

EMINENTOES

Here Comes the Super Judge

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Former Israeli foreign minister Tzipi Livni canceled a trip to Great Britain after an arrest warrant was issued for her role in "Operation Cast Lead" in the Gaza Strip. The British government apologized and announced plans to change its statute invoking universal jurisdiction, but London has failed to act on similar promises made in the past.

Britain is not alone in seeking to prosecute foreigners for actions committed in foreign lands. Canada, France, Germany, and Spain also claim the authority to jail most anyone for acts committed elsewhere. The practice is a dangerous assault both on national sovereignty and, individual justice.

Historically nations only exerted jurisdiction over people and events within their own borders. No matter how offensive the acts of others elsewhere, sovereignty simultaneously dictated and limited the reach of the law.

While that meant some people escaped justice, it protected others from the politicization of the law. One could be held accountable in court only by the government to which one owed allegiance or which had jurisdiction where the alleged crimes occurred.

This traditional limitation on criminal prosecutions is under increasing attack. Transnational tribunals, such as those impaneled for the Balkans and Sierra Leone, have been created under the aegis of the United Nations. The International Criminal Court is a permanent body with jurisdiction over a number of offenses.

More disturbing is national "universal jurisdiction," whereby individual countries assert authority to prosecute legal offenses irrespective of where they occurred. While originally focused on crimes against humanity, tax evasion, organized crime, and even environmental issues have been or could become subject to extraterritorial claims.

The Iraq war triggered multiple complaints against former president George W. Bush and leading figures in his administration. When then-Defense Secretary Donald Rumsfeld faced possible prosecution in Belgium, he threatened to move NATO's headquarters, causing Brussels to scale back the law's reach. But individuals and groups continue to push charges against former American officials elsewhere.

The premier symbol of this new form of "justice" is Judge Baltasar Garzon Real of Spain. A left-wing student activist in the waning days of the Franco dictatorship, he became the National Court's youngest magistrate at age 32 in 1988. Called "super judge," he has much greater power than in a country with common law, Anglo-Saxon legal tradition.

Explains Giles Tremlett of the *Observer*: a typical investigating magistrate "does not conduct trials, but prepares them. He helps coordinate the policy enquiry, jails or bails suspects and, eventually, decides whether to bring charges."

In 2006 Garzon declared: "We are all involved in the universe of human rights and obligations and that is why we all have the duty to find the appropriate solutions, so we can see improvements." But his efforts more often yield publicity than convictions.

"That desire to win spectacular cases -- that is more powerful in him than any other motivation. He needs attention," said Juan Alberto Belloch, a former Spanish justice minister.

No doubt, many of Garzon's targets deserve prosecution for something by someone somewhere. But his campaigns have politicized the concept of justice and threatened the rule of law well beyond Spain's boundaries. "Garzon is a pioneer," opined colleague Lola Delgado. In the field of justice that should not be considered a compliment.

For instance, Garzon has declared that George Bush, former British premier Tony Blair, and Spanish prime minister Jose Maria Aznar should be prosecuted for the war in Iraq, "one of the most sordid and unjustifiable episodes in recent human history; a devastating attack on the rule of law." In Garzon's view, "There is enough of an argument in 650,000 deaths for this investigation to start without delay."

In 2008 Garzon suggested that he would fight global warming by targeting major polluters. The same year he directed a conference at the University of Jaen which included a forum on climate change. His threat mimicked comments made by James Hansen of NASA, who accused major oil company executives of "a crime" in "putting out misinformation" on the topic. Hansen told Congress that "these CEOs should be tried for high crimes against humanity and nature."

Also in 2008 Garzon issued an arrest warrant for Russian State Duma Deputy Vladislav Reznik for alleged connections to organized crime. Reznik's residence on the island of Mallorca was raided and its contents seized. Reznik enjoyed immunity from prosecution in Russia as a member of the legislature.

In 2003 Garzon indicted Osama bin-Laden and 34 other alleged terrorists. They were charged not only for being members of a terrorist organization, but also for their role *in the 9/11 attacks in America*. Garzon explained: "We cannot fight a crime against humanity if we do not accept the priority of universal justice. It should be possible to pursue the authors of these acts anywhere in the world."

While most Americans would like to bring in bin Laden dead or alive, the appropriate

location of any trial and punishment would be the United States, where his most grievous crimes were committed. No wonder Carlos Taibo, a political science professor at Madrid's Complutense University, observed: "The image that many jurists have of Garzon is that he is not very rigorous in the strictly legal sense."

That is the definition of understatement.

Although 18 of the 24 defendants were convicted in 2005 of having terrorist links, the 9/11 counts fared less well. Only Eddin Barak Yarkas, al-Qaeda's Spanish head, was convicted for allegedly conspiring to commit murder in the 9/11 attacks, and that conviction was later tossed out by the Spanish Supreme Court. Even the prosecutor acknowledged that while Yarkas might have been aware of the plot, "it is another thing altogether to say he planned it and assumed the conspiracy as his own."

Garzon later attempted to extradite Omar Degayhes and Jamil al-Banna from the United States on the same charges, even though they then were incarcerated in Guantanamo Bay. They were released in December 2007 to Great Britain without charges, after which Garzon sought their extradition. Under strong criticism he dropped his efforts a few months later.

In 2002 Garzon requested that the British government allow him to question Henry Kissinger, who was visiting London, about "Operation Condor," under which Latin American military dictatorships friendly to the U.S. eliminated political opponents. Garzon claimed that he wanted to interview Kissinger as a witness, not prosecute him as a defendant. The British government denied Garzon's request.

Garzon sought to prosecute Italian Prime Minister Silvio Berlusconi in 2001 for allegedly evading taxes and violating limits on share ownership in a Spanish TV station, Telecinco. Garzon sought to convince the parliamentary assembly of the Council of Europe to lift Berlusconi's immunity as member of that body. Spain's highest court later cleared Berlusconi.

In 1999 Garzon issued warrants for 98 former Argentine military officers, including a dozen leaders of the junta, for murder and kidnapping, though Buenos Aires, which had enacted an amnesty for the accused officials, insisted that only Argentine courts had jurisdiction over such cases. Also indicted was Ricardo Miguel Cavallo, a Navy officer in charge of kidnapping and torture, who on a trip to Mexico was extradited to Spain at Garzon's request.

In 1998, Garzon sought to extradite Chile's then-Senator and former dictator Augusto Pinochet on a visit to London. Garzon charged Pinochet with the death of Spanish citizens in Chile. Garzon explained: the crimes involved "have no statute of limitations, their perpetrators cannot enjoy diplomatic immunity, nor can they obtain refugee status or be granted political asylum." His request set off a lengthy legal battle that eventually reached the House of Lords. The British government released Pinochet in early 2000 on the grounds of poor health.

Also in 1998 Garzon arrested and charged Argentine Army officer Adolfo Scilingo, who had traveled to Spain voluntarily to testify, in the murder of political opponents of the ruling junta two decades before. Eight years later Scilingo was put on trial and convicted.

Although Judge Garzon is the most famous Spanish practitioner of extraterritoriality, he is not alone. In January 2009 Judge Eloy Velasco asserted jurisdiction over human rights abuses committed during the El Salvadoran civil war 20 years ago. Velasco opened an investigation into 14 ex-military personnel in the killing of several Jesuit priests and others.

While greatly expanding the reach of the law in his hands, Garzon criticized other countries for taking liberties with the law. In 2006 he urged the U.S. to close its prison at Guantanamo Bay: "A model like Guantanamo is an insult to countries that respect laws. It delegitimizes us. It is a place that needs to disappear immediately."

Garzon naturally has won accolades from the human rights community, and many of the individuals he targeted richly deserve punishment. However, a promise not to prosecute may be the best, and sometimes only, means of peacefully ousting authoritarian regimes and maintaining social peace. That surely was the case in Garzon's own Spain, with the passing of the Franco era.

Moreover, rules of justice are formulated to limit state abuse and protect the innocent. As long has been said, men of zeal can be the most threatening to people's liberties.

It is worth remembering the famous scene in *A Man for All Seasons* in which Thomas More rejects the willingness of his interlocutor, Thomas Roper, to cut down every law to get the Devil: "And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"

Advocates of universal jurisdiction risk making the same mistake as Thomas Roper. Enthusiasts for arresting George Bush and others are many. But what is to stop the indictment of Barack Obama for "war crimes" in Afghanistan? And of Bill Clinton for committing military aggression against Serbia? Once loosed, the principle of universal jurisdiction is unlikely to be bound by any limits.

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