Curbing Enthusiasm for Universal Jurisdiction

By
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I. INTRODUCTION

In the past decade Israeli officials have faced both criminal and civil law suits for their political and/or military activities in the Israeli government and Israeli Defence Forces respectively. For example, criminal complaints were filed in Belgium against former Prime Minister Ariel Sharon in 2001 and in the United Kingdom against Major General (res.) Doron Almog in 2005. Also, arrest warrants were issued in New Zealand against former Chief of Staff Moshe Ya’alon in 2006, and most recently against the left-center Israeli opposition leader Tzipi Livni for alleged war crimes committed during Operation Cast Lead, during which she served as Israel’s Foreign Minister. Similar civil suits have also been launched in the U.S. One was filed against Avi Dichter, the former Director of Israel’s General Security Services.

Israel’s supporters have pointed to these legal acrobatics as a clear abuse of the principle of universal jurisdiction, a new tool in the box belonging to Israel’s detractors and critics. Advocates of the Jewish state have coined the term “lawfare” to describe this situation—“a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”

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While this sounds far-fetched to the neutral observer and hysterical to those wary of claims of international anti-Semitism masked as anti-Israel sentiment, warnings of the possible abuse of the principle of universal jurisdiction pre-date these Israeli claims. For instance, former U.S. Secretary of State and Nobel Laureate Henry Kissinger, in an article published in Foreign Affairs in 2001 entitled The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny, commended advocates of universal jurisdiction for their commitment to bringing violators of international humanitarian law to justice, but warned of “pushing the effort to extremes” and risking “substituting the tyranny of judges for that of governments.”

Indeed, even judges of the International Court of Justice (ICJ), an institution not known for its friendliness toward the State of Israel, warned against the possible abuse of the principle of universal jurisdiction in the Yerodia case in 2002, stating, “if, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.”

In the early 1960s, Israel became one of the first countries to invoke the principle of universal jurisdiction in its groundbreaking trial against the “architect of the Holocaust,” Adolf Eichmann. Today, amidst “lawfare” and possible abuse, how is Israel to support genuine instances of universal jurisdiction directed at bringing to justice human rights violators, while at the same time rejecting the abuse of the principle?

II. WHAT IS UNIVERSAL JURISDICTION?

The term jurisdiction is a legal term commonly used to describe a state’s authority to give effect to legal interests. There are three such interests a state

3. The Yerodia case concerned an international arrest warrant issued in absentia by a Belgian investigating judge against the Congo’s then Minister of Foreign Affairs, Mr. Abdulaye Yerodia Ndombasi, who was vacationing in Belgium. It charged him as a perpetrator or co-perpetrator of offences constituting grave breaches of the Geneva Conventions of 1949 and the Additional Protocols thereto. The ICJ found that the issue and international circulation by Belgium of the arrest warrant of April 11, 2000 against Ndombasi failed to respect the immunity from criminal jurisdiction and the inviolability which he enjoyed under international law; and that Belgium must cancel the arrest warrant.
may wish to affect, and therefore, there are three traditional forms of jurisdiction. This article is concerned with only one of these forms—judicial jurisdiction—the ability of a state’s legal system to adjudicate the cases that come before it.

Traditionally, a state enjoys judicial jurisdiction over offenses committed within its territory. This makes both legal and common sense, for, as discussed by then ICJ President Judge Guillaume in the Yerodia case, it is in that territory where evidence of the offense can most often be gathered, where the offense generally produces its effects, and where the punishment that is imposed can most naturally serve as an example to others.

However, this is not where a state’s judicial jurisdiction ends. Classical international law has identified specific instances where a state’s courts can exercise jurisdiction over offenses that were committed abroad. For example, a state may exercise jurisdiction over an act performed abroad by one of its nationals (the active personality principle, also known as the nationality principle), or over an act performed abroad against one of its nationals (the passive personality principle). Additionally, a state may exercise judicial jurisdiction over an act that poses a threat to vital state interests (the principle of protective jurisdiction), such as counterfeiting of a state’s currency, even if the counterfeiter is a foreigner who is acting in a foreign state.

The most controversial form of judicial jurisdiction arises when a state claims jurisdiction over an act that was performed by a foreigner against a foreigner abroad. This is known as universal jurisdiction. It arises when the underlying act is so universally condemned that the state has an interest in exercising jurisdiction to combat the act in question. Acts subject to universal jurisdiction include crimes against humanity, war crimes, and genocide.

There are two types of universal jurisdiction. The first arises when the offender enters a state’s territory or is held in a state’s custody. In this form of universal jurisdiction, it is the presence of the offender that grants the state jurisdiction. An example of this form of universal jurisdiction is the legal proceeding stemming from Spain’s request for the U.K. to extradite General Augusto Pinochet, former President of the Republic of Chile, on the grounds of widespread human rights abuses; the request was made when Pinochet was

7. The three forms of jurisdiction, each of which corresponds to a particular state interest are: legislative, the ability of a state’s legislative body to prescribe laws; judicial, the ability of a state’s judicial system to decide cases that come before its courts; and executive, the ability of a state to enforce the laws of the state. Id.
8. Id.
10. Damrosch et al., supra note 7, at 1088.
11. Id.
12. Id.
13. Id.

More often than not, this type of universal jurisdiction is mandated by international covenants and agreements, which impose an obligation on their state parties to prosecute or extradite individuals who are in their territory and are suspected of having committed the relevant offenses.\(^{15}\) For example, Article (2)(5) of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment specifically states that “each state party shall . . . 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 . . . .”\(^{16}\)

The second form of universal jurisdiction is universal jurisdiction in absentia. This exercise of jurisdiction is purely universal; the person being tried has no connection to the state, and is not present in the state.\(^{17}\)

While the first form of universal jurisdiction is an obligation imposed on states by various international agreements, universal jurisdiction in absentia is not mandated by international law.\(^{18}\)

### III. WHAT ARE THE BENEFITS OF UNIVERSAL JURISDICTION?

Universal jurisdiction can play a crucial role in the international legal system and in the pursuit of international justice. It ensures that those who have committed the most heinous offenses, such as war crimes, crimes against humanity, genocide, and torture, are not safe from prosecution anywhere. Its objective is to guarantee that those who have committed “offenses against all mankind” and are therefore hostis humani generis,\(^{19}\) are apprehended and prosecuted.

While this objective is as relevant as ever, universal jurisdiction was a far more appropriate remedy in the days preceding the creation of the International Criminal Court (ICC). At that time, one could point to the absence of a permanent international tribunal and the skittishness of the U.N. Security Council (which created international ad hoc criminal tribunals only erratically and following only some armed conflicts) to argue that the involvement of municipal courts in pursuing international justice was essential if justice was to

\(^{15}\) Id.


\(^{17}\) Malcolm D. Evans, International Law 348 – 49 (2nd ed. 2006).


\(^{19}\) This is Latin for “enemy of mankind.” Originally, this referred specifically to pirates, who were subject to universal jurisdiction; but has since been extended in practice and theory to those who commit the most egregious crimes, which are so egregious as to constitute a crime against all mankind. See Kirsten Campbell, Hostis Humani Generis: The War Criminal and Sociality (May 25, 2009) (unpublished manuscript, presented at the annual meeting of The Law and Society in Las Vegas, NV), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/1/8/0/7/p18076_index.html
be achieved.  

With the advent of the ICC, which can prosecute even nationals of non-member states (as is the case with Sudan’s President Omar al-Bashir),21 the argument for municipal courts’ involvement in international affairs is somewhat weakened. Since there is now a permanent court established to address the very crimes subject to universal jurisdiction claims, these municipal claims are no longer crucial for ensuring that justice is achieved and that perpetrators are not immune from trial. However, while the significance of universal jurisdiction claims has been weakened by the creation of the ICC, it has not been extinguished.

IV. WHAT ARE THE DISADVANTAGES OF UNIVERSAL JURISDICTION?

While universal jurisdiction may still play an important role in the pursuit of international justice, there are several considerations that proponents of universal jurisdiction should keep in mind before instituting their next criminal or civil proceeding.

The first consideration is the burden that both civil and criminal trials instituted on the basis of universal jurisdiction pose to the home state. This burden can be measured in terms of the financial and legal resources that are expended on these high-profile trials and that postpone, if not impede, the realization of local justice in lower-profile matters.

The burden is also felt on the political level, where the executive arm of a state is required to justify, on the international stage, the activities of its judicial arm. Additionally, there is pressure on the state to maintain cordial ties with foreign states whose officials are being prosecuted in its courts. Indeed, if the executive does not successfully negotiate them, trials based on universal jurisdiction could ironically foster future inter-state conflicts while attempting to resolve past ones.

A second and related issue raised by universal jurisdiction is the inviolability of the sovereign state. As recognised by the U.N. Charter, Article 2(1), all states enjoy “sovereign equality”;22 that is, all states are equal members of the international community of states and are to be treated accordingly. Universal jurisdiction, by its very nature, violates sovereign equality of states by

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allowing one state to judge the actions of the officials of another. The principle therefore disregards one of the precepts of modern international law.

Added to this is the possibility, perhaps remote, of judicial chaos arising out of the implementation of universal jurisdiction. If many courts in various countries pursued universal jurisdiction, the result would not be justice, but disarray. Indeed, the ICJ warned against this possibility in Yerodia, when it stated that to confer jurisdiction upon the courts of every state in the world to prosecute the perpetrators of certain crimes would “risk creating total judicial chaos.”

To the proponents of universal jurisdiction, these considerations against such jurisdiction imply impunity for violators of some of the most heinous international crimes. Yet, when pursuing justice through universal jurisdiction, these proponents should bear in mind a further consideration, which mitigates against the automatic resort to universal jurisdiction claims—that there is a difference between justice and peace, between retribution and reconciliation.

In many instances, the offenses subject to universal jurisdiction claims are allegedly committed as part of a greater conflict, be it a civil war, an international war, an asymmetric conflict fought against armed groups, a war on terror, a guerrilla war, or some other conflict. When these conflicts end, it is crucial to decide on a way forward. While retribution may comfort victims of previous offenses, it does not always pave the way to a better future. Moreover, trials abroad do not necessarily bring resolution to the place where conflict actually occurred. Indeed, in many instances, victims opt for alternative forms of reconciliation. For example, following the end of Apartheid in South Africa, the country established the Truth and Reconciliation Commission to foster understanding and seek justice.

In addition, judging the officials of another state may significantly impede a state’s involvement in international peace initiatives. The U.K. recently experienced this phenomenon when its Foreign Office, in light of the arrest warrant issued against former Israeli Foreign Minister Tzipi Livni, stated that the nation was “determined to do all it can to promote peace in the Middle East and to be a strategic partner of Israel. To do this, Israel’s leaders need to be able to come to the U.K. for talks with the British government. We are looking urgently at the implications of this case.”

Ironically, in such cases, the noble pursuit of justice using universal jurisdiction might actually hinder reconciliation efforts. As stated by Henry Kissinger, “the role of a statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between

Finally, the hand-picking of particular cases which are subject to universal jurisdiction is both sanctimonious and disingenuous. As Kissinger eloquently stated with respect to the Pinochet debacle (in which Spain requested the extradition of General Pinochet from the U.K. on several criminal grounds), “one would have thought that a Spanish magistrate would have been sensitive to the incongruity of a request by Spain, itself haunted by transgressions committed during the Spanish Civil War and the regime of General Francisco Franco, to try in Spanish courts alleged crimes against humanity committed elsewhere.”

When universal jurisdiction is illustrated by the example of Spain wishing to prosecute a former Chilean executive after extradition by the U.K., it is not hard to understand how its selective use is perceived as a new form of colonialism, a paternalistic exercise against the “less civilized” nations among us. This is even more pronounced when one considers that most of the countries that can afford to expend resources on universal jurisdiction claims are wealthy and developed.

V. HOW TO REMEDY THE ABUSE OF UNIVERSAL JURISDICTION

Countries with Limited Universal Jurisdiction

While universal jurisdiction can be a useful, important tool in the pursuit of justice, it is not a perfect one. Therefore, it is essential to curb enthusiasm regarding universal jurisdiction and thereby prevent its abuse. Several countries, overwhelmed by claims under newly enacted universal jurisdiction legislation, have recently done just this.

These countries have voluntarily limited the scope of their universal jurisdiction in several ways and have thereby helped to prevent the abuse of the lofty principles of universal justice and human rights. They have stipulated those offenses that can give rise to universal jurisdiction, required prior approval of state officials before claims can be instituted, and insisted on at least some nexus between their state and the alleged offence in question.

France, for example, has opted to limit its universal jurisdictional reach to a closed list of infractions, which include torture, terrorism, nuclear smuggling, naval piracy, and airplane hijacking.27

Canada has adopted a slightly different jurisdictional rule. Though it enacted a very broad piece of legislation implementing universal jurisdiction, Canada requires, under Sections 9(3) and 9(4), that all claims based on universal

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26. Id.
27. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 689 (Fr.), available at http://www.legifrance.gouv.fr/affichCode.do;jsessionid=8D7A735D0F327A8D49651831AD29817E.tpdpjo04v_2?idSectionTA=LEGISCTA000006151920&cidTexte=LEGITEXT000006071154&dateTexte=20090315.
jurisdiction be personally approved by the Attorney General or Deputy Attorney General before they can be introduced in any court.28

Adopting a slightly different approach, both Belgium and Spain have significantly amended their universal jurisdiction laws by insisting on the existence of a nexus or connection between the claim and the country where the case has been filed.

Spain recently reaffirmed the principle of universal jurisdiction but amended its laws to require one of the following conditions before prosecuting universal jurisdiction claims:

- Spaniards are victims; or
- Where there is a relevant link to Spain; or
- Where the alleged perpetrator is in Spain.29

Belgium similarly repealed legislation from 1993, which had granted Belgian courts extensive universal jurisdiction and incorporated more restrictive provisions in the Belgian Code Pénal and Titre Préliminaire du Code de Procédure Pénale. Today, Belgian courts only have jurisdiction over international crimes if:

- The accused is Belgian; or
- The victim is Belgian; or
- Belgium is required by treaty to exercise jurisdiction over the case.30

Furthermore, direct access to Belgian courts is severely restricted by the amendment to the law. For example, it affords the Federal Prosecutor the discretion not to pursue a suit in certain listed circumstances.31

Legal Arguments which can be Relied upon to Prevent Abuse of Universal Jurisdiction

Despite these recent developments, there are still several countries, such as the U.K., in which universal jurisdiction claims can be abused. Therefore, it is important to note that there are several legal arguments useful for restricting the abuse of universal jurisdiction.

The first legal argument is based on the common law notion that there is a more convenient or appropriate forum in which the matter should be heard than the one in which it has been brought. This is the legal doctrine known as forum


non conveniens. This argument goes to the heart of the matter—that courts in the states where the alleged crimes occurred are better positioned to hear the claim because evidence is easier to access there and the effects of the crime are more likely to have been felt there. Such an argument does not seek to avoid justice, but in fact seeks justice in the place where justice is most desperately needed—the place where the crime was committed.

Another advantage of using forum non conveniens is that the doctrine gives courts the discretion to keep a case when the more appropriate forum is unlikely or unable to assert jurisdiction, such as when a state’s court system is destroyed by war. In such a case, universal jurisdiction is clearly not abused. Rather, it ensures justice for those whose national courts are unable to enforce it.

A second legal argument is the international requirement to exhaust local remedies. This rule requires that before claimants can assert a claim in a foreign forum, they must exhaust all local remedies available in their domestic legal system. This rule of customary international law stems from the principle of international comity, and it affords a state where a violation has occurred the opportunity to redress the violation by its own means and within the framework of its own legal system. This principle has been codified by the Rome Statute, which created the ICC, as a prerequisite for the admissibility of claims before the ICC.

The need to exhaust local remedies should, therefore, act as a clear bar to the abuse of universal jurisdiction, which should only be available in the event that the domestic justice system in question is unwilling or unable to address violations of law.

A final though imperfect legal response to a claim of universal jurisdiction is the defense of immunity. State immunity does not extend to all state officials and does not protect all state officials equally. It is a rather limited defense. However, for those officials to whom the defense does apply, including heads of state, foreign ministers, and diplomatic representatives, immunity claims can be an effective legal tool against abuses of universal jurisdiction.

For some officials, such as heads of state or ambassadors, immunity is complete, rendering them immune from all prosecutions whether or not the underlying activities were performed in their capacity as state officials. Such immunity is said to be granted ratione personae. For others, such as foreign ministers, immunity is instead granted ratione materiae, which only encompasses acts performed in official capacities.

While immunity protects state officials, it does not by any means grant impunity. For instance, a state official is not immune from prosecution for acts

32. Evans, supra note 17, at 348–51.
33. This principle was discussed at length in the U.S. Case of Sarei v Rio Tinto. Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008).
35. Evans, supra note 17, at 404-10.
of torture, because these are acts that cannot be viewed as part of an official’s role (as decided in the case of Pinochet). Thus, relying on immunity may prevent an abuse of universal jurisdiction, but it will not create abuse of political positions or legal standing.

Finally, in the event that a court is forced to try an abusive universal jurisdiction claim, judges should not hesitate to award substantial monetary judgments in favor of the wronged state or state official. Such judgments will not only help redress the injustice done to said individuals in terms of lost time, stained reputation, and legal expenses, but will also deter future abusive claimants.

VI. CONCLUSION AND OUTLOOK

The principle of universal jurisdiction has been and continues to be an important implement in the legal practitioner’s tool box and is an essential means for achieving justice for international crimes. Unfortunately, the principle has also become a political device employed for far less noble purposes. This abuse is not limited to attempts to delegitimize Israel, to indict Israeli officials, or to impede their travel. In fact, the principle has also been misused against U.S. officials, including former President George W. Bush and former Secretary of Defense Donald Rumsfeld. In fact, Germany and France both brought claims against Rumsfeld, who has now stopped traveling at all for fear of arrest. Universal jurisdiction claims were also brought in Spain against former White House staffers. Similarly, former British Prime Minister Tony Blair has been the subject of a record number of petitions against him in the ICC. These universal jurisdiction claims (against both Israeli and other officials) should not be dismissed as trivial. They do not merely hinder the comings and goings of frequent travelers. Indeed, they interfere broadly with international diplomatic affairs and international business, they constitute a publicity coup for those instituting the claims (regardless of the outcome), they drain legal resources, and they mire truly lofty principles with political opportunism.

Given these concerns, we would be wise to adhere to the caveat of Henry Kissinger: “Historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts,” and therefore, “any universal system should contain procedures not only to punish the wicked but also to constrain the

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righteous. It must not allow legal principles to be used as weapons to settle political scores." We need to curb enthusiasm for universal jurisdiction.

40. Kissinger, supra note 2.