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## RECENT LEGISLATION

INTERNATIONAL LAW — UNIVERSAL JURISDICTION — UNITED KINGDOM ADDS BARRIER TO PRIVATE PROSECUTION OF UNIVERSAL JURISDICTION CRIMES. — Police Reform and Social Responsibility Act, 2011, c. 13 (U.K.).

Universal jurisdiction permits national courts to prosecute alleged culprits of international crimes considered to be “of such exceptional gravity that they affect the fundamental interests of the international community as a whole.”<sup>1</sup> The principle does not require that a prosecuting state have a “territorial, personal, or national-interest link to the crime in question when it was committed.”<sup>2</sup> Several states have implemented universal jurisdiction by enacting legislation authorizing the prosecution of such crimes,<sup>3</sup> and countries exercise different degrees of procedural and substantive control over who may institute and who may be the subject of these claims.<sup>4</sup> On September 15, 2011, Royal Assent was granted to the United Kingdom’s Police Reform and Social Responsibility Act,<sup>5</sup> which — among other provisions — requires the consent of the U.K. Director of Public Prosecutions<sup>6</sup> before a U.K. court can issue a privately sought arrest warrant for universal jurisdiction offenses.<sup>7</sup> The requirement separates universal jurisdiction crimes from the arrest warrant procedures for domestic crimes in the United Kingdom.<sup>8</sup> This change is the latest in a trend of states’ departing from the far-reaching enforcement that the values underlying universality favor and tightening universal jurisdiction legislation to respond

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<sup>1</sup> PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON UNIV., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (2001) [hereinafter PRINCETON PRINCIPLES]. Universal jurisdiction generally covers “crimes against humanity, genocide, torture, and war crimes.” Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 1 (2011).

<sup>2</sup> Langer, *supra* note 1, at 1.

<sup>3</sup> See HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE 2 (2006).

<sup>4</sup> See, e.g., Langer, *supra* note 1, at 10–41 (describing five universal jurisdiction regimes).

<sup>5</sup> Police Reform and Social Responsibility Act, 2011, c. 13 (U.K.).

<sup>6</sup> The Director of Public Prosecutions is the head of the United Kingdom’s Crown Prosecution Service, see Prosecution of Offences Act, 1985, c. 23, § 1 (U.K.), a group of prosecutors analogous to U.S. Attorneys. Compare *Introduction*, CROWN PROSECUTION SERV., <http://www.cps.gov.uk/about/> (last visited Feb. 25, 2012), with *United States Attorneys’ Mission Statement*, U.S. DEP’T OF JUST., <http://www.justice.gov/usao/about/mission.html> (last visited Feb. 25, 2012).

<sup>7</sup> Police Reform and Social Responsibility Act § 153(1) (“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.”).

<sup>8</sup> See *id.*

to the unique challenges and international relations implications these prosecutions present.

The U.K. criminal system normally allows any person to initiate a criminal proceeding without any express requirement that he or she possess any connection to the alleged offense.<sup>9</sup> When the requesting person is not acting on behalf of a government authority or the police, the United Kingdom classifies him or her as a private prosecutor.<sup>10</sup> To commence a private prosecution, the individual must present information asserting the violation of a criminal offense to a magistrate, who may then issue a summons or an arrest warrant.<sup>11</sup> The evidentiary burden at this stage is low, in effect requiring only a bare allegation of the wrongdoing.<sup>12</sup> Under the law existing before enactment of the Police Reform and Social Responsibility Act, privately brought universal jurisdiction claims followed the same path so long as the defendant currently was or would be on U.K. soil.<sup>13</sup>

The United Kingdom's arrest warrant process for universal jurisdiction crimes received critical examination<sup>14</sup> after British courts, in what became high-profile cases, granted warrants against two Israeli officials: Major General Doron Almog in 2005 and, more recently, former Foreign Affairs Minister Tzipi Livni in 2009.<sup>15</sup> Though neither warrant resulted in arrest,<sup>16</sup> U.K. officials noted that exploitation of the procedure could "bring [the U.K.] legal system into disrepute,"<sup>17</sup> and almost immediately after former Minister Livni's near-arrest, rela-

<sup>9</sup> See Prosecution of Offences Act § 6(1).

<sup>10</sup> *Private Prosecutions*, CROWN PROSECUTION SERV., [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/index.html](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/index.html) (last visited Feb. 25, 2012). This right is subject to a few restrictions: offenses that arise under certain acts sometimes require that specific bodies institute proceedings, and the Director of Public Prosecutions may have a statutory duty to conduct the criminal proceedings of certain cases. See SALLY ALMANDRAS, HOUSE OF COMMONS LIBRARY, SN/HA/5281, PRIVATE PROSECUTIONS § 1 (2010).

<sup>11</sup> See Magistrates' Courts Act, 1980, c. 43, § 1(1) (U.K.); ALMANDRAS, *supra* note 10, § 2.1.

<sup>12</sup> See 20 Jan. 2011, PARL. DEB., H.C. (2011) 126 (U.K.) [hereinafter House of Commons Fourth Sitting].

<sup>13</sup> See ARABELLA THORP, HOUSE OF COMMONS LIBRARY, SN/IA/5422, UNIVERSAL JURISDICTION § 3.3 (2010). For universal jurisdiction allegations to proceed past this stage, however, the private prosecutor needed consent from the Attorney General. See ALMANDRAS, *supra* note 10, § 2.2.

<sup>14</sup> See *Written Ministerial Statement on Arrest Warrants*, BRITISH EMBASSY ISR., <http://ukinisrael.fco.gov.uk/en/news/?view=News&id=22581302> (last updated July 22, 2010).

<sup>15</sup> See Langer, *supra* note 1, at 17. In September 2005, a senior district judge issued an arrest warrant against Major General Almog upon the request of British lawyers acting on behalf of Palestinian victims. *Id.* In December 2009, a British court issued a warrant for former Israeli Foreign Affairs Minister Tzipi Livni upon allegations that she commissioned war crimes in Gaza. *Id.*

<sup>16</sup> Major General Almog escaped arrest when British police did not board his plane. *Id.* The British court withdrew the warrant against former Foreign Affairs Minister Livni when it discovered that she was not on U.K. soil. *Id.*

<sup>17</sup> See House of Commons Fourth Sitting, *supra* note 12, at 120.

tions between the United Kingdom and Israel unraveled, as symbolized by Israel's halting its routine strategic talks with Britain.<sup>18</sup> The summer after the incident, the U.K. government officially announced that it would introduce a legislative amendment requiring consent from the Director of Public Prosecutions before a court could issue an arrest warrant to a private prosecutor for universal jurisdiction offenses.<sup>19</sup> The government formally presented the amendment to Parliament through the House of Commons's First Reading on November 30, 2010, as a clause of the Police Reform and Social Responsibility Bill.<sup>20</sup>

Public Bill Committee debates in both Houses evaluated the amendment against the backdrop of the United Kingdom's international duties and status. Opponents of the new requirement worried that the change, when packaged with a domestically focused criminal system, would create time inefficiencies and barriers that would dilute private individuals' abilities to seek prompt recourse for alleged crimes.<sup>21</sup> Proponents of the clause highlighted the diplomatic protections that the new safeguard would offer, noting that the fear of being subject to privately initiated arrests tainted outsiders' perceptions of the state.<sup>22</sup> Specifically, some thought this fear affected foreign officials who hold "leading positions in their countries, with whom the Government would wish to engage in discussions."<sup>23</sup> In the government's view, an arrest procedure that caused such hesitation was "unsatisfactory and risk[ed] damaging [its] ability to help in conflict resolution and to pursue a coherent foreign policy."<sup>24</sup>

During debate in Parliament, Director of Public Prosecutions Keir Starmer detailed the procedure he intended to follow in his consent

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<sup>18</sup> See Adrian Croft, *U.K. Law on Rights Arrests Ends Row with Israel*, REUTERS (Sept. 15, 2011), <http://uk.reuters.com/article/2011/09/15/uk-britain-israel-idUKTRE78E4PS20110915>.

<sup>19</sup> *Written Ministerial Statement on Arrest Warrants*, *supra* note 14. The offenses enumerated in the Act are: (1) piracy or "piracy where murder is attempted"; (2) "grave breaches of Geneva conventions"; (3) "attacks and threats of attacks on protected persons" under the 1978 Internationally Protected Persons Act; (4) "hostage-taking" under the 1982 Taking of Hostages Act; (5) offenses such as hijacking under sections 1, 2, or 6 of the 1982 Aviation Security Act; (6) "offences relating to nuclear material"; (7) torture under the 1988 Criminal Justice Act; (8) offenses such as "endangering safety at aerodromes" or "hijacking ships" under the 1990 Aviation and Maritime Security Act; and (9) "attacks on UN workers" under the 1997 United Nations Personnel Act. Police Reform and Social Responsibility Act § 153(1).

<sup>20</sup> *Bill Stages — Police Reform and Social Responsibility Bill 2010–11*, PARLIAMENT, <http://services.parliament.uk/bills/2010-11/policereformandsocialresponsibility/stages.html> (last visited Feb. 25, 2012).

<sup>21</sup> See House of Commons Fourth Sitting, *supra* note 12, at 119–20.

<sup>22</sup> See 17 Feb. 2011, PARL. DEB., H.C. (2011) 682 (U.K.) ("There are indications that some people may not be prepared to visit the UK for fear of a private arrest warrant being sought.")

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

decisionmaking.<sup>25</sup> Director Starmer noted that he would apply the Full Code Test of the Code for Crown Prosecutors — which prosecutors already must employ when deciding whether to proceed with public prosecutions — to determine: (1) if there is “sufficient evidence to provide a realistic prospect of conviction,” and (2) if it would be in the public’s interest.<sup>26</sup> In evaluating evidence, Director Starmer would depart from the previously sufficient *prima facie* standard and instead look at the private prosecutor’s statements and discuss with him or her “how that would go in court, about other available evidence, and about whether there were any medical injuries” before making a judgment about “whether there was a realistic prospect that the case would succeed at court.”<sup>27</sup> The second prong of the Full Code Test, the public interest evaluation, would consist of a discretionary balancing of public interest factors based on the merits of the case.<sup>28</sup> Director Starmer noted that his public interest evaluation would “inevitabl[y]” involve consultation with the Attorney General,<sup>29</sup> the chief legal adviser to the Crown; the Attorney General would then typically seek the opinions of Cabinet Ministers to gauge how they “viewed such an arrest and the impact that that might have on [the United Kingdom’s] national interest.”<sup>30</sup>

The Police Reform and Social Responsibility Act’s introduction of state-centric, politically guided assessments to the early arrest warrant stage adds the United Kingdom to a roster of states — including, most recently, Belgium<sup>31</sup> and Spain<sup>32</sup> — that have limited their universal jurisdiction statutes. Such domestically centered valuation of international claims and cabining of the law’s scope may be at odds with the vigorous prosecutorial spirit and global victimhood principles that underlie universal jurisdiction’s aim of upholding not just the prosecuting state’s “own interests and values but the basic interests and values common to the international community.”<sup>33</sup> Yet these reforms reflect states’ attempts to address the practical foreign relations problems that unchecked prosecutorial discretion under a broad universal jurisdiction statute creates. These adjustments suggest a shift in universal jurisdiction’s goals within the domestic enforcement context as states respond to the international relations consequences of such jurisdiction.

<sup>25</sup> See House of Commons Fourth Sitting, *supra* note 12, at 122–34.

<sup>26</sup> *Id.* at 123; see also THE CODE FOR CROWN PROSECUTORS §§ 4.5–7, .12 (2010).

<sup>27</sup> House of Commons Fourth Sitting, *supra* note 12, at 126.

<sup>28</sup> See THE CODE FOR CROWN PROSECUTORS, *supra* note 26, §§ 4.13–17.

<sup>29</sup> House of Commons Fourth Sitting, *supra* note 12, at 129.

<sup>30</sup> *Id.* at 132.

<sup>31</sup> See Langer, *supra* note 1, at 30–32.

<sup>32</sup> See *id.* at 40.

<sup>33</sup> PRINCETON PRINCIPLES, *supra* note 1, at 24.

The current scope of universal jurisdiction arguably found its chief grounding in the legal aftermath of World War II.<sup>34</sup> The decision of the District Court of Jerusalem in the trial of Nazi organizer Adolf Eichmann, for example, expressed the principle's core sentiment when it noted that such crimes "struck at the whole of mankind and shocked the conscience of nations[ as] grave offences against the law of nations itself."<sup>35</sup> The court further stated that instead of "negating or limiting the jurisdiction of countries with respect to such crimes, international law is . . . in need of the judicial and legislative organs of every country."<sup>36</sup> It considered the power and ability "to try [such] crimes under international law [to be] *universal*."<sup>37</sup> While the court did not delve into how each state should effectuate such a global admonishment, the decision's rhetoric reflects the foundational notion of global injury — for which perpetrators consequently will be held globally accountable — upon which universal jurisdiction is based.<sup>38</sup> In their prosecutorial roles, states in turn become "agents of this global interest,"<sup>39</sup> a duty that inspires far-reaching enforcement of these crimes in order to punish grave offenses considered to be committed not simply against the state's own populace, but also against "the *international* legal order."<sup>40</sup>

Yet the universal norm-setting and accountability that such a broad framework attempts to establish do not entirely address the complex international relationships that are active behind the scenes.<sup>41</sup> Univer-

<sup>34</sup> See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 800 (1988) (discussing the introduction of war crimes and crimes against humanity into the universal jurisdiction framework).

<sup>35</sup> Attorney-General v. Eichmann, 36 I.L.R. 18, 26 (Dist. Jerusalem 1961) (Isr.), *aff'd*, 36 I.L.R. 277 (S. Ct. 1962).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* As enumerated by Professor M. Cherif Bassiouni, the theories underlying universal jurisdiction are: (1) the international community's shared values and interests; (2) the need for broadened enforcement tools to counter the more serious breaches of such values and interests; and (3) the presumption that such enforcement will have deterrent, preventative, and retributive effects that strengthen global justice. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 97 (2001).

<sup>38</sup> See Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 404–05.

<sup>39</sup> *Id.* at 405.

<sup>40</sup> *Id.* at 404. In 1957, the United Kingdom rhetorically adopted this approach in its Geneva Conventions Act. Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52, § 1(2) (U.K.). The Act states that "a person may be proceeded against, indicted, tried and punished [for grave breaches of the Geneva Conventions] in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall . . . be deemed to have been committed in that place." *Id.*

<sup>41</sup> See Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SECURITY, Winter 2004, at 5, 5 (noting that enforcing uni-

sal jurisdiction crimes involve a unique cast of players that precludes states from engaging in enforcement in a way that fully mirrors the robust enforcement of domestic crimes.<sup>42</sup> First, state officials, rather than common citizens, often commit the crimes covered under universal jurisdiction statutes.<sup>43</sup> The actors' status increases the likelihood that their home states will respond to invocations of universal jurisdiction with threats, or that there will be significant costs to international or diplomatic relations.<sup>44</sup> Second, prosecuting atrocities of such scale consolidates and empowers not only direct victims of the alleged crimes, but also "coalitions of activists, parliamentarians, scholars, journalists and legal specialists" on a global stage.<sup>45</sup> Tellingly, a similar coalition — lawyers acting on behalf of alleged victims against Israeli leaders — paved the way for the change implemented in the Police Reform and Social Responsibility Act.<sup>46</sup> Unsurprisingly, a tangible deterioration in British-Israeli diplomatic efforts resulted<sup>47</sup> — precisely the type of consequence to which many universal jurisdiction prosecutions are vulnerable.

In reforming the Act, the United Kingdom joins its peers that have limited the reach of their universal jurisdiction statutes in acknowledgement of these issues — most recently Belgium and Spain.<sup>48</sup> In 1993, Belgium passed a sweeping universal jurisdiction statute that allowed victim-initiated criminal investigations; the 1999 abolition of sovereign immunity as a defense expanded its reach even further.<sup>49</sup> In 2003, several Iraqi citizens and a nongovernmental organization brought a civil complaint against former U.S. President George H.W. Bush in Belgian court,<sup>50</sup> after which the United States warned Belgium that "it was risking its status as a diplomatic capital and host of

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versal standards of prosecution "risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities").

<sup>42</sup> See Laurie King-Irani, *Does International Justice Have a Local Address? Lessons from the Belgian Experiment*, MIDDLE E. REP., Winter 2003, at 20, 21 ("[U]niversal jurisdiction [prosecution] is first and foremost a judicial endeavor. But it is often a profoundly political undertaking as well.").

<sup>43</sup> Langer, *supra* note 1, at 5.

<sup>44</sup> See King-Irani, *supra* note 42, at 21; Langer, *supra* note 1, at 2, 5.

<sup>45</sup> King-Irani, *supra* note 42, at 21. Action by these and other nongovernmental and nonvictim parties can play an integral role in states' maintenance of an active universal jurisdiction agenda. *See id.* ("Bottom-up processes are crucial for successful prosecutions of international crimes in national courts, given the considerable pressures exerted by political and economic elites who are indifferent to popular opinion and dismissive of international law.").

<sup>46</sup> See *supra* note 15.

<sup>47</sup> See Croft, *supra* note 18.

<sup>48</sup> See generally Langer, *supra* note 1 (discussing five states' contemporary treatment of universal jurisdiction).

<sup>49</sup> See *id.* at 26–27.

<sup>50</sup> See *id.* at 29.

the NATO headquarters.”<sup>51</sup> Though plaintiffs had previously used Belgium’s universal jurisdiction recourse to file complaints, the Belgian government determined that “[President Bush’s] case pointed to a serious problem with the universal jurisdiction statute.”<sup>52</sup> Belgium responded that same year by: (1) providing an immunity defense based on official capacities; (2) allowing prosecution of alleged perpetrators of war crimes, crimes against humanity, and genocide only if they became Belgian citizens or residents after the offense; (3) eliminating victims’ and other organizations’ ability to initiate proceedings as civil parties; and (4) placing the sole right to pursue such cases in the hands of the federal prosecutor.<sup>53</sup> Spain’s 2009 amendment of its universal jurisdiction statute followed a similar path. After a series of criticized universal jurisdiction proceedings, the state now requires that the accused be on Spanish territory or that there exist a relevant link between Spain and the case before Spanish courts can assert universal jurisdiction.<sup>54</sup>

These states’ reforms — and the parallel manner in which the facts underlying both unfolded — suggest a general unsustainability of wide-reaching universal jurisdiction legislation in light of states’ foreign relations positions and goals.<sup>55</sup> Despite what advocates of universal jurisdiction may have anticipated at its conception, the marriage of international justice and international politics requires a reimagining of what practical application is tenable in today’s complex international arena. This reimagining could necessitate a fundamental reconstruction of universal jurisdiction’s role and timing in the enforcement of global justice.<sup>56</sup> When one accounts for the international relations landscape, the flaw in believing that immediate, universal adoption of strictly enforced objective rules best contributes to international peace becomes clearer.<sup>57</sup> The enforcement of global norms may instead fare better when the procedure is partly based on “a political bargain among contending groups,” for which nonprosecution “may be a necessary tool.”<sup>58</sup> This framework acknowledges that a state’s inaction may actually be integral to better achieving global norms and may create

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<sup>51</sup> *Id.* at 30.

<sup>52</sup> *Id.* at 29.

<sup>53</sup> *See id.* at 30–31.

<sup>54</sup> *See id.* at 37–40.

<sup>55</sup> One can also infer from these facts that there has been a more global recognition of the value of limiting universal jurisdiction enforcement powers. Since the mid-1970s, only twenty-six people worldwide have been criminally convicted for universal jurisdiction crimes. *See id.* at 45.

<sup>56</sup> *See Snyder & Vinjamuri, supra* note 41, at 6 (noting that the common strategy of first advocating for the adoption of universal standards may be flawed).

<sup>57</sup> *See id.*

<sup>58</sup> *Id.*

socially optimal results without diluting universal jurisdiction's value.<sup>59</sup>

The United Kingdom and its predecessors in reform have learned that global interest protection and global injury ideals cannot be the sole guides of universal jurisdiction legislation and enforcement. Such a myopic approach likely creates too expansive a standard to function in a reactive foreign relations domain, as exemplified by the unfavorable responses to enforcement from these states' peers. Instead, approaches to universal jurisdiction enforcement that are guided by the forward-looking preservation of diplomatic ties — which the United Kingdom attempts to achieve in its government-consent requirement — better suit these political realities. When the universal jurisdiction framework makes such factors integral considerations, the international order that it esteems can then more stably form around that framework.

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<sup>59</sup> Kontorovich, *supra* note 38, at 392, 396.