belgium and in Spain so as to not remain a safe haven for alleged war criminals
- Failure to respect the above mentioned recommendations would mean that a suspected war criminal visiting the UK at short notice will simply not be arrested because the Attorney-General or the Crown Prosecution Service will not have the time, resources or will to do so.
- If the UK truly wants to bring about peace in Israel and Palestine it must become a strong advocate for accountability and stand firmly against impunity. Any change in the law would amount to a denial of the principle of universal jurisdiction.

