

# **The Decline of Universal Jurisdiction – Is it Reversible?**

**10<sup>th</sup> Annual Ruth Steinkraus-Cohen International Law lecture**

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I am honoured to be asked to give the 10<sup>th</sup> Annual Ruth Steinkraus-Cohen International Law Lecture. We know that in 1956, Ruth attended the World Federation of the United Nations Association (UNA) where she acted as secretary to Eleanor Roosevelt and developed a burning desire to serve as an advocate for the UN. After attending Vassar, Ruth became an outstanding Juilliard-trained pianist and teacher. She was also a singer, editor, radio host, bibliophile, activist and multi-award winning "Point of Light" in the quest for global peace. In short, she was a remarkable person.

## INTRODUCTION

In late December 2009, an obscure UK Magistrate Court issued an arrest warrant for the former Israeli Foreign Minister Tzipi Livni on charges of alleged war crimes committed in Gaza.

The Judge who issued the warrant had not been identified, nor was it entirely clear who had requested the warrant since in the identity of the person or group had not been made public.

It is believed that the warrant was issued at the request of lawyers acting for pro-Palestinian activist groups.

However, what was apparent is the fact that the British government seemed oblivious to the court's actions.

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When asked, a Government spokesperson stated that there had been no application for an arrest warrant and “no record of any such hearing.” Ms. Livni cancelled her trip to London.

Around the same time, another magistrate issued an arrest warrant for a former Israeli army general who had reportedly landed in London and refused to leave the plane having been given information that he would be arrested.

The reason for these James Bond type exploits was the UK’s proclivity in using “private prosecutions” under which a *warrant of arrest* can be issued *without* prior consent of the Attorney General, (even though the ultimate *prosecution requires* consent of the Attorney General.) Whereas *public* investigations and prosecution involve the U.K. government at the very early stages of investigations, *private* prosecution does not.

For human rights advocates, the UK’s approach to this more aggressive form on Universal Jurisdiction could not have been more powerful or more welcome. In many ways, it represented a pinnacle moment in the drive for accountability, certainly for alleged violations of the most heinous crimes in international human rights and humanitarian law.

For the UK Government the approach was seen as direct assault on state sovereignty. You can just imagine the Government’s indignation over the prospects of foreign dignitaries refusing to disembark a plane sitting on the tarmac of Heathrow, or deciding not to travel to the UK, for fear of being arrested!

The UK Government’s response was swift and uncompromising. Former UK Foreign Secretary Jack Straw stated:

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.

Straw's strong condemnation of private prosecutions was matched with the immediate introduction and passage last year of the Police Reform and Social Responsibility Bill.

The key provision of the Bill provides that *the consent* of the Director of Public Prosecutions (DPP) is required before a magistrate can issue an arrest warrant based on a private prosecution in respect of certain offences alleged to have been committed outside the United Kingdom.

The relevant provision of the Bill is as direct as it is unambiguous in its meaning:

(4A) Where a person who is not a public prosecutor lays an information before a justice of the peace in respect of an offence to which this subsection applies, no warrant shall be issued under this section without the consent of the Director of Public Prosecutions [DPP]...

We need to pause. The consequences of this new Bill are breath-taking. The previous legal basis (1980 Magistrates' Courts Act) which, along with the 1957 UK Geneva Conventions Act, gave Magistrates courts the power to issue a warrant for the arrest of a person suspected of war crimes to be brought before a UK court has been shattered.

In my opinion, the concept of *absolute Universal jurisdiction* in the UK has ceased.

## ABSOLUTE UNIVERSIAL JURISDICTION

What is it? In its most literal interpretation, *absolute universal jurisdiction* promotes jurisdiction by the forum state over offenses committed abroad by the accused—the exercise of which is not dependent on the accused being on the territory of the forum state. It is based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the accused, or any other connection to the forum state.

Most importantly, the principle does not require an assessment of relevant “personal jurisdiction.” Thus, any state has the authority unilaterally to pursue an action against an individual, regardless of the individual’s nationality.

From the Government’s perspective, this more aggressive form of judicial activism is unacceptable. When talking to Government officials, they say the new Law is intended to ensure that cases proceed only where there is solid evidence likely to lead to a successful prosecution.

But that is a bit disingenuous, suggesting that judges are somehow not capable of making the same assessment.

The real issue is the desire of the UK Government to pursue a coherent foreign policy. The UK Foreign Office stated: “It was an appalling situation when political abuse of our legal procedures prevented people like Ms. Livni from travelling legitimately to the UK.”

The consequences of the policy shift with the enactment of the new law were immediate. Within days of the Bill coming into law, Ms. Livni arrived in the UK without hindrance of a potential arrest warrant.

For human rights advocates, the new Bill ends an important accountability judicial process. The same country that had so dramatically upheld the principle of accountability in the Pinochet case was seen as abandoning this same principle in order to protect state political alliances.

### INTERNATIONAL SHIFT

But the actions in the UK also marked the continuing and dramatic shift in states moving away from actively embracing the most robust elements of universal jurisdiction.

As much of the international community promotes universal jurisdiction, state practice is limiting the scope and use of it. AND this is being done without much notice.

The primary method for the limitation is through broad prosecutorial discretion. Similar to the UK practice, states are stressing the importance of broad discretion by prosecutors in deciding whether or not to exercise universal jurisdiction and how it can be utilized. This discretion is being applied to ensure a more curtailed exercise of universal jurisdiction.

## SPAIN

Spain is perhaps the best example of a country that had adopted an aggressive form of absolute universal jurisdiction. Spain established itself as one of the world's most hospitable forums for cases based on universal jurisdiction over certain international crimes.

For the offenses of genocide, terrorism, and torture, Spain's criminal procedure code allowed for suspects to be charged regardless of their nationality or that of the victims. In addition, Spanish courts had found that no nexus or tie to Spain was necessary in order to initiate a complaint based on universal jurisdiction.

A defendant was not even required to be present in Spain in order for a court to open a case against him; the defendant only needed to be present for the actual trial. Spanish courts clearly viewed universal jurisdiction as eliminating national boundaries. The court's focus had been on victims, not the idiosyncrasies of geographical boundaries.

Similar to the UK, any Spanish citizen or NGO could seek a prosecution even though they were not victims. They could act as "public prosecutors" (in *UK Private*). Furthermore, non-Spanish individuals and NGOs could also initiate proceedings if they were victims of the crime.

An investigative judge could also launch an investigation on his or her own initiative. This is important because it relates to a relevant case at hand- Judge Baltasar Garzón .

In addition to these cases, Spanish prosecutions (through people's prosecution) were directed at six former U.S. government officials for their involvement in alleged

torture at Guantanamo Bay. Similarly, another Spanish judge ordered investigations to continue into alleged crimes against humanity committed in the 2002 Israeli attack in Gaza.

Then in 2009 a Spanish Prosecutor sought arrest warrants for three Nazi prison guards charged as accomplices to genocide during World War II. The suspects are currently living in the United States.

### LEGISLATIVE CHANGES

However, as was the case in the UK, there has been a major backlash against the aggressive form of universal jurisdiction.

A new law recently came into force. The new law limits the jurisdiction of Spanish courts to cases in which the alleged perpetrators are present in Spain, the victims are of Spanish nationality, or where there is a relevant and binding link to Spain.

The law also limits Spanish courts from utilizing universal jurisdiction if the case is being investigated or prosecuted by a country with jurisdiction or by an international tribunal.

The results have been as dramatic as they were in the UK. In 2009, a panel for Spain's National Court ordered an end to that investigation of alleged crimes against humanity committed by Israel in the Gaza Strip attack. The courts further ended the two year court proceedings against the "Bush Six".

### CONDITIONAL UNIVERSAL JURISDICTION

There is no doubt that the propensity of judicial actors to aggressively reach out beyond their national borders to prosecute those who committed crimes in other countries is having an adverse effect on government support.

Governments tend to take a more cautious view of absolute universal jurisdiction. No doubt sensitive to the political implications of proffering a judicial action against another sovereign state, governments see themselves as a natural counterbalance to more activist investigative judges and prosecutors, and private parties.

It is clear that in place of *absolute universal jurisdiction*, states are embracing the principle of *conditional universal jurisdiction*, which requires a stronger link between the criminal act and the forum State.

There needs to be some degree of nexus between the crime and the forum state ( e.g., the victim or the accused is a citizen or resident of the forum country).

Conditional universal jurisdiction also tends to denote procedural limitations established by the state (e.g., requiring the Federal Prosecutor to approve any prosecutions).

## UK

Again, looking here at the UK, the Law now [ICC Act] provides that British authorities have jurisdiction to prosecute those crimes committed outside the United Kingdom ONLY in circumstances where the accused is a UK national, resident in the United Kingdom, or a British soldier.

This jurisdictional limit excludes visitors to the UK who do not have resident status. Thus, the Act would not permit prosecutions where a suspect is merely “passing through” or “present” in the UK.<sup>1</sup>

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<sup>1</sup> Consistent with customary international law, the only exception to this jurisdictional limit is when the suspect is accused of grave breaches of the Geneva Conventions and its Additional Protocol and crimes of Torture. In



Furthermore, the Law does NOT permit prosecution of visitors for serious violations of international crimes.<sup>2</sup>

The United Kingdom's approach to adopting territorial restrictions for purposes of jurisdiction is again consistent with the trend towards adopting and utilizing the conditional form of universal jurisdiction.

The move to alter both the *substantive definition of universal jurisdiction* and the *procedural limitations* to its use is expanding rapidly among countries.

### FRANCE

In France, the sole presence of the victim in the territory of France is no longer a permissible legal basis for French courts to launch a prosecution and embrace universal jurisdiction where the alleged perpetrator is not shown to be on French soil.

This trend continued in 2010. In a further remarkable repudiation of absolute universal jurisdiction, a new amendment to the Code, which seeks to formally incorporate provisions of the Rome Statute into French law, applies severe restrictions to France's reach over international crimes.

The Code of Criminal Procedure requires that the suspect must become a resident of France after the allegation of the crime, that the double-criminality requirement must be applicable, and that French jurisdiction holds *only* when no other

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this case, U.K. law provides for universal jurisdiction over these extraterritorial crimes regardless of the residency status of the suspect. Yet, there are still restrictions on this illustration. Because the ICC Act does not repeal the U.K. 1957 Geneva Conventions Act, which only applies to international armed conflicts, the current ICC Act does not provide an expansive jurisdiction over internal armed conflicts.

<sup>2</sup> although The term "resident" has now been expanded to include any person who has leave to enter or remain in the territory for the purposes of work or study, any person who has made an asylum claim, or any person who has had an asylum claim rejected but cannot be removed.

international or national court requests extradition for the purpose of trying the suspect for the crimes.

From a procedural perspective, France also took an even more dramatic step, mirroring the changes here in the UK. Currently only the prosecutor can pursue cases. Victims and NGOs can no longer act in this jurisdiction capacity.

## BELGIUM

For years in the mid-1990s Belgium was one of the most progressive countries in the world in adopting universal jurisdiction legislation. It allowed for prosecution by Belgian courts for war crimes, torture, crimes against humanity, and genocide regardless of where the violations had taken place or the nationality of the accused. There was no requirement that the suspect be present on Belgian territory in order to initiate an investigation.

Furthermore, as in France, victims could trigger an investigation by simply filing a complaint directly before an investigating judge as a Civil Party. Belgium had ostensibly adopted the principle of *absolute universal jurisdiction* and subsequently pursued an aggressive series of investigations and arrest warrants directed *inter alia* at the former Democratic Republic of Congo's former Foreign Minister, Abdoulaye Yerodia Ndombasi Yerodia; the former Prime Minister of Israel, Ariel Sharon; the former President of Chad, Hissène Habre; and the former President of the United States, George W. Bush, and other U.S. government officials involved with the invasion of Iraq.

However, the ICJ in the *Yerodia* case<sup>3</sup> provided the justification for the Belgian Parliament to significantly weaken the country's universal jurisdiction statute.

This new Act severely limits the ability of victims to pursue cases. Only the Federal Prosecutor can pursue these new cases. The new Act also makes it impossible for Belgium to prosecute individuals for genocide, war crimes and crimes against humanity without there being a nexus to the country.

As in France, Belgium's new law requires that the accused become a Belgian citizen or have his/her primary residence in Belgium after the offense could be prosecuted.

Although a bit softer than the new legislation in France, if not a Belgian citizen, the accused must be from a country where the crimes are not prosecuted or in which fair judicial proceedings are not possible. But at least one of the VICTIMS must also be a Belgian national or must have lived in Belgium for a minimum of three years.

## GERMANY

German law – both its Criminal Code and its Code of Criminal Procedure provided *absolute universal jurisdiction* over a wide series of international crimes. The law provided to all criminal offences against international law and required no nexus between the offence and Germany.

It was an intentional and far-reaching decision by Germany to uphold absolute universal jurisdiction.

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<sup>3</sup> The ICJ ruled in *Yerodia* arrest warrant case that the former DRC foreign minister had immunity from arrest by foreign jurisdictions. The ICJ did not directly rule on the question whether the Belgian court could exercise universal jurisdiction by issuing an arrest warrant for a foreign suspect when the suspect was not present in the country. The case focused on the issue of immunity for government officials.

However, Germany has dramatically weakened its universal jurisdiction leadership by amending its procedural code. So even though Germany's substantive *Code of Crimes Against International Law* is rather expansive, its new procedural code radically alters the landscape of universal jurisdiction within Germany.

The new Procedural Code gives the Federal Prosecutor (who serves under the Minister of Justice) extensive discretion on deciding *not* to open an investigation or to dismiss the case after proceedings have begun. The Prosecutor can refuse to pursue a case, or decide to dismiss a case, if the crime was committed outside of Germany, or if the suspect is not in nor likely to be present in Germany, or the crime is being prosecuted by the jurisdictional state or an international court.

The provisions clearly move Germany away from *absolute universal jurisdiction* and towards embracing *conditional universal jurisdiction*, requiring some nexus between Germany and either the perpetrator or the victim of the crime. It represents a significant shift in public policy by providing this discretionary power to the Federal Prosecutor.

Even more dramatic is the fact that it is nearly impossible for a judge to reverse the Prosecutor's refusal to investigate if the decision was based on the lack of a sufficient nexus. The Prosecutor's refusal to investigate does *not* depend on judicial consent.

The role of the Federal Prosecutor is proving to be powerful indeed. The Prosecutor has declined to initiate nearly all potential investigations under the broader universal principle. For instance, complaints filed relating to the war in Iraq, the Middle

East conflict, persecution of Falun Gong practitioners in China and other violations of human rights have all been rejected by the Prosecutor.

There are some absurd consequences of this new approach. As mentioned, the Federal Prosecutor can deny jurisdiction if he/she thinks the jurisdictional country will undertake an investigation.

For instance, the Federal Prosecutor dismissed a complaint against Donald Rumsfeld. In this case, the Prosecutor ruled that there was no indication that the United States had refused to take action on the *circumstances* described in the complaint.

I would argue the Prosecutor's decision was an abuse of discretion, since the Prosecutor considered it sufficient that the United States investigated the circumstances rather than the individual offenses, his decision will stand.

#### THE NETHERLANDS

The Netherlands is yet another country which has announced to the world that it too is retreating from its blanket use of *absolute universal jurisdiction* and embracing *conditional universal jurisdiction*.

Investigations will ONLY be opened in cases where the suspect is present in the Netherlands. For this purpose, and unlike the UK, it is sufficient that the suspect is simply present in the territory of the Netherlands, which means no formal residency is required. However, "being present" must be voluntary, and Dutch courts will not issue an extradition request.

However, once again, it is now the Public Prosecutor who has the exclusive rights to prosecute and is empowered with significant discretion to decide whether or not to

bring a prosecution based on public interest. However, a decision not to prosecute can still be challenged by an interested party in the Court of Appeals (Article 12-13 (a) of the Code of Criminal Procedure).

## DENMARK

Denmark has similarly been unwilling to embrace the principle of *absolute universal jurisdiction*. In the case of *Lee Urzua v. Pinochet*, the Director of Public Prosecution declined to prosecute for lack of jurisdiction. Despite the fact that the victims had obtained Danish citizenship, the Prosecutor has ruled that the accused *must* be either a Danish citizen or be present in Denmark.

The Courts have ruled that the country's Genocide Convention Implementation Act, in conjunction with the Dutch Criminal Code, prevents national prosecutions of the crime of genocide committed in another country where the victims lack Dutch nationality.

## SWEDEN/NORWAY

There are some European countries that have maintained a stronger commitment to absolute universal jurisdiction. Sweden<sup>4</sup> and Norway<sup>5</sup> are two. However, even here you are beginning to see cracks.

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<sup>4</sup> Sweden would not normally launch a full investigation into a suspected war criminal unless it believed the offender to be in Sweden and capable of being prosecuted in a Swedish Court—although Sweden might launch an investigation should authorities be alerted to an impending visit by a suspected war criminal. The jurisdiction of the Commission over this type of investigation has not yet been codified. However, this practice of self-restraint does suggest that Sweden acts prudently when applying universal jurisdiction.

<sup>5</sup> Norway has adopted procedural limitations so that any decision to open an investigation on serious international (crimes) lies with the Director General of the Public Prosecutions. An appeal against his/her decision is not possible.

## ASSESSMENT

The propensity of states retaining a more expansive view of jurisdictional reach is ending. The discernible trend is moving towards a more restrictive interpretation and application of universal jurisdiction.

The question is whether overall, the corrective shift now occurring in the international community over universal jurisdiction is a practical and needed counterbalance to a perceived uncontrolled exercise of universal jurisdiction by some states actors. Or is this an unwelcomed paradigm shift in international law?

Perhaps given the hard political realities of external reach this adjustment is not surprising. In the long run the change may be salutary. If every state fully pursued absolute universal jurisdiction, then the result would very likely be chaotic and carry with it unintended consequences, such as weakening the role of the ICC.

There is also a legitimate fear *that absolute universal jurisdiction* could easily be used to initiate political or malicious prosecutions against a state's interests.

Of course, this evolutionary trend doesn't eliminate the concept of universal jurisdiction but as I have shown states have adopted some form of universal jurisdiction. However, there is no doubt that the concept is evolving with more restrictive provisions.

A clear trend is where the law requires the Public or Federal Prosecutor to approve the pursuance of a case under universal jurisdiction. The argument in support of this approach is that it prevents the use of politically motivated arrest warrants

against foreign officials. But of course this approach could lead to politically motivated decisions not to prosecute because of diplomatic sensitivities.

However, for the human rights advocate we are witnessing a dramatic decline in the use of *universal jurisdiction* as at least a deterrent to travel.

For me, there is something pleasing about the fact that Robert Mugabe will not travel to any country where a private prosecution could be initiated against him for crimes against humanity. But would he be arrested today?

A possible compromise could be the creation of a special war crimes commission or court that specializes in the prosecution of international crimes.

Another approach could be for states to use universal jurisdiction to mirror the ICC's principle of complementarity. Complementarity aims to regulate, organize and leverage the existing body of international criminal law.

In deciding whether to pursue criminal proceedings against an accused, the forum state should also determine whether the territorial state is *willing* and *able* to undertake *good faith* prosecutions. If it is evident that the territorial state responsible to prosecute is unable or unwilling to do so, then the principle of universal jurisdiction should be activated. In this way, the forum state is incorporating the complementarity principle within the principle of universal jurisdiction.

Moreover, the suggested requirement that there be a nexus between the forum state and the accused or the victims when activating universal jurisdiction should not be upheld if the accused is on the territory of the forum state and there is a *prima facie* case that he committed the crimes. Rather, he should be apprehended and tried under the principle of universal jurisdiction so long as the jurisdictional state is unable or



unwilling to prosecute him. Under this scenario, if Robert Mugabe, President of Zimbabwe, were to travel outside of Zimbabwe, then he should be apprehended on charges of war crimes and crimes against humanity.

Finally, even with the more aggressive use of universal jurisdiction diminishing, it is still possible to create a dynamic legal structure that incorporates both universal jurisdiction and the ICC's principle of complementarity in support of domestic prosecution of international crimes.

Restricting the use of absolute universal jurisdiction does not prevent a state from actively cooperating with the ICC through domestic courts. For State Parties to the Rome Statute, there is still an obligation to arrest and transfer suspects to the ICC. Article 89(1) reads, in part: "State Parties shall ... comply with requests for arrests and surrender."

Article 89 of the ICC Rome Statute distinguishes the extradition procedures used in mutual legal assistance agreements between states from the compulsory "surrender" requirement to the ICC. This distinction acknowledges that an accused may be transferred to the ICC even when a state is unable to extradite an accused to another state or lacks jurisdiction to hear the case itself. Thus, an accused who is a non-resident and is present in the territory of a State Party to the Rome Statute can be arrested and transferred to the ICC, assuming the Court has jurisdiction. Similarly, a state, through bi-lateral extradition laws, can extradite a suspect to another state to face prosecution. Thus, even without adopting a principle of absolute universal jurisdiction, states can still ensure that suspects are brought to justice.

In the end, it is actually states' support of the ICC that could salvage the remnants of the more aggressive form of universal jurisdiction.

Thank you this honor to be with you tonight. I would be happy to take any questions.