Universal jurisdiction

Standard Note: SN/IA/5422
Last updated: 25 March 2010
Author: Arabella Thorp, International Affaris and Defence
Section International Affairs and Defence Section

The UK has universal jurisdiction under the *Geneva Conventions Act 1957* (and other legislation) for a limited number of serious international crimes. It also has an obligation under international law to prosecute or extradite those suspected of war crimes or torture anywhere in the world.

Such prosecutions in England and Wales require the consent of the Attorney General, but currently this consent does not have to be obtained before a warrant for arrest is issued. This has led to arrest warrants being issued for high-profile foreign politicians such as Tzipi Livni for private prosecution for war crimes, even where there is a high chance that the Attorney General's consent to prosecution would not be forthcoming. There are mixed views on whether the law on arrest warrants for such private prosecutions should be changed. The Government is consulting on whether the right to prosecute foreign nationals for offences committed abroad should be restricted to the Attorney-General or the Director of Public Prosections, but no legislation is expected before the general election.

Although the principle of universal jurisdiction is widely supported, there are many problems and limitations in its practical application. Not least among these is the element of the political in such cases. Many African states are concerned that universal jurisdiction is not being applied impartially and objectively by European states, and these concerns have led to a UN review of the scope and application of the principle of universal jurisdiction.

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to our general terms and conditions which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

Contents

1 What is universal jurisdiction? 2

2 Universal jurisdiction in the UK 3

2.1 Legislation and international obligations 3

2.2 Prosecutions in practice 4

Public investigation and prosecution 4

Private prosecutions, arrest warrants and the Attorney General's consent 4

3 Limitations and difficulties 7

3.1 Scope 7

3.2 Time limits 8

3.3 Presence of the accused 8

3.4 Gathering evidence 8

3.5 Politics 9

3.6 Immunity 10

4 UN review of universal jurisdiction 11

1 What is universal jurisdiction?

Universal jurisdiction enables the national courts of a state to try a person for a crime committed outside that state, even where there is no link between the suspect, the victim or the place of crime. It is a relatively new concept, and one which, despite laudable intentions, is beset with limitations and difficulties – legal, practical and political – and is therefore rarely applied.

Universal jurisdiction exists to compensate for the failure of national courts to provide justice. The best justice is almost always at the local or national level, but those courts are not always able or willing to prosecute. There has been a growing recognition since the Second World War that certain crimes are so serious that they should not go unprosecuted, and that therefore other states should take responsibility for prosecuting them. The preamble to the Rome Statute of the International Criminal Court states this clearly:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, […][1]

[1] *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9

The 1949 Geneva Conventions and the 1982 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) are the principal treaties which place a legally-binding obligation on states that have ratified them to exercise universal jurisdiction over persons accused of grave breaches of the Geneva Conventions or of torture, respectively, or to extradite them to a country that will. "Grave breaches" include wilful killing, torture or inhuman treatment of people protected by the relevant convention; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; and wilfully attacking civilians.[2]

A number of countries have enacted legislation to give their courts universal jurisdiction. This means that they can prosecute a person suspected of committing specified serious international crimes anywhere in the world, regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located. Different countries interpret the requirement differently, and not all countries include the same offences. An Amnesty International study in 2001 found that over 125 states have universal jurisdiction over at least one serious international crime; that since the end of the Second World War, more than 15 countries have exercised universal jurisdiction in investigations or prosecutions of persons suspected of crimes under international law, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the United Kingdom and the United States of America; and that others, including Mexico, have extradited persons to countries for prosecution based on universal jurisdiction.[3]

2 Universal jurisdiction in the UK

2.1 Legislation and international obligations

The UK has universal jurisdiction under the *Geneva Conventions Act 1957* (and other legislation) for war crimes and a limited number of other serious international crimes. It also has an obligation under international law to prosecute or extradite those suspected of war crimes anywhere in the world

The international crimes for which the UK has universal jurisdiction include: grave breaches of the four 1949 Geneva Conventions and its Additional Protocol I;[4] torture by or on behalf of persons acting in an official capacity;[5] hostage taking;[6] and certain other terrorist offences.[7]

The UK has complied with the requirements in the 1949 Geneva Conventions, their Protocol I and the CAT to make grave breaches of the convention and torture crimes under domestic law, regardless of where they are committed or by or against whom.[8] But the treaties go further than this, requiring states either to prosecute people who are alleged to have committed or ordered these crimes, or to extradite them to another country which will prosecute them.

---

2 See ICRC, *How "grave breaches" are defined in the Geneva Conventions and Additional Protocols*, 4 June 2004

3 Amnesty International, *Universal Jurisdiction: the duty of states to enact and implement legislation*, September 2001

4 *Geneva Conventions Act 1957* and *Geneva Conventions (Amendment) Act 1995*

5 *Criminal Justice Act 1988* s134

6 *Taking of Hostages Act 1982* s1

7 For offences in England and Wales to which universal jurisdiction applies, see *Halsbury's Laws of England* vol 11 'Criminal Law and Procedure', para 1061

8 *Geneva Conventions Act 1957* and *Geneva Conventions (Amendment) Act 1995*; *Criminal Justice Act 1988* s134

The enactment of the *International Criminal Court Act 2001* (ICCA) and *International Criminal Court (Scotland) Act 2001* was a major step forward in the UK's jurisdiction for serious international crimes. These Acts give UK courts jurisdiction for war crimes, genocide and crimes against humanity if they were committed anywhere in the world after 2001. But under this legislation, crimes committed outside the UK can be prosecuted here only if the suspect is a UK national, a UK resident or a person subject to UK service jurisdiction. Strictly speaking, therefore, this is 'extraterritorial jurisdiction' rather than 'universal jurisdiction'.

2.2 Prosecutions in practice

So the law is there; the issue is how and whether cases actually get to the courts in practice. Very few cases have proceeded to prosecution under universal jurisdiction in the UK.

Public investigation and prosecution

The Counter Terrorism Command division of the Metropolitan Police (also called "SO15") has the national mandate for investigating serious international crimes, and the Counter Terrorism Division of the Crown Prosecution Service (CPS) has responsibility for their prosecution. SO15 and the CPS operate together under a published National Protocol on *War Crimes and Crimes against Humanity*. In accordance with the National Protocol, SO15 will at an early stage of a potential case forward a report to the CPS for its advice on jurisdiction, immunity and any potential offences disclosed by the evidence available. As with all cases, the CPS must decide whether there is a "realistic prospect of conviction";[9] in these cases, issues of jurisdiction and immunity are highly relevant to the prospects of conviction. If the CPS concludes that there is no reasonable prospect of conviction, SO15 will not proceed with an investigation.

All prosecutions for serious international crimes require the consent of the Attorney General. This is welcomed by some as a necessary brake and rejected by others as a limitation on the freedom of the courts to apply the principle of universal jurisdiction. Many people feel it introduces a political element into the decision: one of the explicit justifications for the requirement for consent is "to ensure that prosecution decisions take account of important considerations of public policy or international nature".[10]

The most significant UK public prosecution of a serious international crime under universal jurisdiction was the case of Farayadi Sawar Zardad in 2005.[11] Zardad, an Afghan national resident in the UK, was prosecuted for torture and hostage-taking whilst manning a checkpoint in Afghanistan. Neither the defendant nor his victims were British nationals and the witnesses lived outside the United Kingdom. At the initial trial, witness evidence from Afghanistan had been given via video link. That jury was unable to agree a verdict, but arrangements had been made for more witnesses to travel to the United Kingdom to give evidence in person at the re-trial. The second trial resulted in a conviction and Zardad was sentenced to 20 years' imprisonment.[12]

Private prosecutions, arrest warrants and the Attorney General's consent

The alternative is private prosecutions. Although they too need the Attorney General's consent to proceed, this consent does not have to be obtained before a warrant for arrest is

---

9 CPS, *Code for Crown Prosecutors*, 2004, para 5.2

10 Home Office memorandum to the 1972 Franks Committee, quoted in CPS website, *Consents to Prosecute* [accessed on 20 January 2010]

11 Chatham House International Law Discussion Group meeting, *Universal Jurisdiction for International Crimes,* 9 October 2008

12 See CPS press release, *CPS secures Historic Torture Conviction*, 18 July 2005

issued. This has led to private individuals obtaining arrest warrants for people – including high-profile foreign politicians such as Tzipi Livni – even where there is a high chance that the Attorney General's consent to prosecution would not be forthcoming.

In England and Wales there is a general right for private individuals to bring and conduct a criminal prosecution. They can do so by presenting a record of the allegation and details of the accused to a magistrates' court. If the magistrate decides the case is worth proceeding with, he or she may issue either a summons (for less serious cases) or an arrest warrant (for more serious cases). The general principle is that the magistrate ought to issue a summons or warrant unless there are compelling reasons not to do so, for example if impropriety or an abuse of process is involved.[13] Case law has established the matters that the magistrate should consider as a bare minimum:

> It would appear that he should at the very least ascertain: (i) 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; (ii) that the offence alleged is not 'out of time'; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute.[14]

Determining whether the informant has "the necessary authority" would for serious international crimes involve considering whether the Attorney General's consent has been obtained. For a summons, the magistrate would have to satisfy himself that such consent has been obtained *before* issuing the summons.[15] However, most such cases are serious enough for the magistrate to issue a warrant for arrest instead, in which case, according to section 25 of the *Prosecution of Offences Act 1985*, there is no requirement for a magistrate to satisfy himself as to consent before issuing a warrant of arrest. This is in order to allow the offender to be detained when there is not time to obtain consent.[16] However, consent would subsequently need to be sought before the prosecution could proceed any further.

The fact that an arrest warrant can be issued without consent has recently led to some controversy in the context of private prosecutions instituted against Israeli politicians and military figures for alleged war crimes. For example, in 2005, lawyers acting for a group of Palestinians obtained a warrant under the *Geneva Conventions Act 1957* for the arrest of Doron Almog, a former general in the Israeli army who was due to visit the UK.[17] Almog never left the plane that brought him to London, apparently because a message from the Israeli embassy warned him that police officers were standing by to intercept him at the immigration desk (the embassy would not normally know that an arrest warrant was outstanding).[18] Jack Straw, then Foreign Secretary, apologised to his Israeli counterpart for any embarrassment caused by the incident, and James Arbuthnot, parliamentary chairman of Conservative Friends of Israel, said:

---

13 *R (on the application of the Mayor and Burgesses of the London Borough of Newham) v Stratford Magistrates' Court* [2004] EWHC 2506 (Admin). An example of when a private prosecution might be an abuse of process is where the private prosecutor encouraged the crime or in some other way created the same mischief as that about which he is complaining: *R (on the application of Dacre) v Westminster Magistrates' Court* [2008] EWHC 1667 (Admin)

14 *R v West London Justices, ex parte Klahn* [1979] 2 All ER 221

15 *Price v Humphries* [1958] 2 All ER 725

16 *R v Lambert* [2009] EWCA Crim 700

17 Hickman & Rose press release, *UK court issues warrant against Israeli General*, 11 September 2005

18 Joshua Rozenberg, 'Modern lawfare', *Standpoint*, December 2009. See also "Investigation urged after Israeli officer avoids arrest", *Guardian*, 13 September 2005 and "Police feared 'airport stand-off'", *BBC news online*, 19 February 2008

> I do not believe that when the Geneva Conventions were agreed it would have been envisaged that they could have been invoked without reference to the government of the day. I consider that the issue of such a warrant should be a matter for the government and only the government, and would suggest that it should be impossible to issue a warrant under the Conventions without the prior consent of the attorney general.[19]

In September 2009 lawyers representing 16 Palestinians applied for an arrest warrant for the Israeli defence minister Ehud Barak during a visit to the UK. However, magistrates determined that the minister enjoyed diplomatic immunity from prosecution and so could not be prosecuted in the UK.[20] Most recently, Palestinian campaigners obtained an arrest warrant for Israel's former foreign minister Tzipi Livni, who was due to visit the UK in December 2009. She cancelled her visit, though she said that this was due to scheduling problems.[21]

This has led to calls for the law to be changed so that the Attorney General's consent is required for the issue of an arrest warrant as well as for any subsequent prosecution. Andrew Dismore, chair of the Parliamentary Joint Committee on Human Rights, said:

> ...I would like to see our courts protected from being used as campaign forums by politically motivated groups that are not really interested in justice, but are interested in scoring party political or other political points in this long-running conflict in the middle east, which is not going to be resolved in courts of law. Our courts have been left dangerously open to political manipulation and being brought into disrepute. There is a way forward by allowing the Attorney-General to decide whether this should happen. The Attorney-General is, in the end, responsible for deciding which prosecutions should go ahead, based on the likelihood of both a conviction and a public interest test. We may have the embarrassment of leaders being arrested but no prosecution following on from that.[22]

However, others have criticised this proposal on the grounds that it would politicise the judicial process:

> Justice, the all-party law reform and human rights organisation, believes instead that the Director of Public Prosecutions (DPP) is better placed than the Attorney for such decisions.
>
> It says: "The role of the Attorney-General has been in issue since the controversial intervention of Lord Goldsmith in a case relating to Saudi Arabia and a subsequent consultation as part of the Government's Governance of Britain programme."
>
> [...]
>
> Daniel Machover, chairman of [Lawyers for Palestinian Human Rights], ... warns:
>
> "Restricting the present system, including the long-standing judicial arrest warrant procedure, for narrow political interests will risk endangering human rights everywhere.

---

19 Letter to the Foreign Secretary and the Attorney General, quoted in "Straw apology on Israeli arrest", *BBC news online*, 22 September 2005

20 "Israeli minister Ehud Barak faces war crimes arrest threat during UK visit", *Guardian*, 29 September 2009

21 "UK ponders law change after Tzipi Livni arrest warrant", *BBC News website*, 15 December 2009

22 HC Deb 12 January 2010 c200WH

> Meanwhile, there is no evidence of judges falling short of high standards in making these decisions."[23]

Some of the differences of opinion were aired in David Winnick's adjournment debate on Thursday 28 January 2010. On 1 March 2010 Andrew Dismore introduced a Private Member's Bill (presentation Bill) to amend the *Prosecution of Offences Act 1985* to require the Attorney General's consent for an arrest warrant, but the Bill will not progress any further.

On 4 March 2010, the Justice Secretary Jack Straw set out proposed changes to the law governing the issue of arrest warrants in respect of certain specified universal jurisdiction offences.[24] In essence, the right to bring a prosecution for such an offence, where it is alleged to have been committed by a foreign national on foreign soil, would be restricted to the Attorney General or the Director of Public Prosecutions (DPP). No arrest warrant could be issued in relation to such offences unless the information had been laid by or on behalf the Law Officers or the DPP. A private individual or organisation would therefore only be able to bring a private prosecution or apply for an arrest warrant in respect of such an offence where either the suspect was a UK national or the offence was alleged to have been committed on UK soil. A background briefing on the proposals and a draft clause making the necessary legislative amendments are available on the Ministry of Justice website.

Recognising the controversial nature of the proposed changes, Mr Straw indicated that he would undertake a brief consultation prior to legislating. On 6 March 2010 he therefore wrote to the Justice Committee asking it to consider the Government's proposals and requesting a response by 6 April 2010.[25] The Committee indicated that given the proposed timetable for consultation it would be unable to undertake an appropriate process, and recommended instead that interested parties should respond directly to the Ministry of Justice.[26] The Committee also "commended this topic to our successor in the new Parliament for early attention", noting that any legislation implementing changes to the private prosecution regime will not now be brought forward until after the forthcoming general election.

A more detailed analysis of private prosecutions, in particular the procedure for bringing one and the requirement for consent, is set out in Library Standard Note SN/HA/5281, *Private prosecutions*.

3 Limitations and difficulties

3.1 Scope

The range of offences covered by universal jurisdiction is dependant on national legislation, and so varies from country to country. In the UK, because each extension of universal jurisdiction has been in response to specific treaties rather than as the result of a general assessment of the appropriate approach and scope, the UK courts do not have jurisdiction to try everything that might be considered a serious international crime.

---

23 "War crimes: should a magistrate still have the right to issue a private arrest warrant?", *Times*, 14 January 2010. See also Clive Baldwin (senior legal advisor at Human Rights Watch), "Prosecuting war crimes: the courts must be independent", *Open democracy*, 28 January 2010

24 HC Deb 4 March 2010 cc118-9WS. See also Gordon Brown writing in the *Telegraph* ("Britain must protect foreign leaders from private arrest warrants", 4 March 2010).

25 Letter from Jack Straw to Alan Beith, *Arrest warrants – universal jurisdiction*, 6 March 2010

26 Justice Committee press release (No. 18 of Session 2009-10), *Informal reference of matter to the Committee: arrest warrants - universal jurisdiction*, 19 March 2010

There are also divergent national approaches to universal jurisdiction. For example, Spain has taken a progressive approach. Although the Spanish Supreme Court had required a link between the victim or the crime and Spain, in 2005 the Spanish Constitutional Court reversed this and confirmed unconditional universality. In contrast, the German approach has been more restrictive. A recent attempt by human rights groups in Germany, France and other countries to bring proceedings in Germany against Donald Rumsfeld for the crimes committed by US forces under his command in Iraq failed.[27]

3.2 Time limits

Another weakness of some treaties and legislation is the lack of retroactivity. For example, the ICCA covered only acts committed from 2001. This prevented the prosecution of Rwandan nationals living in the UK who were suspected of committing war crimes and genocide in Rwanda in 1994. New legislation will from 6 April 2010 apply the ICCA retrospectively to certain crimes committed on or after 1 January 1991.[28]

3.3 Presence of the accused

Whilst the arrest of a person depends on his or her physical presence, different countries take different approaches to whether or not a person needs to be in the country for an investigation or prosecution to take place. In the UK, the police will investigate even if the suspect is not in the country, but they would in general be reluctant do so unless they were sure that the individual would enter the UK at some point. The UK, however, has no concept of a holding charge, so for example a passenger in transit cannot be held whilst the UK decided whether or not to prosecute. Another option is for the police to use the ordinary procedure for arrests: a passenger in transit could be arrested where a police officer had reasonable grounds for suspecting that he had committed an offence.

In contrast to the British approach, both Denmark and Germany required the defendant to be present in order for an investigation to be undertaken. Canada is often cited as having a model code for universal jurisdiction, but even Canadian law requires physical presence before a non-national may be prosecuted.[29]

A significant limitation to the ICCA is that its application is restricted to UK nationals and UK residents. Originally it did not even define who was resident in the UK for these purposes, even though there is no generally-understood meaning for this term – it varies according to context. This weakness has now been addressed: a new provision, inserted by section 70 of the *Coroners and Justice Act 2009* (in force 6 April 2010),[30] provides a definition which is based on immigration status and includes people with indefinite leave to remain in the UK and those who are in the UK for work or study or for refugee or humanitarian protection. It does not include visitors or passengers in transit. The residence question is not relevant to prosecutions for war crimes or torture for which the UK has universal jurisdiction.

3.4 Gathering evidence

It is inherently more difficult for a prosecution to gather evidence when the crime was allegedly committed in another country by a non-national against other non-nationals. The

---

27 Chatham House International Law Discussion Group meeting, *Universal Jurisdiction for International Crimes,* 9 October 2008

28 *Coroners and Justice Act 2009* s70, and SI 2010/816, art 2, Schedule, para 3

29 Chatham House International Law Discussion Group meeting, *Universal Jurisdiction for International Crimes,* 9 October 2008

30 SI 2010/816, art 2, Schedule, para 3

legal complexity of cases involving international crimes can put an enormous strain on domestic resources, both in terms of the significant financial cost of an investigation and the commitment of personnel. In addition, national police forces are often not accustomed to investigating such cases. Finding witnesses, getting their agreement to give evidence and arranging their travel to the UK can present serious obstacles. Perhaps even more problematic is that the country where the events happened may not cooperate in providing evidence. Evidence from security services of that country or other interested countries may be particularly unforthcoming.

Nevertheless, it is not impossible to gather enough evidence for a prosecution. For example, witnesses can give evidence by video link, and satellite evidence can be used.[31]

3.5 Politics

The law does not work in a vacuum. Political considerations affect many aspects of universal jurisdiction, from the need for it to exist in the first place to the practicalities of gathering evidence.

Prosecutions may be vulnerable to accusations of double standards on the grounds that universal jurisdiction only serves to prosecute those from third world states, whilst no cases have been brought successfully against the leaders of western states. The Pinochet case is sometimes cited as an example of double standards: Spain had charged the former Chilean dictator with torture but was criticised for not seeking to bring to account those responsible for the crimes during the Franco era (though such investigations are now being started in Spain). But it could be argued that the very existence of universal jurisdiction has political roots – there will often be a political reason why the domestic courts in the country where the alleged offence took place cannot or will not prosecute. Conversely, there is a risk that universal jurisdiction could be used to legitimise show-trial prosecutions of political enemies.

Political pressure can be brought to bear in very general ways. In 1993 and 1999 Belgium enacted laws which provided for comprehensive universal jurisdiction. This led to the state becoming the foremost jurisdiction for the potential prosecution of international crimes – until Belgium repealed its laws in favour of a more limited regime. This reportedly followed suggestions from Donald Rumsfeld that unless they did so there would be pressure for NATO to withdraw from Belgium.[32]

Lack of political will has in several instances apparently led to a potential defendant evading prosecution. In 1999, Izzat Ibrahim al-Duri, one of Saddam Hussein's closest aides, travelled to Austria for medical treatment. Despite documentary evidence that Izzat Ibrahim had ordered the gassing of Kurds, it was reported that Austria bowed to political pressures and permitted him to leave the country without facing prosecution.[33] Later in 1999, Mengistu Haile Mariam, the exiled Ethiopian dictator, travelled from his exile in Zimbabwe for medical treatment in South Africa. Numerous groups called for him to be prosecuted in South Africa for crimes against humanity and torture, and the public prosecutor agreed to consider the case.[34] However, before any charges were brought, Mengistu returned to the protection of Mugabe in Zimbabwe. A third example was the case of a senior Peruvian intelligence officer who in 2000 was questioned on landing in the US in connection with torture. Again,

---

31 Amnesty USA, *Universal Jurisdiction: Questions and Answers* (undated; viewed 18 January 2010)

32 Chatham House International Law Discussion Group meeting, *Universal Jurisdiction for International Crimes,* 9 October 2008

33 'Saddam deputy escapes arrest in Austria for torture crimes', *Independent*, 19 August 1999

34 See Amnesty UK, *Mengistu -- the opportunity for justice must not be lost*, 7 December 1999

apparently for political reasons (in this case the Clinton administration's close relationship with President Fujimori), the intelligence officer was released.[35]

As noted above, prosecutions cannot take place unless there is sufficient evidence, and the lack of evidence may very well have political overtones. If, say, the USA has political interests in the country where the alleged offence took place, it may be extremely unwilling to release surveillance and other evidence.

Even in Canada, whose War Crimes Programme is often cited as a model for universal jurisdiction, there is scope for political intervention in prosecutions.[36] In the UK, the requirement for the assent of the Attorney General to prosecutions (see p4 above) is often seen as introducing an element of the political for serious international crimes in particular.

3.6 Immunity

It is a well-known principle of international law that heads of state and certain other senior members of government enjoy immunity from prosecution. However, some of the details of this immunity are less clear.

In October 1998 ex-President Augusto Pinochet of Chile was arrested in London, pursuant to arrest warrants issued by the Spanish court. The warrants alleged, amongst other things, torture, an international crime for which both the Spanish and English courts had universal jurisdiction. Pinochet's lawyers averred that as a former head of state he benefited from state immunity from prosecution. In March 1999, the House of Lords ruled that Augusto Pinochet's immunity as a former head of state extended only to acts done in his official capacity as a head of state.[37] The Law Lords ruled that acts of torture, as crimes under international law, could not be acts within the official capacity of a head of state and that extradition proceedings to Spain should continue. Lord Browne-Wilkinson set out the principle of state immunity:

> It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted ratione personae.[38]

This immunity is enjoyed by heads of government as well as heads of state, and certain other senior ministers, as the following extract from the International Court of Justice judgement in *Congo v Belgium* indicates:

---

35 Chatham House International Law Discussion Group meeting, *Universal Jurisdiction for International Crimes,* 9 October 2008

36 See Morten Bergsmo (editor), *Criteria for Prioritizing and Selecting Core International Crimes Cases,* p87 ff

37 *Ex parte Pinochet (No. 3)* [2000] 1 A.C. 147

38 *Ex parte Pinochet (No. 3)* [2000] 1 A.C. 147

> […] in international law it is firmly established that … certain holders of high-ranking office in a state, such as the head of state, head of government and minister for foreign affairs, enjoy immunities from jurisdiction in other states, both civil and criminal.[39]

When such people leave office, they will enjoy a reduced level of immunity, referred to by Lord Browne-Wilkinson as immunity *ratione materiae*. The summary of a Chatham House Discussion Group on International Law includes the following information on immunity *ratione materiae*:

> Essential characteristics of *immunity ratione materiae* are that it applies: (i) to acts of state officials during and after their period of office; (ii) only if carried out in an official capacity; and (iii) it is not absolute. Though there is some debate (e.g. dissent of Lord Goff in Pinochet), many would agree that it does not apply in respect of international crimes.[40]

Under Article 27 of the Rome Statute there is no immunity from the jurisdiction of the ICC on the grounds of official capacity: this means that heads of state or government, and other officials, are liable to prosecution, and this is notwithstanding any other immunity or special rules which they may enjoy under national or international law.

The UK's view of the international law on state immunity is currently reflected in the *State Immunity Act 1978* (as amended). Part 1 states the general principle that every state is immune from the jurisdiction of the UK courts, but goes on to set out exceptions concerning submission by the state concerned to the jurisdiction of the UK courts and acts of a commercial or private law nature rather than of a sovereign or public nature.[41]

This immunity applies to any foreign or commonwealth state other than the UK; and references to a state include references to (a) the head of that State in his public capacity; (b) the government of that State; and (c) any department of that government.

4 UN review of universal jurisdiction

Although many African states have expressed approval of the principle of universal jurisdiction in treaties, they consider that the scope and applicability of the principle of universal jurisdiction outside the context of such treaties remain to be determined. In particular, the African Union has for some time been concerned that the principle is not being applied impartially and objectively by European states. Rwanda, for example, considers that the principle is open to abuse and has been used to serve political interests, which in its view endangers and undermines the very principles of universal jurisdiction and international law.

The African Union Commission is therefore looking into 'abusive' uses of universal jurisdiction by non-African states against African personalities.[42] As part of this, an AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction was set up and produced a report on the practices and concerns of both African and European countries.[43] This made a series of recommendations encouraging all states to prosecute war crimes and

---

39 *Congo v Belgium*, ICJ Reports, 2002, para. 51

40 'Summary of discussion at the International Law Program Discussion Group at Chatham House on 9 September 2004', Daniel Geron, ILP, Chatham House

41 Joanne Foakes and Elizabeth Wilmshurst, 'State Immunity: The United Nations Convention and its effect', *Chatham House Briefing Paper ILP BP 05/01*, May 2005, p3

42 See African Union, *Progress report of the Commission on the abuse of the principle of universal jurisdiction*, January 2010

43 *AU-EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009

other serious international crimes, but emphasising that this is usually best done in a country with a territorial link to the crime, and if not, friendly international relations should be maintained.

Following this, Tanzania, on behalf of the Group of African states, put the issue on the agenda of the UN General Assembly. They considered that:

> there is a need for the international community to come up with clear rules and approaches that could be taken into consideration in guiding the application of the principle of universal jurisdiction and to provide a uniform set of regulations that would guide our national courts in meeting the challenges of prosecuting perpetrators of international human rights. There is also a need to clarify in international law the rights and obligations of States under this important principle in order to minimize potentials for misuse and to maximize the benefits of extraterritorial jurisdiction.[44]

In the interim, at the behest of the EU, the UN General Assembly's Sixth (Legal) Committee considered the issue and at the initiative of Rwanda put forward a draft resolution which was the result of considerable negotiation and compromise between the African and European factions.[45] In December 2009 the UN General Assembly passed (without a vote) a resolution on universal jurisdiction[46] which asks the Secretary-General to report on State practice with regard to scope and application, gathering information and observations from Member States by 30 April 2010. The report is to be presented to the General Assembly at its next session, in September 2010. The UK has been asked to submit its report, and intends to respond.[47]

---

44 UN General Assembly, 63rd session, 105th plenary meeting, 14 September 2009, A/63/PV.105, Agenda item 158, "The scope and application of the principle of universal jurisdiction: Draft decision (A/63/L.100)"

45 Document A/64/452, 16 November 2009

46 A/RES/64/117, 16 December 2009

47 See HL Deb 22 February 2010 c208WA