Arrest Warrants – Universal Jurisdiction

JUSTICE Response to Ministry of Justice Consultation

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE has had a long engagement with issues relating to the prosecution of criminal offences, including war crimes. For instance, the first chair of JUSTICE from 1957 to 1972 was Lord Shawcross QC, former Attorney General and Chief Prosecutor for the United Kingdom before the International Military Tribunals at Nuremberg. JUSTICE has published numerous reports on criminal matters, including *Preliminary Investigations of Criminal Offences* (1960); *The Prosecution Process in England and Wales* (1970); and *Pre-Trial Criminal Procedure: Police powers and the prosecution process* (1979), *Under Surveillance: Covert policing and human rights standards* (1998), *Intercept Evidence: Lifting the ban* (2006), and *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11* (2007). It also intervened in *R (Corner House and CAAT) v Serious Fraud Office* in July 2008 concerning the relationship between the principles of prosecutorial discretion and the rule of law, and supported the amendments to the Coroners and Justice Bill that strengthened universal jurisdiction in the UK in relation to genocide, war crimes, and crimes against humanity.

Summary

3. JUSTICE regrets that the government's proposals appear ill-founded and unnecessary. Notwithstanding the adverse comments of the Prime Minister, the Justice Secretary and the Attorney General, there is no indication that arrest warrants for war crimes have been issued improperly or on the basis of insufficient evidence.

4. More generally, the right to seek a private prosecution is a fundamental check against a failure by the executive to enforce the criminal law. The right is of particular importance in the context of war crimes and other offences of universal jurisdiction, because of (i) the extremely limited resources of the Metropolitan Police and the Crown Prosecution Service to investigate and prosecute such offences; and (ii) the risk that the Attorney General may refuse consent to prosecute persons reasonably suspected of war crimes for fear of damaging the UK's relations with a friendly state.

5. The government's preferred option for amending section 25(2) of the Prosecution of Offences Act 1985 is in most cases likely to result in no action being taken against suspected war criminals who visit the UK at short notice and for short periods of time. It would severely undermine in practical terms the effectiveness of the current law on universal jurisdiction.

The right to bring a private prosecution

6. The right of a citizen to bring a private prosecution for a criminal offence is one of the oldest rights known to the common law.[1] As Lord Wilberforce noted in 1978, even though most prosecutions are nowadays undertaken by the Crown, the right remains 'a valuable constitutional safeguard against inertia or partiality on the part of authority'.[2] His judicial colleague Lord Diplock similarly described it as 'a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law'.[3] Another Law Lord, Lord Simon of Glaisdale, later described the right of private prosecution as being founded upon the 'fundamental constitutional principle of individual liberty based on the rule of law'.[4]

7. The right to bring a private prosecution was explicitly preserved by Parliament under section 6(1) of the Prosecution of Offences Act 1985. More than a decade later, the Law Commission referred to 'the ordinary individual's right to set the criminal law in motion' as a 'fundamental principle'.[5] In the same year as the Law Commission report, Lord Justice Schiemann noted in a Divisional Court judgment that:[6]

> Parliament has for centuries clearly been persuaded that is desirable to allow private prosecutions. It would not in my judgment be right for magistrates or this court substantially to curtail the options which Parliament has left open to the private prosecutor *unless in the circumstances of a particular case abuse of process is shown.*

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[1] *Gouriet v Union of Post Office Workers* [1978] AC 435 at 439-440 per Lord Wilberforce: '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'.

[2] Ibid at 440.

[3] Ibid at 498. See also e.g. the 1981 report of the Royal Commission on Criminal Procedure (Cmnd 8092) at para 7.50, referring to the right 'as an effective safeguard against improper inaction by the prosecuting authority' and Professor Carol Harlow, *Pressure through Law* (Routledge, 1992) at 232, describing the right as 'a safeguard against corrupt, negligent or inappropriate conduct on behalf of police or prosecuting authorities'.

[4] Hansard, HL debates, 29 November 1984, col 1068.

[5] See Law Commission, *Consents to Prosecution* (LC255, 1998), at page iii of the executive summary and paras 3.31, 4.4, 5.3 and 5.4 of the report.

[6] *Hayter v L and T* [1998] 1 WLR 854 at para 21, emphasis added.

8. A similar approach was adopted by the House of Lords in the 2006 case of *Jones v Whalley*,[7] in which Lord Mance noted 'the traditional English view that the right to institute a private prosecution is an important right and safeguard possessed by any aggrieved citizen'.[8] Lord Mance continued:[9]

> The right of private prosecution operates and has been explained at the highest level as *a safeguard against wrongful refusal or failure by public prosecuting authorities to institute proceedings* … That justification is relevant not just where police fail to take any action at all, but also where their only response is to obtain a caution. Further, as the Law Commission pointed out … *it cannot always be assumed that, if it is wrong to bring a public prosecution, then it is also wrong to bring a private prosecution.* While it is a matter of speculation, it is not impossible that such a thought played its part in the decision of the Chief Crown Prosecutor for Merseyside in the present case, declining to take over the prosecution with a view to bringing it to an end.

9. As recently as December 2009, in a unanimous judgment, the Court of Appeal held that the right of private prosecution was sufficiently important to justify the police being required to consider whether material seized under the Police and Criminal Evidence Act 1984 should be retained for the purpose of enabling a private prosecution to go ahead.[10] Noting the comment of the judge in the court below that many private prosecutions were not in the public interest, Lord Justice Leveson said:[11]

> Not only is the converse of this proposition also true *(many private prosecutions being unarguably in the public interest),* but it is also important to note that there are many mechanisms for bringing a prosecution to an end if a conclusion is reached that it is not.

In particular, Leveson noted that private prosecutions were often commenced by organisations with specialist knowledge of the particular area of the criminal law concerned, such as the RSPCA in animal cruelty cases and FACT (the Federation Against Copyright Theft) in copyright infringement cases, because of the difficulty in pursuing such cases through the police and the CPS:[12]

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[7] [2006] UKHL 41.

[8] Ibid, para

[9] Ibid, para

[10] *Scopelight Ltd and others v Chief of Police for Northumbria* [2009] EWCA Civ 1156.

[11] Ibid, para 46, emphasis added.

[12] Ibid, para 51.

> These cases are complex, specialist knowledge will inevitably be required to pursue them, and each case is likely to be difficult, time consuming and expensive …. In a time when allegations of terrorism and other extremely serious crime take up more and more time and involve ever increasing resources, it is inevitable (and appropriate) that the CPS will have to be selective. For my part, I see no reason why the CPS should not be entitled to conclude that it is unnecessary for them to embark on another prosecution while issues of law are being resolved …. If there is no merit in the prosecution, that will no doubt be revealed. A preparatory hearing under Part III of the Criminal Procedure and Investigations Act 1996 can, if it is thought appropriate, generate an early resolution of legal issues (particularly if determinative). If the power to prosecute is being used in bad faith, or inappropriately … there are various mechanisms available to the court to prevent an abuse of its process.

In other words, to the extent that there are increasing limits on the ability of the police and the CPS to pursue prosecutions in areas of the law that are complex and technical, the right to bring a private prosecution becomes all the more important.

10. We note, moreover, that the UK is far from the only jurisdiction to recognise the importance of the right of private prosecution. As the Ministry of Justice paper itself makes clear,[13] private prosecutions for war crimes are also possible in Australia, Canada, France, the Republic of Ireland, New Zealand and Spain.

Safeguards against abuse of the right of private prosecution

11. As Lord Justice Leveson noted, the law already provides a number of safeguards to prevent an individual from abusing the right of private prosecution. The 1998 Law Commission report identified four main procedural constraints:[14]

    i. *the discretion of the magistrate to refuse to issue a summons (or a warrant)*;

    ii. the power of the Attorney General to enter a *nolle prosequi*;

    iii. the power of the Attorney General to apply to the High Court for an order declaring the person to be a vexatious litigant; and

    iv. the power of the DPP to take over proceedings, including either discontinuing it, withdrawing it or entering no evidence.

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[13] Page 7. See also e.g. Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (June 2006).

[14] *Consents to Prosecution*, n5 above, paras 2.14-2.19. Emphasis added.

12. In addition, there is the substantive safeguard that certain offences – including war crimes and other offences of universal jurisdiction – require the consent of the Attorney General before a prosecution can be brought.

13. The first of these procedural constraints – the discretion of the magistrate to refuse to issue a summons or warrant – is obviously a key safeguard. In *R v West London Justices ex parte Klahn*, Lord Widgery CJ held that, when considering whether to issue a summons or warrant, magistrates should 'at the very least ascertain':[15]

> (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are *prima facie* present; (2) that the offence alleged is not 'out of time'; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute. In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious …. Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. *Plainly he should consider the whole of the relevant circumstances.*

The Lord Chief Justice also made clear that the magistrate 'must satisfy himself that it is a proper case in which to issue a summons', and 'must be able to inform himself of all relevant facts' including hearing from a proposed defendant if he feels it necessary to do so.[16] Although the magistrate should not preempt any subsequent proceedings by holding a preliminary hearing on the evidence,[17] nonetheless the magistrate must 'decide whether or not on the material before him he is justified in issuing a summons'.[18]

14. It is highly unfortunate that the Ministry of Justice paper makes no mention of any of these safeguards. Instead, the paper gives the impression that it is somehow *intrinsically* problematic that a magistrate may issue a summons or a warrant 'on far less evidence than would be required for the Crown Prosecution Service to bring a charge or for a jury to properly convict'.[19] If sufficiency of evidence is thought to be a problem, however, then this must hold

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[15] [1979] 2 All ER 221 at 223. Emphasis added. See also e.g. *R (Green) v City of Westminster Magistrates Court* [2007] EWHC 2785 at para 35 per Hughes LJ: 'The decision whether or not to issue a summons is a judicial one; it calls for the exercise of judgment'.

[16] Ibid.

[17] Ibid: 'There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet; no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard'.

[18] Ibid, citing Lord Goddard CJ in *R v Wilson ex parte Battersea Borough Council* [1948] 1 KB 43 at 46-47.

[19] Page 2 of the MoJ paper.

true for the issuance of summons and warrants for criminal offences generally, rather than in respect of private prosecutions for crimes of universal jurisdiction. The Ministry of Justice paper does not explain why sufficiency of evidence is only problematic in this context. Moreover, if lack of evidence were in fact the problem, then it would be better to address this by introducing a higher evidential threshold for the issue of warrants in respect of private prosecutions for war crimes, rather than – as is proposed - curtailing the right altogether.

The issue identified by the Ministry of Justice paper

Section 25(2) of the 1985 Act

15. The Ministry of Justice paper notes that the requirement of the Attorney General's consent is needed before a private prosecution can be brought for war crimes or crimes against humanity, but that section 25(2)(a) of the Prosecution of Offences Act 1985 does not prevent the 'issue or execution' of an arrest warrant sought by way of a private prosecution. The paper describes this situation as both anomalous and unsatisfactory.

16. However, this was no oversight but a deliberate decision by Parliament. As the Criminal Division of the Court of Appeal has found on more than one occasion, section 25(2) of the 1985 Act was crafted to allow 'certain procedural steps' to be taken 'prior to the time when the required consent is obtained',[20] including the issue of an arrest warrant where the relevant criteria are met. As the Court of Appeal held as recently as March 2009:[21]

> The language of s.25 is clear. The purpose is to enable the arrest, charging and remand in custody or bail of a person against whom proceedings may have been commenced without the consent of the Attorney General or Director; it covers action that needs to be taken to apprehend the offender and detain him *if there is not time to obtain permission.*

In other words, Parliament specifically intended that magistrates should be free to issue warrants even where consent had not been obtained. To the extent that this still seems anomalous, it is also worth bearing in mind the observation of Lord Bingham that 'the common law is not intolerant of anomaly'.[22]

17. The Ministry of Justice paper suggests that it is problematic that it is possible to obtain a warrant for arrest of a suspect on the basis of much less evidence than would be required to

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[20] *R v Bull* [1994] 99 Cr App R 193. See also *R v Elliott* (1985) 81 Cr App R 115; *Whale and Lockton* [1991] Crim L R 692.

[21] *R v Goldan Lambert* [2009] EWCA Crim 700 at para 21. Emphasis added.

[22] *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 at para 48.

charge or convict. But, as noted above, this is the case with warrants for *all* offences, and irrespective of whether the prosecution is public or private. If it is problematic, then it is unclear why the problem should be limited to private prosecutions for war crimes. Moreover, if lack of evidence is genuinely a problem, the more appropriate response would be to require a higher evidential threshold, rather than to seek to amend section 25 of the 1985 Act.

The possible harm to diplomatic relations

18. Indeed, the Ministry of Justice elsewhere suggests that the core issue is not in fact warrants being issued on a lack of sufficient evidence, but the fact that warrants have been sought in relation to government officials of friendly states. As the Better Trials Unit stated in the letter accompanying the MoJ paper:[23]

> The Government is concerned that this might have implications for this country's relations with other states.

And, as the MoJ paper itself states:[24]

> 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.

19. We certainly do not suggest that the UK government's diplomatic relations with foreign governments are unimportant. On the contrary, it is the very importance of these relations which gives rise to what we see as the more serious issue, namely the possibility that the Attorney General might refuse to consent to the prosecution of a foreign national reasonably suspected of war crimes due to concerns that this would seriously harm the UK's diplomatic relations with the state in question. When deciding whether to consent to a prosecution, the Attorney is of course required to act 'judicially' rather than as a minister of the Crown.[25] But serious doubts have arisen as to whether this separation between the different roles of the

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[23] Letter from the Better Trials Unit of the Ministry of Justice to JUSTICE dated 17 March 2010.

[24] Page 3.

[25] See e.g. Lord Steyn, 1996 ALBA annual lecture, 'The power of the Attorney-General to take civil proceedings on behalf of the general community and his control over criminal prosecution is quasi judicial. Yet he is also a political figure responsive to political pressures. It is argued that abuse is avoided by two constitutional conventions. First, in his quasi judicial function the Attorney-General is not subject to collective responsibility and he does not take orders from the Government. But he may seek the views of other ministers and they may volunteer their views. Secondly, it is said that the Attorney-General is not influenced by party political considerations. On the other hand he may take into account public policy considerations. These conventions are weak. Their efficacy depends on Chinese walls in the mind of the Attorney-General'.

Attorney is workable in practice.[26] In the Corner House case, for instance, there were widespread concerns that the decision to drop the BAE prosecution had been largely dictated by the UK government's desire to maintain friendly relations with the Saudi government, notwithstanding the Attorney's statement to Parliament in which he denied that such things were considered.[27] Recall that Lords Diplock and Wilberforce described the right of private prosecution as a constitutional safeguard against government inaction. This safeguard is surely no less important in circumstances where the government may well prefer to overlook its duty to prosecute those reasonably suspected of war crimes because of fears that the prosecution would harm its relations with a foreign state.

20. It is of course well-established that certain government officials enjoy state immunity from prosecution for war crimes and crimes against humanity,[28] 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. Again, we find it unfortunate that the Ministry of Justice paper omitted mention of these immunities. To the extent that there are others 'with whom the British Government needs to engage in discussion', and who would be liable to be arrested on suspicion of war crimes if they entered the UK, we see no reason why such discussions could not take place via video-link or by having UK officials meet with them overseas. More generally, however, if there are people who would be liable to be arrested on suspicion of war crimes if they entered the UK because of the existence of a *prima facie* case against them, the UK government's own duty under international law to prosecute such persons would itself be engaged. It is unclear, therefore, why a change in the law should need to be effected.

The importance of democratic accountability of public officials

21. In JUSTICE's view, 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'.[29] Even though the consent of the Attorney General would still be required in order for charges to be laid, a finding by a magistrate that there exists *prima*

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[26] See e.g. the reports of the House of Commons Constitutional Affairs Committee (now the Justice Committee), *The Constitutional Role of the Attorney General* (HC 306, July 2007) and the House of Lords Constitution Committee, *Reform of the Office of Attorney General* (HL 93, April 2009).

[27] See *R (Corner House and CAAT) v Serious Fraud Office* [2007] UKHL at para 22. The actual decision in that case was taken by the Director of the SFO, but with the close involvement of the Attorney.

[28] 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.

[29] Lord Wilberforce, n1 above.

facie evidence that a suspect has committed war crimes,[30] 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. As the Lord Chief Justice noted in the *Binyam Mohamed* case:[31]

> In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents *an element of democratic accountability …. Ultimately it supports the rule of law itself*. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.

22. Although that case concerned allegations of wrongdoing by the executive itself and the transparency of the court's own reasoning on that issue, the principle set out above is in our view also relevant to litigation that highlights the possible failure of the executive to prosecute suspected war criminals. In other words, if a private citizen is able to satisfy a magistrate that there is sufficient *prima facie* evidence to justify the issuance of a warrant of a person suspected of war crimes, then this raises the inevitable question of why the authorities did not do so themselves. Given that the UK government is under a duty to ensure the prosecution of such suspects, a judicial determination of this kind deserves to be taken very seriously indeed.

The practical expertise of magistrates responsible for arrest warrants

23. We also note that, in practice, applications made by private citizens and NGOs for warrants for the arrest of persons suspected of war crimes are not dealt with by ordinary magistrates but instead dealt with exclusively by specialist magistrates at the City of Westminster Magistrates' Court, which also has exclusive jurisdiction in terrorism and extradition cases. Indeed, the warrant for the arrest of Major General Doron Almog in September 2005 was issued by Senior District Judge Timothy Workman, the Chief Magistrate for London, and one of the most experienced UK judges in this area of the law. In 2004, for instance, Judge Workman refused the application made by a private citizen for an arrest warrant against Robert Mugabe, on the

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[30] Or the other offences for which there is universal jurisdiction under UK law, e.g. torture, genocide and crimes against humanity. For the sake of convenience, all references to 'war crimes' and 'war criminals' in this response should be read as a generic reference to any of the relevant offences of universal jurisdiction.

[31] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at para 39. Emphasis added.

grounds that he enjoyed state immunity.[32] The following month, a colleague of Judge Workman's refused a private application for a warrant to arrest General Shaul Mofaz, the Israeli Defence Minister, on the grounds that he also enjoyed state immunity.[33] In November 2005, Judge Workman similarly declined to issue a warrant for the arrest of the Chinese Trade Minister Bo Xilae during a visit to London on the same basis.

24. Given the experience of the judges deciding the private applications in these cases, we would expect the government to accord their decisions a certain degree of respect. We are therefore deeply dismayed that the Prime Minister, rather than acknowledge that experienced judges would not lightly issue warrants in respect of suspected war crimes, instead appeared to dismiss their decisions as flimsy:[34]

> The only question for me is whether our purpose is best served by a process where an arrest warrant for the gravest 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*.

25. While the Prime Minister did not directly attack the judges for their decisions, nowhere did he acknowledge that the issue of an arrest warrant is always an independent judicial act. While government ministers are certainly not obliged to agree with every decision of a court, any public criticisms they make should at least be justified. If, for instance, the government believes that warrants have been issued on the basis of inaccurate or insufficient information, it should be prepared to identify those inaccuracies. It seems to us inconsistent with the principle of respect for the rule of law for government ministers to describe a judicial decision in the manner of a gesture or a political stunt.[35]

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[32] See Application for a Warrant for the Arrest and Extradition of Robert Gabriel Mugabe, President of the Republic of Zimbabwe, on charges of torture under Section 134 of the Criminal Justice Act 1988, before Bow Street Magistrate's Court, 7 and 14 January 2004, decision of District Judge Timothy Workman 14 January 2004 (unreported).

[33] Application for Arrest Warrant Against General Shaul Mofaz, before Bow Street Magistrates' Court 12 February 2004, decision of District Judge Pratt (unreported).

[34] Gordon Brown, 'Britain must protect foreign leaders from private arrest warrants', Daily Telegraph, 3 March 2010. Emphasis added.

[35] See e.g. the statutory duty of Ministers of the Crown under section 3(1) of the Constitutional Reform Act 2005 to respect the independence of the judiciary.

The options

26. The MoJ paper sets out three options for possible changes to the law:

    i. 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;

    ii. 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; or

    iii. restrict to the CPS the right to initiate proceedings in respect of universal jurisdiction offences.

27. After discussing the first two options, the paper comes down in favour of the third. The main objection it gives to the first option (requiring the Attorney to consent to the issuance of a warrant) is one of practicality:[36]

> 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.

28. Similarly in respect of the second option, the MoJ paper suggests that the summons route would be:[37]

> 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.

29. The paper suggests the main reason for favouring the third option, aside from the impracticality of the first two, is that:

> 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.

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[36] Page 4.

[37] Ibid.

30. While we consider that requiring the consent of the Director of Public Prosecutions instead of the Attorney General would avoid many of the problems associated with the latter (chiefly, the risk that consent might be improperly refused because the Attorney is insufficiently independent from government), it would unfortunately involve many of the same practical objections as the first two. Specifically, unless private citizens have the right to seek arrest warrants for crimes of universal jurisdiction, it seems very likely that persons reasonably suspected of war crimes entering the UK for short-term visits will escape detection because of the practical difficulties in the police and CPS initiating proceedings in sufficient time. As Lord Justice Leveson made clear in the *Scopelight* case, the fact that the offences in question involve considerable time and resources to investigate means that it is *more* likely that the CPS will decline to pursue them:[38]

> These cases are complex, specialist knowledge will inevitably be required to pursue them, and each case is likely to be difficult, time consuming and expensive …. In a time when allegations of terrorism and other extremely serious crime take up more and more time and involve ever increasing resources, it is inevitable (and appropriate) that the CPS will have to be selective.

In other words, the very complexity of prosecuting offences of universal jurisdiction means that the CPS is less likely to be able to take the decision to seek an arrest warrant at short notice. The design of section 25(2) was specifically intended to overcome this problem by enabling private citizens and organisations to step in to fill the gap. And, as the Court of Appeal noted in *Scopelight*, private organisations may frequently have specialist knowledge and access to information that the CPS lacks. There is no reason in principle, therefore, why a well-organised NGO might not in certain circumstances be better placed than public authorities to present the necessary information to a magistrate in order to determine whether a warrant should be issued. Once the suspect is in custody, the CPS could then take the decision as to charge. If there was concern about lack of admissible evidence at the point of charge, the CPS could rely on the threshold test to charge suspects where it was in the public interest to do so. In certain circumstances, it may be also be appropriate for the CPS to consider extradition or referral to the relevant international tribunal as alternatives to prosecution in the UK.

31. The lack of police and CPS resources to pursue suspected war criminals is not an academic issue. First of all, the Ministry of Justice has described war crimes investigations and

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[38] *Scopelight*, n12 above.

prosecutions as 'very protracted and resource intensive'.[39] This is particularly likely to be true where 'the events took place a long time ago and/or in a foreign country':[40]

> Records may be untraceable, destroyed or unreliable, particularly if the events took place during armed conflict. Witnesses may be untraceable, or unwilling to come forward, particularly if the events took place overseas. Both evidence and witnesses may be overseas, and access to them may depend on the co-operation of local governments and other organisations. There may often be language barriers to be overcome. And in some cases, even the identity of the suspect may be in doubt, because they may have deliberately or necessarily during a conflict adopted different identities, or a range of identities. Given these practical difficulties, it is unlikely that there will ever be large numbers of prosecutions for such offences committed abroad.

For instance, the investigation and successful UK prosecution of Faryadi Zardad in 2005 for offences of torture committed in Afghanistan:[41]

> is estimated to have cost at least £300,000 in police costs alone, with additional prosecution, court, legal aid and prison costs. One estimate put the total cost at £3 Million.

32. Secondly, the number of suspected war criminals already present in the UK is unknown but since 2004, the UKBA war crimes unit has investigated 1863 individuals for genocide, war crimes or crimes against humanity, of which 22 cases have been referred to the Metropolitan Police.[42] And with the coming into force of section 70 of the Coroners and Justice Act 2009 (creating retrospective universal jurisdiction for genocide, crimes against humanity and war crimes), the pool of suspected war criminals in the UK who may be prosecuted is now even larger than before.

33. Thirdly and most crucially, both the investigation and prosecution of war crimes are now dealt with by the respective counter-terrorism units of the police and CPS. In practice, this means that the pursuit of suspected war criminals post 9/11 and 7/7 necessarily runs a very distant second to the apprehension of suspected terrorists.

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[39] Written evidence of the Ministry of Justice to the Joint Committee on Human Rights, February 2009, para 18.

[40] Ibid, para 5.

[41] Ibid, para 18.

[42] Joint Committee on Human Rights, *Closing the Impunity Gap: UK law on Genocide (and related crimes) and redress for torture victims* (HL 153/HC 553: August 2009), para 34.

34. In the case of the police, the dedicated Metropolitan Police War Crimes unit was disbanded in 1999. Since then, national responsibility for the investigation of war crimes has been entrusted to the Metropolitan Police Anti-Terrorist Unit (since 2006, known as Counter-Terrorism Command or S015). Although there is a Crimes against Humanity unit within SO15, its resources and personnel are not ring-fenced.[43] Giving evidence to the Joint Committee on Human Rights in May 2009, the former Director of Public Prosecutions Sir Ken Macdonald QC referred to the 'reluctance' of the SO15 to 'take officers off major contemporaneous terrorism inquiries and put them onto Rwanda'.[44] The Joint Committee itself recommended that:[45]

> the Government reestablish a specialist war crimes unit and that they give it the resources commensurate with the seriousness of the crimes they need to investigate and the importance of leading the world in bringing international criminals to justice.

However, the Metropolitan Police is now facing cuts of between 30% and 40% for the next financial year, including a review of counter-terrorism spending.[46] It is therefore deeply unlikely that additional funding for war crimes investigations will be forthcoming. Instead, it seems far more likely that existing resources will be squeezed further, in order to maintain SO15's existing counter-terrorism capabilities.

35. Like war crimes investigations undertaken by the Metropolitan Police, the CPS team responsible for prosecuting war crimes is similarly part of the CPS's Counter-Terrorism Division (CTD). However, the CPS lacks the resources to have its team working full-time on war crimes. Instead the lawyers responsible for war crimes prosecutions also work on terrorism cases, cases of incitement to racial and religious hatred, and prosecutions under the Official Secrets Act. Moreover, the CPS as a whole is facing a budget cut of at least 10% for the next financial year.[47]

36. The practical shortcomings of the existing arrangements are clear from the protocol agreed between the Crimes against Humanity unit of SO15 and CTD concerning war crimes investigations. Under the protocol, SO15 has the responsibility to consider requests by private individuals or organisations for the arrest of suspects 'expected to visit England and Wales'.

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[43] Ibid, para 19.

[44] 19 May 2009, Q33.

[45] Joint Committee on Human Rights, *Closing the Impunity Gap: UK law on Genocide (and related crimes) and redress for torture victims* (HL 153/HC 553: August 2009), para 76.

[46] See e.g. 'Police spending in England and Wales to fall by £500m', BBC News, 2 December 2009; 'Police terror budget cut by millions after Ring of Steel blunder', Daily Mail, 27 February 2010; 'Boris Johnson to cut London's police force', Guardian, 3 February 2010.

[47] Meeting of the CPS War Crimes community involvement panel, London, 29 March 2010.

SO15 will then ask the complainant to provide relevant details and copies of any evidence against the suspect. The protocol states that:[48]

> Provided the above documentation *is received in sufficient time for it to receive proper consideration, SO15 will seek the advice of CTD on jurisdiction, immunity and any potential offences disclosed*.

In light of the severe resource constraints set out above, it seems likely that 'sufficient time for … proper consideration' will depend very much on how much time SO15 can itself devote to the request. Given that complainants are themselves unlikely to receive much notice of a suspect's pending arrival in the UK, it is often likely to be more straightforward for concerned individuals and organisations to make a private application for the arrest of a suspect rather than wait on SO15 to respond to their urgent request. Indeed, the protocol agreed between SO15 and the CPS indicates that, where the authorities judge that they do not have sufficient information upon which to make a decision, the complainant should be sent a letter inviting them to consider a private prosecution:[49]

> The purpose of this letter is to address another option that might be available to you, that is to say *initiating a private prosecution*. This is not an option which would involve either the police or the Crown Prosecution Service, unless at some stage during the process you requested that the private prosecution be taken over by the Director of Public Prosecutions (DPP) in accordance with his discretion under Section 6 (2) of the Prosecution of Offences Act 1985. In a case such as this, that discretion would be exercised by the Counter Terrorism Division of the Crown Prosecution Service (the CPS). *In order for the CPS to consider whether to exercise that discretion, an individual must have already been charged and be facing proceedings in the magistrates' court*.

Simply put, the CPS will not consider its discretion to take over a private prosecution unless proceedings have already commenced. This, of course, ignores the fact that prosecutions for offences of universal jurisdiction cannot be commenced without the consent of the Attorney-General. But it is notable that even SO15 and the CPS seem to rely on the availability of private prosecutions to complement to their own limited efforts.

37. To sum up, there are an unknown number of suspected war criminals already present in the UK. Following the introduction of retrospective universal jurisdiction under the Coroners and

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[48] Protocol between the Crimes against Humanity Unit of SO15 and the Counter-Terrorism Unit of the CPS (www.cps.gov.uk/publications/agencies/war_crimes.html). Emphasis added.

[49] Ibid, annex 1 (http://www.cps.gov.uk/publications/agencies/war_crimes_annex1.html). Emphasis added.

Justice Bill 2009, the number of suspects liable to be prosecuted is likely to have increased considerably. The government has acknowledged that war crimes cases are highly resource intensive. At the same time, the investigation and prosecution of war crimes have been subsumed within the counter-terrorism units of the Metropolitan Police and the CPS, in circumstances where they must compete for funds with counter-terrorism cases, and at a time when both bodies are facing severe budget cuts. Already obliged to do more with less, it is highly unlikely that SO15 and the CPS will be able to deal with urgent requests from private citizens for the arrest of suspected war criminals visiting the UK at short notice.

38. The most likely consequence of adopting the third option is, therefore, that suspected war criminals visiting the UK at short notice will simply not be arrested because the priorities of the police and the CPS are understandably elsewhere. Although the MoJ paper claims that none of the options presented 'would reduce the scope or effectiveness of universal jurisdiction', the practical effect of its preferred option would be exactly that. The situation might perhaps be different if the government accepted the JCHR's recommendation to reestablish a specialist war crimes unit with sufficient (and ring-fenced) resources to undertake effective investigations. That hardly seems likely in the foreseeable future, though, given the currently dire economic circumstances. Even if a properly-resourced specialist unit were established, however, we would still question the need to remove the right of private citizens to seek a private prosecution, given that it remains an important constitutional safeguard against the potential inaction of public authorities.

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