

**Opinion on possible English criminal law liability
in the context of disclosure of classified material made by
witnesses to a German parliamentary inquiry**

Introduction

1. I am asked to provide an opinion on whether German citizens (and specifically parliamentarians) participating in a German parliamentary inquiry may be exposed to criminal liability under English law in the event reference is made at the inquiry to classified material either emanating from, or touching upon, UK security interests, particularly in circumstances where the original obtaining of this information may have involved the breach of unspecified English criminal law(s).
2. For clarity I note that, although the individual who obtained the classified information in the first place ('the original witness') is expected to give evidence to the inquiry in person about that material, I am asked to focus not on that individual's potential criminal liability but that of others involved in the proceedings (either as witnesses or by asking questions) who may come into contact with or (already?) have knowledge of the classified material.
3. I also note at the outset that I have limited information about the precise scope and nature of the parliamentary inquiry set up in Germany. My opinion proceeds on the basis it is a commission which will call on a range of witnesses of different statuses and roles to provide information in open and closed sessions. I do not know whether the inquiry has the power to compel witnesses to attend and answer questions under threat of contempt. Furthermore, and significantly, I do not know the detail of the classified information which may be provided either by the original witness who obtained it or by other potential witnesses in the proceedings. This necessarily means that the discussion in the paragraphs below occurs at a general level. I am not in a position to apply the principles discussed to the precise facts of this case. If further information is sought in this regard, please let me know.

Summary

4. It is my opinion that German citizens who participate in a German parliamentary inquiry, in which reference is made to evidence or information classified in the UK, whether now in the public domain or not, would not be liable to prosecution as a matter of English criminal law. The key reasons for this are:
 - a. I have identified no offence with the extraterritorial jurisdiction to criminalize such conduct committed by foreign nationals abroad;
 - b. In any event, the *purpose* behind such a parliamentary inquiry (and the actions of any witnesses or those conducting the questioning) would not likely satisfy the requirements creating liability for any potential English offence;
 - c. The UK offences concerned with disclosure of classified information require in advance of any prosecution the express consent of the Attorney General. In the circumstances of this case, even if potential liability arose (which I conclude it does not), I cannot foresee circumstances in which such consent would be given to prosecute German parliamentarians for participating in a parliamentary inquiry.
5. If, in the course of the inquiry, the original witness somehow provided information that rendered him punishable under UK law, I do not consider (in general terms) that those conducting the inquiry would be judged to have aided, abetted or conspired in the commission of any criminal offence committed by that witness contrary to English law.
6. In addition, and quite separately from the legal issues I am asked to consider, there would be extremely strong public policy considerations for no prosecution being contemplated by UK authorities.

Preliminary issue: the location of the conduct

7. I clarify at the outset that I am only concerned with what may occur or have occurred outside of the UK and within the confines of the parliamentary inquiry. If any offence under British law was committed by the original witness when on UK soil, or from outside the UK as part of a conspiracy with others, which adversely impacted the UK, then that individual (and any conspirators) would potentially be criminally liable and may be subject to an extradition request to face trial in the United Kingdom. For the purposes of this opinion I therefore discount any consideration of criminal conduct which may have occurred in the United Kingdom and focus exclusively on the position as regards conduct within the inquiry in Germany.

Extraterritoriality and English criminal law

8. As a general principle English criminal law does not apply to the acts of foreign nationals on land outside of the UK and its territories. Where it does, various pieces of legislation *expressly* provide for this. The categories of offences to which such extensive jurisdiction to prosecute exists are as follows:

- Certain sexual offences;
- Certain dishonesty and blackmail offences;
- Certain forms of conspiracy, encouragement and attempts;
- Offences connected with aircraft;
- Homicide;
- Taxation offences;
- Offences by servants of the Crown;
- Slave trade
- Offences under the Merchant Shipping Act;
- Offences committed by British seamen;
- Offences in the Admiralty jurisdiction;
- Offences against the safety of ships and fixed platforms;
- Drug offences committed at sea;
- Offences committed by foreigners in foreign ships;

9. The first question it is therefore necessary to consider is whether the disclosure or repetition of UK classified information before a German parliamentary inquiry comes

within any of the offences which include universal or extraterritorial jurisdiction under English criminal law. The initial step must therefore be the identification of *potential* concrete criminal offences concerned with this type of conduct.

The Official Secrets Acts 1911, 1920 and 1989

10. The most obvious criminal offences targeted at the wrongful disclosure of classified information are those created by the Official Secrets Acts. These three pieces of legislation establish a framework to safeguard against and punish the disclosure of Government secrets.
11. As noted above, since I do not know the actual detail of the classified information in this case, I cannot evaluate whether it comes within the reach of these Acts. I therefore presume for the purposes of this analysis that it does and that it is necessary to consider the liability created by these enactments.

The 1911 Act

12. By section 1(c) of the Act: "*If any person for any purpose prejudicial to the safety or interests of the State—(c) ...communicates to any other person any...information which...might be...directly or indirectly useful to an enemy*" he is guilty of an offence.
13. This formulation is extremely broad and would appear to catch a very wide range of potential conduct. Notably it also purports to render "*any person*" liable. However, it is essential to note the territorial reach of the Act: Section 10 provides as follows: "*(1) This Act shall apply to all acts which are offences under this Act when committed in any part of His Majesty's dominions, or when committed by British Officers or subjects elsewhere. (2) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British court in the place where the offence was committed, or in England*". By this provision it appears to me that the UK courts enjoy jurisdiction over any person who commits an offence contrary to the Act within the UK and its territories, but only against British officers or subjects if the offence is committed outside that territorial scope.

14. Finally, it is relevant to note that any prosecution under this Act can only be brought with the consent of the Attorney General.

15. It is therefore my clear view that, even were disclosure to the inquiry to be viewed as "*prejudicial to the safety or interests of the [UK]*", the legislation would not create criminal liability on the part of German (non-UK) nationals participating in a German parliamentary inquiry.

The 1920 Act

16. I do not consider this in any detail as the particular circumstances which it addresses appear to have no relevance in the present context.

The 1989 Act

17. The 1989 Act makes it a criminal offence for an individual to disclose any "*information, document or other article relating to*" a wide range of national security subjects in an individual's possession if (and only if) he or she was either a member of the security or intelligence services in the UK, or, entirely separately, was notified of being subject to the restrictions set out in the Official Secrets Act 1989. I do not suppose that any of the proposed participants or witnesses within the inquiry satisfy these requirements. Importantly, again, the territorial provisions concerning the Official Secrets Act 1989 are quite clear: Acts done abroad are only punishable if committed by a British Citizen or Crown servant.

18. For these reasons, as with the 1911 Act, it is my view that the inquiry's witnesses or questioners would not be criminally liable under the 1989 Act by conducting the proceedings presently envisaged.

Alternative offences

19. I have considered a number of potentially relevant alternative offences, including widely drafted terrorism legislation concerned with prejudicing security¹ and other

¹ In particular I have considered the effect of the Terrorism Act 2006, sections (1) and (17). Section (1) is concerned with acts done to encourage terrorism. It provides: "*(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect*

offences addressing general prejudice caused to the interests of the State. In my view, the context with which we are concerned does not warrant further consideration of these categories of offences. The most relevant offences are those created by the Official Secrets Acts and considered in the paragraphs above.

Summary on criminal liability

20. In my view it is clear that although deliberately widely drawn in ambit, the potential criminal offences with which we are concerned do not have the territorial reach to criminalise German citizens participating in a German parliamentary inquiry during which disclosure of or reference to evidence or information may be made and which may be considered classified by the UK authorities.
21. So far as conduct which occurred outside the UK's territorial jurisdiction is concerned, all of the identified potentially relevant offences enable only the prosecution of UK subjects or Crown servants. In the present case I do not understand any of the witnesses or participants to fall within that class.
22. Secondly, even were the UK to assert jurisdiction, I do not see how the constituent elements of the identified offences could be satisfied in the context of a parliamentary inquiry. So far as the broadest offence created by the 1911 Act is concerned no disclosure would be made or evidence given for a *purpose prejudicial to the safety or interests of the State* but would be provided exclusively to assist (potentially under powers if compulsion) the German parliament in its investigations.

encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences." Subsection 3 provides further definition: "*For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—*
(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances." Section 17 of the Act then provides for extremely expansive extra-territorial jurisdiction: "*If—(a) a person does anything outside the United Kingdom, and (b) his action, if done in a part of the United Kingdom, would constitute an offence falling within subsection (2), he shall be guilty in that part of the United Kingdom of the offence.*" Subsection (3) goes particularly far in establishing the scope of that jurisdiction: "*Subsection (1) applies irrespective of whether the person is a British citizen or, in the case of a company, a company incorporated in a part of the United Kingdom.*"

On its face there is nothing to suggest that any disclosure likely to be made by any witness to the inquiry would be understood to whom it is published (i.e. the inquiry) as encouragement to commit terrorism offences. Thus in my view this provision, though almost unique in its extra-territorial aggression, has no application.

23. Finally, in all circumstances, I cannot envisage a situation in which the UK authorities would seek to prosecute those involved in such a parliamentary inquiry, far less that the Attorney General would, as is required, provide his consent for any prosecution to be mounted.

Specific questions

24. Having addressed the preliminary matters set out above, I now address the specific questions posed in my instructions.

a. *Do German parliamentarians enjoy immunity in the UK*

25. Any immunity from criminal prosecution is relevant only in the event of potential liability. For the reasons set out above, I do not consider that such liability arises on the part of German parliamentarians in this case. However, the theoretical position in respect of immunity can be summarised as follows.

26. The particular factual context we are concerned with involves non-UK citizens appearing to provide information or evidence before an official inquiry in Germany. If any such a person appearing before the inquiry held the status of a member of the German parliament that would not of itself confer any form of immunity so far as English law is concerned merely because of that person's status as a parliamentarian. If a German parliamentarian committed an offence over which the UK exercised extraterritorial jurisdiction, so far as UK law is concerned, criminal liability could arise.

27. Generally, British law concerning the immunity of foreign officials from criminal suit focuses upon immunity when in the territory of the United Kingdom as a diplomat or part of a diplomatic mission from the 'sending' state (see the Diplomatic Privileges Act 1964, giving force to certain provisions of the Vienna Convention). That immunity may arise in a number of ways (whether *ratione personae* or *ratione materiae*), but all have in common the core notion of immunity within the 'receiving' State. In the current factual scenario, where the individuals in question are outside of the UK, no such issue of immunity arises.

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28. As an adjunct to the question of immunity, I have also considered whether any question of legal or parliamentary *privilege* might arise. I do not know whether such privilege exists as a matter of German law, however in the UK the courts have very limited scope to challenge or check what is said in Parliamentary proceedings. In my view this doctrine is purely one of *domestic* constitutional law, however, which is designed to ensure the UK Parliament can work free from executive or judicial interference. I see no basis upon which it could be said that such a constitutional doctrine applies to the conduct of members of other legislatures.

29. It is therefore my view that no issue of potential 'immunity' arises in the present context.

b. Does UK law provide for universal jurisdiction with regard to crimes which have been committed in Germany or any other state (e.g. Russia) disclosing classified or otherwise protected information from the UK

30. See paras 8-18, above. Whilst English criminal law does exercise jurisdiction extraterritorially it is relatively unusual and must be expressly stated in the relevant law. For the reasons I have described above, there is no 'universal' or extraterritorial jurisdiction to prosecute the offences I have identified which deal with the disclosure of classified UK information by foreign nationals abroad.

c. Is it a punishable crime under UK law if the witness within a hearing before the committee of inquiry is made to disclose information classified or otherwise protected by UK law? Could this be considered as an act of abetting or aiding? Could inquirers and witness fall under any 'conspiracy' legislation?

31. In my opinion it would not be an offence under any provision of English law for a German citizen, not subject to any contrary and express obligation under UK law, and who was acting as a witness or participant providing evidence to a German parliamentary inquiry on matters within his or her knowledge, to provide information including evidence that the British government treated as classified. I have set out the reasons for this above. In short, I have identified no offence which would criminalise this particular form of conduct committed by such an individual.

32. Encouraging, assisting / aiding, abetting, counselling and procuring an offence: The next issue I am asked to consider is whether those questioning the witnesses, or the witnesses themselves, could potentially be liable under English law for 'aiding and abetting' an offence by having facilitated or prompted disclosure of classified material. I envisage that this concern has arisen because, absent the parliamentary inquiry's work, there would be no prospect of disclosure of classified information at all, and consequently, the inquiry (and its participants) might be said to have brought about the offence. In my view the risk does not arise in this case.
33. In the first place, if disclosure by a non-UK citizen appearing as a witness before the inquiry in the circumstances envisaged would not constitute an offence by that person as a principal under English law, then no question of secondary liability arises. In my assessment of the present case the only slight prospect of a witness being liable as a principal arises in connection with the original witness and his or her particular circumstances.
34. In respect to the original witness, if s/he were a UK national or Crown servant s/he could potentially be liable for an offence under English law by disclosing 'official secrets' to a German inquiry. It would still be an open question whether, in the circumstances, such a disclosure was made for a purpose prejudicial to the interests of the State. In any event, it appears likely that if such evidence were to be provided by the original witness it would be done so under compulsion. In those circumstances it is difficult to see how it could be said the commission of a criminal offence by the original witness would have been procured by the inquiry or its participants in any meaningful sense. In such circumstances evidence would have been compelled legally so far as German law was concerned and given by the witness under an obligation to provide it. In my view such circumstances would fail to disclose the existence of the necessary mental element to constitute the commission of an offence as a secondary party.
35. In the event evidence given by the original witness was provided voluntarily rather than under compulsion, again I do not analyse this as a case of the inquiry aiding and abetting the commission of an offence by the original witness because the necessary intent would still simply not be present on the part of those acting for the inquiry. The sole intention would be the conduct and aims of the parliamentary investigation.

36. Ultimately, it should be recognised that as a matter of English criminal law any liability for assisting an offender requires proof that those said to be assisting as a secondary party must have intended that the principal would commit the offence in question, and that those assisting had the intention to assist, and the knowledge of the relevant circumstances rendering the principal's act criminal. It seems very unlikely (not least from a common sense perspective) that such a conclusion could be drawn about any actions of participants in the inquiry whose singular aim would be to establish matters of concern to the German parliament. There appears to me to be no intention whatsoever that offences contrary to English criminal law should be committed by a principal.

37. Conspiracy: The essence of a conspiracy in English law is an unlawful *agreement* between two or more parties to carry out a criminal plan². There is no sense in which the orchestration or operation of a parliamentary inquiry involving the questioning of witnesses (potentially under compulsion) in order to establish the truth on a matter of importance to the State's legislature would constitute the formation of a criminal agreement or conspiracy to disclose information considered classified in the UK.

d. Is it a punishable crime under UK law if the witness within a hearing before the committee of inquiry is made to once more provide classified information which has already has been made public previously? Could this be considered as an act of abetting or aiding?

38. I believe this is covered by my comments at (c), immediately above. I do not consider that this context founds criminal liability on the part of the witnesses or participants in the inquiry generally. To the extent (unknown to me) that disclosure of classified information may place the original witness in jeopardy, the repetition of such disclosure would potentially constitute the commission of a further offence, if indeed it constituted an offence at all, for all of the reasons discussed above.

e. In case questions (c) and (d) are answered positively: when would the criminal offence be committed – the moment the witness is summoned or the moment the hearing actually starts?

² The offence of conspiracy is defined by section 1 of the Criminal Law Act 1977, which provides: "...if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions either – (a) will necessarily amount to or involve the commission of an offence...he is guilty of conspiracy to commit the offence or offences in question."

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39. See (c) above. Theoretically however, in the event a disclosure offence did arise, liability would occur at the point of disclosure, not when any potential witness had been summoned nor when the hearing started. At those points no steps would have been taken to deal with classified information the subject of concern in a prohibited way.

f. Is it a punishable crime if the witness is questioned about new, so far not disclosed, information which the witness, however, does not answer?

40. If the witness refused to answer any question plainly that witness would not commit any disclosure related offence. For the reasons set out elsewhere in this opinion, I can see no general basis for criminal liability on the part of those asking questions of witnesses about information not previously disclosed.

g. Does it make a difference whether the witness discloses information during a public or a closed meeting of the committee of inquiry? If so: what are the requirements in terms of participants and procedures in order to qualify a meeting as "secret"?

41. Given the opinion I have expressed above, and throughout, it is entirely a matter for the inquiry what procedures it chooses to adopt.

42. On the theoretical basis an offence did arise under the Official Secrets Acts, however, liability would not be removed by disclosure to a closed and smaller audience. Such disclosure would still constitute an offence, but would only alter the seriousness of any perceived offence by limiting the unauthorised recipients.

h. In case question (g) is answered positively: does a German member of parliament make himself liable to prosecution under UK law if after a confidential meeting he discloses the meeting's content to the public ?

43. For the reasons set out immediately above, I do consider the question of open or closed meetings to be very relevant. It follows that reporting the content of a closed meeting would not, of itself, trigger particular liability under English criminal law. The critical point remains that addressed in the discussion of general considerations in relation to criminal liability: if there is no extraterritorial jurisdiction criminalizing actual

disclosure by a foreign national abroad, it cannot follow that disclosing the classified content obtained in closed German parliamentary meeting would then somehow create criminal liability in the UK.

Does UK law acknowledge that members of the committee of inquiry may enjoy a defence by the fact that parliament has set up the committee of inquiry and instructed its members to carry out the inquiry?

44. Any question of defences is relevant only if potential criminal liability exists. I have set out elsewhere, why, in my view such liability is unlikely to arise in this case. However, on the assumption potential liability were to be established there is no general doctrine of English criminal law to the effect that those acting in pursuance of or at the request of a foreign parliamentary inquiry benefit from any special defence. Similarly, the particular offences identified above do not create such an exemption. It would, however, in all circumstances be a defence to argue that the required intention constituting the offence could not be established.

Conclusion

45. I hope that the above discussion answers the questions raised. It is my view that criminal liability in English law would not arise on the part of general witnesses and participants in the inquiry. I am unable to advise in detail on the position of the original witness who obtained or possesses the classified material in issue. If he was or is a British subject or Crown servant, liability may well arise in the event of any impermissible disclosure. In order to advise further on this I would need to know more about the individual's circumstances and (in general terms) the proposed disclosure.

46. If I can be of any further assistance, or if any further information would be helpful please do not hesitate to contact me.

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