

Universal Jurisdiction

Adv. Irit Kohn

Bar-Ilan University; Vice President of the International Association of Jewish Lawyers and Jurists and former Director of the International Department of the Israel Ministry of Justice

Universal jurisdiction is the power of a country to legislate, implement, judge, and punish a person for crimes committed outside that country's borders, whether these crimes were against its own citizens or not. It is applied in relation to war crimes, crimes against humanity, and genocide. Around these crimes there exists an international consensus – anyone who commits them must be punished.

The nature of these crimes is derived from historical processes, for example, the Nuremberg trials. The convention which laid down the basic principles according to which the Nazi war criminals were tried ruled that anyone accused of crimes against peace or crimes against humanity carried out during the Second World War would be prosecuted before an international military court in Nuremberg administered jointly by the signatories to the convention (the U.S., USSR, England, and France). Likewise, it was decided that these criminals could also be tried in the countries which founded the said court. The convention was authorized by nineteen other countries and in 1946 the UN General Assembly adopted its principles unanimously. Accordingly, it was decided that crimes against peace, war crimes, and crimes against humanity are crimes in every country. On this basis, each and every country is authorized to try those accused of committing them. As a result, Nazi war criminals were tried in a number of countries.

A further example is the laws of war which were expanded in 1949 by four Geneva Conventions. These conventions dictated what is permitted and forbidden in war. They define what constitutes violations and severe violations of the prohibitions. It was decided that it is the responsibility of each and every country to find the violators and bring them to trial, even if the crime was not committed in that country, the crime was not directed against it, and the criminals are not its citizens. The description of these serious violations expanded the definition of war crimes over and above the definition applied during the Nuremberg trials and made them subject to universal jurisdiction.

These examples were selected from many possibilities and presented to demonstrate that universal jurisdiction existed before the 1990s, when a wave of trials began in various countries. This wave has continued to this day. In an article published in 2001 it was stated that for ten years, or even less, an unprecedented movement has taken place which has transferred international politics to legal processes. This movement advanced at a rapid pace, without public discussion, largely as a result of the strong desire of its supporters (who will be mentioned later) to bring to justice violators of human rights and criminals who had committed crimes of the types outlined above. Theoretically this is a worthy aim, although, as it is implemented, there are many obstacles. It is important to emphasize that although, as was demonstrated in the examples above, conventions defining such authority existed for many years, it was never before used on a scale similar to that witnessed today.

The case which began the recent wave was that of Augusto Pinochet of Chile. In 1998 a warrant arrived in the UK from a Spanish judge requesting Pinochet's arrest and extradition to Spain to be tried for crimes against Spanish citizens in Chile. Those lawyers who supported universal jurisdiction saw in the arrest of Pinochet for a sixteen-month period a turning point in the upholding of justice. However, critics of the events expressed concern at the use of the principles of universal jurisdiction as a mechanism for resolving political conflicts. Pinochet was perceived by the European Left as a right-wing extremist anti-democrat, since he had led a revolt against the elected leader. Others, amongst them leaders of the Democratic Party in Chile, had perceived Salvador Allende as a revolutionary Marxist ideologue who led a Cuban-style dictatorship using Cuban weapons, and therefore welcomed his removal. They changed their attitude after the junta began to use harsh means, much more so even than was to be expected in the emergency situation in which Chile found itself at the time. Critics pointed out that disagreement with the reign of Allende did not justify the crimes committed after his removal. However, universal jurisdiction should not be allowed to dictate the political history of Chile.

Indeed, in the year 2000 the Chilean Supreme Court revoked Pinochet's immunity and allowed his trial in that country, where he had committed his crimes. Critics continue to point out that the Spanish judge, when writing the request for Pinochet's arrest, should have taken into account the history of post-Franco Spain. The government which followed the Franco regime

decided to abandon judgments from the recent past in order to promote a process of national restoration which undoubtedly strengthened Spanish democracy. If so, the question begs to be asked, why was Chile not allowed to do the same? The same question could also be applied to South Africa. Should courts outside South Africa that are trying people who had committed crimes in South Africa consider the process of national rebuilding? Today a similar process can be witnessed in the International Criminal Court (ICC) in the case of Uganda.

It is necessary to remember that there has been no appropriate public discussion of universal judicial authority and there exist no clear rules as to how it should be applied. Rather, the jurisdiction is applied in every country according to internal laws. Courts established by the Security Council or the ICC were molded specifically within the framework of a convention which defined, with the participation of the signatory countries, the offenses to be tried and procedures for gathering evidence and defense. In the applications of international law in individual states, the internal laws of a country are not clearly known by everyone and it is possible that they do not comply with international standards, thus hindering the activation of the jurisdiction. Likewise, there is no unanimity in the definition of crimes between the various countries, since the trial takes place in accordance with the internal laws of each country. There are no certainties about the defense provided to the defendant. On the one hand, the statutes of time limitation, which define the time periods within which certain crimes must be tried, differ from state to state. On the other hand, in cases of the offenses discussed here, it is accepted that no time limitation applies. Within the legal system of the various countries there is a lack of judges and prosecutors expert in international law, a problem which is likely to cause inappropriate interpretation during the judicial process.

A further factor which is especially problematic is the political exploitation of universal jurisdiction. When the prosecution is initiated by a state not related to the matter in any way, there is a realistic concern of political exploitation for negative motives. There is no demand that the state initiating the trial be neutral and its political echelons free from corruption. One example of this is the Belgian attempt to put on trial former Israeli prime minister Ariel Sharon for actions in the Sabra and Shatila camps in Lebanon. This complaint resulted from the passing of a more-encompassing law on universal jurisdiction in Belgium. From then on, letters describing Belgium's past actions in the Congo

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arrived at the Israel Ministry of Justice. This particular case demonstrates that in the past of many countries there are deeds which could perhaps make them subject to international jurisdiction, yet these countries are deemed worthy to function as representatives of the international community which will try such crimes. Adding to this the large Muslim community in Belgium, whose electoral power today is significant, it is clear that factors other than the desire to see justice done were influential in the conduct of the process in Belgium. There is no doubt that the readiness of a country to arrest and try will be influenced by the relations of the country with the country in which the crimes were committed, as well as the military and economic strength of the country in question. It is interesting to note that Margaret Thatcher sharply criticized the arrest of Pinochet since he helped Britain during the Falklands War.

A complaint was brought in Spain against the Israeli Chief of Staff and a number of IDF generals, together with the Minister of Defense incumbent at the time, for the targeted killing in 2002 of Hamas commander Salah Shehadeh, which led to the deaths of a number of innocents. In 2009 Spain's highest court finally dropped the matter.

Today many countries are careful to limit their universal laws so as not to find themselves in an embarrassing situation of a complaint being brought in their judicial system. The final word on this subject has yet to be heard.