



Burma Briefing

No. 49
July 2019

The need for a new Universal Jurisdiction law in the UK

The problem

There is no single comprehensive universal jurisdiction law in the UK. Instead, there is a patchwork of existing laws, treaties and obligations which have evolved over many decades. The current application of universal jurisdiction in the UK is so restricted that even the crime of genocide cannot be prosecuted in British courts.

For the limited crimes which can be prosecuted, a government minister, rather than impartial courts, makes the decision on whether a case can go ahead, meaning political or trade calculations can outweigh the impartial application of justice and upholding international law.

Only 122 of 193 UN members have signed up to the Rome Statute of the International Criminal Court. In cases such as Syria, Yemen and Burma, United Nations Security Council members Russia and China are either using, or threatening to use, their veto power to block referrals to the ICC of countries which are not signatories.

Impunity for genocide, war crimes and crimes against humanity encourages further crimes to be committed.

Expanding the application of universal jurisdiction in the UK would be an important step in helping victims seek justice and reducing the sense of impunity currently enjoyed by those violating international law.

This joint briefing paper by Burma Campaign UK and Justice 4 Rohingya UK calls on all political parties to commit to introducing a new comprehensive universal jurisdiction law expanding the crimes which can be prosecuted in British courts, and ensuring that impartial courts, not government ministers, have the power to decide whether prosecutions can go ahead. We call on all political parties to put such a commitment in their manifestos ahead of the next general election.

How serious international crimes can be prosecuted

Normally, crimes are prosecuted in the country where they are committed, or in some cases in the country of the perpetrator or the victim.

In cases of international crimes where there is no prospect of justice in the territory where the alleged crimes took place because of the lack of an impartial judiciary, the status of the alleged perpetrator, the lack of the requisite legal provisions, or the unwillingness of local prosecution authorities, the international community has various options available to uphold international law.

One option taken is the establishment of international criminal tribunals, such as the International Criminal Tribunal for Yugoslavia and the International Tribunal for Rwanda. These tribunals are often established by the Security Council under their Chapter 7 power.

Another option that the international community has taken where there is a willingness, at least for limited prosecutions, but a lack of expertise to undertake them, is the establishment of hybrid courts which operate as part of a country's domestic court system, but with the addition of international judges, lawyers and support staff. Examples of these hybrid tribunals include the Extraordinary Chambers in the Courts of Cambodia (ECCC, Khmer Rouge Tribunal) and the Kosovo War Crimes Court.

The permanent International Criminal Court (ICC) was also set up to counter the problem of impunity for the gravest crimes. The ordinary jurisdiction of the ICC is limited to crimes committed on the territory of state parties or by nationals of state parties. Therefore, the effectiveness of the International Criminal Court as a court of last resort is hampered by the fact that only 122 of the 193 members of the United Nations are State Parties.

Although the United Nations Security Council has the authority to refer non-State Parties to the International Criminal Court, giving the ICC special jurisdiction to deal with crimes committed outside the territory of state parties by non-state party nationals, its ability to do so is hampered in part by a general unwillingness of members to act on international crimes, and in part by the fact that all 5 permanent members of the Security Council have the ability to veto a referral to the ICC even in the exceptional cases where there is support for action by the majority of the international community.

China and Russia have in the past and are likely to continue to use their veto power to block referrals to the Court.

Universal Jurisdiction

The principle of universal jurisdiction allows courts in any country to prosecute perpetrators of the most serious violations of international law regardless of where they happened and the nationality of those involved. It is based on the understanding that the most serious international crimes, such as genocide, war crimes, crimes against humanity, torture and other crimes as defined by the Rome Statute, are so serious that they affect the international community as a whole, that the international community has a

responsibility to act, and that it is in each country's own national interest to do so.

The obligations of the British government

The British government is obliged by international conventions and resolutions to investigate and prosecute the most serious international crimes. However, it is not meeting these obligations.

These obligations include:

- The Rome Statute of the International Criminal Court
https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”

- General Assembly Resolution 60/147 of 16 December 2005: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

“In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction.”

- The Geneva Conventions

<https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”

- Convention on the Protection of all Persons from Enforced Disappearances

<https://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>

“Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction...”

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

“Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

“Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

“Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.”

Universal Jurisdiction in the UK

Opportunities for the application of the principle of universal jurisdiction in the UK are severely limited. The government currently only has the ability to prosecute alleged war criminals in international armed conflicts and officials or those acting in the capacity of an official who have committed torture.

This ability does not allow for the prosecution of the serious international crimes as outlined in the Rome Statute regardless of the status of the alleged perpetrator because the International Criminal Court Act 2001 only provides jurisdiction over UK nationals, residents, and persons subject to UK service jurisdiction.

The current application of universal jurisdiction is based on changes to British law following the signing of various treaties or conventions. There is no single law governing the application of universal jurisdiction in the UK. This has created a situation whereby it is technically possible for the police to investigate individuals for torture of an individual, but not for the far greater crime of genocide.

The War Crimes Unit of the Counter Terrorism Command of the Metropolitan Police investigates cases relating to war crimes and torture, but the evidence bar for going ahead with prosecutions is so high that it is rare for cases to go to court. There also appears to be a severe lack of resources given to the investigations of such crimes.

The British government appears to prefer deporting alleged war criminals to prosecuting them.

In 2012 the UK Border Authority stated that none of the cases of possible war criminals it was assessing had been prosecuted in the UK.

<https://www.gov.uk/government/publications/war-criminals>

Opportunities for individuals to use the UK courts to seek justice through private prosecutions under universal jurisdiction are even more limited. As well as the legal limits on which crimes can be prosecuted as outlined above, following a change in the law in 2011, the consent of the Attorney General, a government minister, is needed to prosecute and the consent of the Director of Public Prosecutions is required before an arrest warrant is issued.

This means the government effectively has veto power over cases brought forward by individuals, enabling them to put political considerations as a 'public interest test' ahead of that of applying the law impartially and holding perpetrators to account.

The change followed the issuance of an arrest warrant against Tzipi Livni, former Foreign Minister of Israel. The Justice Secretary at the time, Kenneth Clarke said: *"These changes are essential to ensure we do not risk damaging our ability to help in conflict resolution or to pursue a coherent foreign policy."*

<https://www.gov.uk/government/news/universal-jurisdiction>

The then Foreign Secretary William Hague stated: *"The law as it stands has been abused in relation to visitors from several other countries."*

<https://www.theguardian.com/commentisfree/2011/mar/30/coalition-criminal-justice-universal-jurisdiction>

At the time of the change there had been only ten applications for arrest warrants in ten years, and only two were successful, indicating that the courts were properly evaluating the evidence rather than frequently issuing politically motivated arrest warrants.

UK falling behind

In 2018 there were 60 different cases investigated under universal jurisdiction in 16 different countries. Only four of those cases were in the UK.

<https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2019-overcoming-evidentiary-challenges-though-collaboration/>

Justice denied

Conflict and human rights violations are increasing across the world. Dictators act with impunity while authoritarian regimes are on the increase.

International mechanisms for upholding international law are hamstrung by political agendas of powerful countries.

Impunity encourages further atrocities and means that those affected by the most serious crimes lack access to justice. While in some cases the problem is obstruction from Russia and China, in others it is the lack of willingness of any state, including the UK, to seek accountability for those responsible.

This is why any new universal jurisdiction law in the UK must allow for individuals to commence cases to be assessed by our impartial courts to determine whether there is evidence of international crimes, rather than these cases being barred by partial British government ministers.

The cost of impunity, in lives lost and in financial terms for the cost of humanitarian assistance, is far higher than the potential costs of broadening universal jurisdiction in the UK.

What is needed in the UK

Recommendation 1

A specific new universal jurisdiction law is needed in the UK, bringing together the current patchwork of laws relating to universal jurisdiction, and expanding the crimes which can be prosecuted. We call on all political parties in the UK to support the introduction of a new and comprehensive universal jurisdiction law, and to include this commitment in their manifestos for the next general election.

Recommendation 2

A new universal jurisdiction law should enable the prosecution of crimes listed under the Rome Statute to be prosecuted in the UK, no matter the nationality or residency of the alleged perpetrator.

Recommendation 3

A new universal jurisdiction law must vest the power in deciding whether any particular prosecutions should proceed in our Court system rather than in the Attorney General and Director of Public Prosecutions.

Recommendation 4

The War Crimes Unit should be expanded and given adequate resources to reflect the seriousness of the continued perpetration of international crimes.

About Justice 4 Rohingya UK

Justice 4 Rohingya UK was formed in response to Burmese military offensives against the Rohingya in 2017. Its aim and objectives are to bring peace and justice to the Rohingya people, enabling them to live safely and with full rights in their homeland, Burma. The injustices in Burma cannot continue.

Our campaign is designed to raise both awareness of the current crisis and to facilitate avenues for justice for the Rohingya people. Our campaign organisation consists of Lords, Parliamentarians, religious and non-religious leaders, community leaders, international lawyers, Barristers, and QCs all working to bring the crimes against Rohingya to the International Criminal Court (ICC) in The Hague.

<https://www.justice4rohingya.org>

About Burma Campaign UK

Burma Campaign UK works for human rights, democracy and development in Burma. Founded in 1991, Burma Campaign UK is one of the leading Burma campaign organisations in the world. We play a crucial role in coordinating the international campaign for human rights in Burma and work closely with human rights activists in Burma and in exile.

We expose human rights abuses and lobby governments all over the world to do more to promote human rights in Burma. We provide support and training to Burmese organisations and individuals, and we generate worldwide media coverage, ensuring the world does not ignore human rights abuses in Burma.

Our campaigns have helped free hundreds of political prisoners, we have ensured life-saving aid has reached villagers forced to flee attacks by the Burmese Army and have stopped companies investing in Burma in ways which contribute to human rights abuses.

<https://burmacampaign.org.uk/>