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Universal Jurisdiction for International Crimes

A Summary of the Chatham House International Law Discussion Group meeting held on 9 October 2008.

The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives.

Speakers:

- Reed Brody, Human Rights Watch
- Paul Hardy, Crown Prosecution Service
- Professor David Sugarman, Lancaster University

Introduction

Universal jurisdiction enables a person to be tried in the national courts of a state for a crime committed outside that state, even where there is no link between the state and the alleged offender such as nationality of the accused or of the victim of the crime.

In October 1998 ex-President Pinochet 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. The discussion group considered the prospects, ten years after Pinochet's arrest, for the prosecution of leaders who commit genocide and other international crimes and whether there was room for further movement in the law. Although immunity is relevant to such prosecutions, and was a principal issue in the *Pinochet* cases, the focus of the meeting was the concept of universal jurisdiction.

Universal Jurisdiction in the United Kingdom

The courts in the United Kingdom have universal jurisdiction for various international crimes. Such jurisdiction has been gradually extended on an ad hoc basis in order to comply with the United Kingdom's obligations under international treaties. Today UK courts have universal jurisdiction for a very limited number of offences: torture, hostage taking and certain other terrorist offences and grave breaches of the Geneva Conventions and Additional Protocol I.

Because each extension of universal jurisdiction has been in response to specific treaties, such as the enactment of section 134 of the Criminal Justice Act 1988 in implementation of obligations under the 1985 UN Convention

against Torture, rather than as the result of a general review as to the appropriate approach and scope, the UK's regime of universal jurisdiction has certain flaws. First, the UK courts do not have jurisdiction to try all serious international crimes. For example, there is domestic legislation implementing the Geneva Conventions and Additional Protocol I but not Additional Protocol II i.e. the courts have universal jurisdiction for grave breaches of humanitarian law in international but not internal armed conflicts. Secondly, the domestic system has inherited weaknesses in the parent treaties. For example, just as the 1951 Genocide Convention limited the obligation to prosecute to acts of genocide committed within a state party's territory, the jurisdiction of the UK courts was confined to genocide committed within the United Kingdom itself until the enactment of the International Criminal Court Act 2001.

Extraterritorial Jurisdiction in the United Kingdom under the International Criminal Court Act 2001

The enactment of the International Criminal Court Act 2001 (ICCA) was a major step forward in the United Kingdom's jurisdiction for serious international crimes. As its name suggests, the ICCA is a response to the Rome Statute of the International Criminal Court. As noted by one participant, however, State parties are not required to implement Articles 6 to 8 of the Rome Statute. The rationale behind the enactment of the offence-creating sections of the ICCA was, in part, to pre-empt the prosecution of British citizens in the International Criminal Court.

The ICCA gives national courts jurisdiction for war crimes, genocide and crimes against humanity, wherever committed, provided that the accused is either a UK national or resident. It has therefore been possible since 2001 for a UK national/resident to be prosecuted in the domestic courts for certain kinds of war crimes, wherever committed, under either the Geneva Conventions (universal jurisdiction) or the ICCA (extra-territorial jurisdiction). As yet there has been no conviction under the ICCA in the Crown Court, but there has been in a court martial arising out of offences committed by UK Forces in Iraq.

A significant weakness in the ICCA is its failure to define who is resident in the United Kingdom. The scope of the Act is dependent upon the meaning of the term as, unless the accused is a UK national, there is no extra-territorial jurisdiction without residency. One participant noted that if the issue of residency were raised in court a Crown Court judge might well adopt the definition of ordinarily resident that had developed in immigration case law, which requires that for an individual to be ordinarily resident there must be a

degree of permanency in the United Kingdom. It was not, however, necessarily appropriate to allow a definition developed in the immigration context to determine the scope of jurisdiction under the ICCA.

A second weakness in the ICCA was its lack of retroactivity; the ICCA only confers jurisdiction for acts committed from 2001. One participant noted that recently this temporal limitation had prevented the prosecution of Rwandan nationals living in the UK who were suspected of committing war crimes and genocide in Rwanda in 1994. Because the relevant acts had occurred prior to 2001 no prosecution was possible under the ICCA. This Rwandan case was also cited as an example of the lacuna in the UK's universal jurisdiction for war crimes; because the acts had taken place in the context of an internal (rather than international) armed conflict and there had not been sufficient evidence of torture, the domestic courts lacked jurisdiction. It was noted that proceedings were underway for the extradition of the accused to Rwanda.

The Investigation and Prosecution of International Crimes

In the United Kingdom 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 has responsibility for prosecutions. SO15 and the CPS operate together under a published National Protocol on War Crimes and Crimes against Humanity. In accordance with the National Protocol the police will forward a report to the CPS on a potential case for its advice on jurisdiction (including the issue of residency under the ICCA), immunity and offences. SO15 then decides on the basis of the advice given by the CPS whether to proceed with an investigation.

The meeting was reminded of the test within the prosecutor's code for the prosecution of all criminal offences in the United Kingdom:the first stage of which is whether there is a realistic prospect of conviction. This code test applied equally to the prosecution of serious international crimes. Evidently in such cases issues of jurisdiction and immunity were relevant to the prospects of conviction. It was noted that under the National Protocol, SO15 consulted the CPS at an early stage. An advantage of this procedure was that the police would not incur the costs of an investigation if the CPS concluded that there was no reasonable prospect of conviction.

The most significant recent UK prosecution of a serious international crime under universal jurisdiction was the case of Farayadi Sawar Zardad in 2005. Zardad, an Afghan national resident in the UK, was prosecuted for torture and

hostage taking whilst manning a checkpoint in Afghanistan. The meeting recalled the practical problems in bringing the case. 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. The jury had been 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 had resulted in a conviction and Zardad had been sentenced to 20 years imprisonment.

The meeting discussed the potential for the prosecution of passengers who transit through UK airports. There was, however, a practical difficulty in that the United Kingdom has no concept of a holding charge, so that a passenger in transit could not be held whilst the UK decided whether or not to prosecute. One participant suggested that in such cases the police could use the ordinary procedure for arrests so that a passenger in transit could be arrested where a police officer had reasonable grounds for suspecting that he had committed an offence. Another participant proposed as an alternative solution that an investigation could be taken in advance of an individual arriving in the United Kingdom. It was, however, concluded that the police would in general be reluctant to investigate a case unless they were sure that the individual would pass through the jurisdiction at some point.

It was noted that other states took a different approach towards the investigation and prosecution of international crimes. 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 was often cited as having a model code for universal jurisdiction, but its regime was not without problems. For example, Canadian law requires physical presence before a non-national may be prosecuted and there was scope for political intervention in the procedure for bringing prosecutions.

Legal, practical and political problems

The idea of universal jurisdiction had been gathering steam ever since Pinochet's arrest in 1998. Professor Sugarman noted that today at least eight European states, including Spain, Belgium and the UK, were at the forefront of the movement towards universal jurisdiction for serious international crimes. There also had been not insignificant developments in respect of the immunity of former heads of state.

Professor Sugarman examined the legal, practical and political problems of universal jurisdiction. First, the operation of universal jurisdiction posed many legal uncertainties. By its nature universal jurisdiction empowered the national courts of many states to try an individual, but the question of which of these states should do so had not yet been resolved. For example, should priority be given to the first state to charge a defendant or the state with the strongest link to the accused, the victims or the crime? Professor Sugarman also noted divergent national approaches to universal jurisdiction, including within civil law jurisdictions. For example, the Spanish took 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 had reversed this and confirmed unconditional universality. In contrast the German approach was more restrictive. Professor Sugarman cited the recent failed attempt by human rights groups in Germany, France and other countries to bring proceedings in Germany against Donald Rumsfeld for the atrocities committed by US forces under his command in Iraq.

The fair and effective exercise of universal jurisdiction was also hampered by practical difficulties. Professor Sugarman emphasised the legal complexity of cases involving international crimes and that investigations strained domestic resources, both in terms of the significant financial cost of an investigation and the commitment of personnel. In addition, national police forces would not be accustomed to investigating such cases.

A final problem was that, although in theory prosecutions were politically neutral, in practice politics played a central role in the decision to prosecute. This led to various difficulties. First, prosecutions were vulnerable to accusations of double standards on the grounds that universal jurisdiction only served to prosecute those from third world states, whilst no cases had been brought against the leaders of western states. The Pinochet case was 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. (It was noted, however, that investigations were now being started in Spain in respect of such crimes.) As well as accusations of neo-colonialism there was also the risk that universal jurisdiction could be used to legitimise show-trial prosecutions of political enemies.

Professor Sugarman noted that politics also affected the situation. In 1993 and 1999 Belgium had enacted laws which provided for comprehensive universal jurisdiction. This had led to the state becoming the foremost jurisdiction for the potential prosecution of international crimes until the

Belgians repealed their laws in favour of a more limited regime following suggestions from Donald Rumsfeld that unless they did so there would be pressure for NATO to withdraw from Belgium.

Post-Pinochet and Political Will

In 1998 Human Rights Watch had described the Pinochet case as a wake-up call to tyrants. Reed Brody noted that progress had been made; the world was evidently a smaller place for leaders who commit atrocities. It had also become clear that the Pinochet case had been a source of inspiration to victims, who regarded it as a precedent. The spirit of the case had also contributed to the unravelling of the transitional arrangements set up in the 1980s in Latin America which had given immunity and even power to perpetrators of atrocities. Mr Brody reminded the meeting that the former presidents of Peru and Uruguay were being prosecuted for human rights abuses and members of the Argentinian junta are facing domestic trials.

But while Pinochet's peers no longer choose to holiday in Europe, the promise of the case had not been fulfilled; there were no high-level prosecutions based on universal jurisdiction and there had been no major trials. The only prosecutions had been of comparatively lowly Serbs, Hutus and Afghan warlords.

The Pinochet case had only been possible because in 1998 the political climate had been right. In Spain the general public had given wide-spread support for the prosecution which in turn had forced the Spanish government to continue to back Prosecutor Garzon when it might not otherwise have done so. The British Prime Minister had also been a decisive factor. Crucially Mrs Thatcher was no longer in power and Tony Blair was still in the early days of his premiership. It was hard to imagine that the result would have been the same had the political conditions been different.

Mr Brody cited three examples where the lack of political will had led to a potential defendant evading prosecution. In each case the host state had been unwilling to disturb the status quo by making a prosecution. The first case was that of Izzat Ibrahim al-Duri, one of Saddam Hussein's closest aides. In 1999 he travelled to Austria for medical treatment. Despite documentary evidence that showed that Izzat Ibrahim had ordered the gassing of Kurds, Austria bowed to political pressures and permitted him to leave the country without facing prosecution. Later in 1999 Mengistu, 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. However, before any charges were brought, Mengistu returned to the protection of Mugabe in Zimbabwe. A third example was the 2000 case of a senior Peruvian intelligence officer who was questioned on landing in the US in connection with torture. Again, because of political reasons, namely the Clinton administration's close relationship with President Fujimori, the intelligence officer was released.

The Hissène Habré prosecution, however, did show promise. Habré had wiped out several ethnic groups in Chad during his dictatorship in the 1980s. In 1999, inspired by the Pinochet example, Habré's victims had approached Human Rights Watch for assistance in preparing a case against the deposed dictator, who was living in exile in Senegal. In early 2000 Habré was arrested and indicted in the Senegalese courts for torture and crimes against humanity. The case was founded on Senegal's obligations under the UN Convention against Torture. The Senegalese courts later held that, as Senegal had not incorporated the Convention against Torture into domestic law, they had no jurisdiction to try Habré for crimes committed outside the country. It was widely regarded that this decision had been reached due to political considerations.

Habré's victims turned to Belgium's then favourable laws on universal jurisdiction and filed charges against Habré in Belgium. Over the next five years some progress was made. Chad waived Habré's immunity and the Belgium authorities investigated the case. (Due to transitional arrangements the case was not affected by the changes in the Belgian law on universal jurisdiction.) In 2005 Habré was charged in Belgium and a request was made for his extradition.

Habré then played the race card. The argument that a former African head of state could not be extradited to a former colonial power was persuasive, in particular given that the prosecuting authorities were in Belgium.. Public opinion in Senegal turned in favour of Habré and the Senegalese president became reluctant to decide the matter. Eventually Senegal turned to the African Union for advice. In 2006 the African Union established a legal committee to consider the issue, which advised Senegal to prosecute Habré itself in the name of Africa.

The result was that Senegal now has the most comprehensive law on universal jurisdiction in the world. It is retroactive, has no presence requirement and covers all four crimes (genocide, war crimes, torture and crimes against humanity). Mr Brody noted, however, that Senegal faced

certain practical problems. No developing state has ever prosecuted grave international crimes that were committed outside its territory. Although no such request was made in a reservation to the UN Convention against Torture, Senegal asked for help from the international community and the European Union has since agreed to provide advice and financial assistance for the trial. Mr Brody expressed high hopes for the prosecution, but noted that there were still problems of political will. It was for this reason that the case still had not been heard. In an attempt to accelerate the proceedings the victims had filed a new complaint against Habré in September 2008.

The Habré prosecution was an example of how many in Africa see double standards being applied in respect of universal jurisdiction and suspect that it is being used as a political tool. Mr Brody noted that the principal proponents of this argument were exactly the African leaders who fear universal jurisdiction will be used against them in due course. There was, however, some factual basis to this argument. For example, no prosecution has been brought against Donald Rumsfeld. In order to counter such arguments and preclude any taint of partisanship, prosecutions would have to be made across the board.

Mr Brody concluded by cautioning against over-reliance on universal jurisdiction. There was a risk that over-enthusiasm for prosecutions could in fact harm progress and result in bad law. It was important to choose prosecutions strategically and carefully.

Future Prospects

Prosecutions in National and International Courts

The meeting discussed the appropriate forum for the future prosecution of serious international crimes. The general consensus was that ideally prosecutions would take place in the victims' and defendant's home state. In reality this was unlikely to occur, hence the role of the International Criminal Court and the importance of universal jurisdiction.

One participant queried whether in future there might be a decentralisation of prosecutions from the ICC to regional international courts. Reed Brody was not in favour of such a proposition. He advocated one strong ICC with unanimous international support together with widespread domestic universal jurisdiction for international crimes.

It was agreed that in the interests of justice and in order to reduce the politicisation of prosecutions, in future prosecutions on the basis of universal

jurisdiction would have to be brought by a wide-range of states, such as Argentina, South Africa and India, rather than being confined to Spain, Britain, Belgium and Senegal. It was asserted by one participant that over 125 states already had international jurisdiction for certain crimes. For example, China has universal jurisdiction for any crime in its criminal code provided that the relevant conduct is prohibited under a treaty that provides for universal jurisdiction.

Even if prosecutions under universal jurisdiction became widespread, there was still risk of politicisation and abuse. One participant cited the case of the French judge who had issued arrest warrants for a number of Senegalese officials in connection with the sinking of a ferry boat which had left 1800 dead, including some French nationals. In retaliation Senegal issued an arrest warrant for the French judge. It was noted that caution would have to be exercised in order to ensure that judicial norms were respected and that universal jurisdiction was not hijacked for political vendettas.

Universal Jurisdiction and Civil Claims

One participant raised the issue of universal jurisdiction for civil claims for damages, citing the example of the damages paid by Libya in respect of the Lockerbie bombing. Given the problems in prosecuting a criminal case she queried whether it would be easier for victims to use civil claims as an alternative form of recourse. Reed Brody noted that victims and their families often wanted compensation just as much or even more than justice under the criminal law. Another participant recalled that certain of Pinochet's bank accounts were frozen following his arrest in 1998 and eventually about $9 million had been allocated as reparation payments to victims.

Future Prosecutions

The meeting was generally optimistic about the future of prosecutions for serious crimes under both domestic and international jurisdiction. It was to be expected that in many cases politics would continue to be a relevant factor in the decision of whether to prosecute. For example it was possible that an ill-timed prosecution could prolong a conflict or prevent a dictator from relinquishing power. It was noted, however, that such prejudice did not appear to have occurred to date. Milosovic had had to give up power even after he was charged with war crimes and Charles Taylor's indictment had marked the beginning of his end. That said, the relationship between prosecutions under universal jurisdiction and peace agreements which might confer immunity would continue to be a difficult issue

Various participants raised the issue of future prosecutions against US officials for torture or war crimes in Iraq or Afghanistan, in particular in light of the administration's admission that waterboarding was used. It was mooted whether a prosecution might be possible in Germany, but noted that whether prosecutions would be brought would be a question of political will. It was also expected that if prosecutions were brought the defendants would seek to rely on maverick legal opinions which had advised that waterboarding was not torture within the meaning of international law.

Katie Dilger