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Averting Abuse of Universal Jurisdiction

Irit Kohn

- Right at the outset of Israel's recent operation in [Gaza](#), French pro-Palestinian organizations filed a lawsuit against the Israeli president, foreign minister and defense minister. Turkish prosecutors said in February 2009 that they were investigating whether Israeli leaders should be prosecuted for crimes against humanity over Israel's offensive in Gaza, after Mazlum-Der, an Islamic-oriented human rights organization, filed an official complaint in [Turkey](#). At the same time, a Spanish judge is currently investigating the role of Israeli soldiers and security officials in a bombing in Gaza in 2002 in which a top [Hamas](#) suicide bombing planner, Salah Shehada, and 14 other people were killed.
- Universal jurisdiction refers to the power of a state to legislate, adjudicate, and punish any individual for war crimes, crimes against humanity, or genocide committed outside its borders, even when those crimes were not committed against that country or its citizens, and even if the accused is not its citizen. The idea is that anyone who commits such atrocious, internationally condemned crimes will not be able to find shelter or hide from judgment anywhere on the globe.
- Human rights organizations all over the world have been instrumental in the implementation of universal jurisdiction. This has contributed to the entry of politics into the universal jurisdiction process, as may be seen in many actions brought by NGOs that are supported financially by special interest groups or even states for the benefit of their own agendas. In 2005, Israeli Brig.-Gen. Doron Almog was warned not to leave his plane at Heathrow Airport in London after a UK court issued a warrant for his detention.
- It is important to remember that universal jurisdiction and the International Criminal Court are applied when a country does not or cannot act to prosecute. Yet Israel is a democracy with a well-developed judicial system and does not need external intervention to conduct any investigation.

- In fact, the Israeli military police reported that between 2000 and 2007, Israel's military judicial system conducted 272 investigations of illegal firing of weapons, with 31 indictments and 17 convictions; 330 investigations of property damage, with 36 indictments and 36 convictions; 475 investigations of violence, with 37 indictments and 34 convictions; and 128 investigations of crimes in the Palestinian areas, with 20 indictments and 18 convictions. The case of Salah Shehada, mentioned above, has already been reviewed thoroughly by Israel's Supreme Court, which is widely respected in the international legal community. What would a Spanish court have to add?
- Dr. Henry Kissinger wrote that we are witnessing an unprecedented movement to turn international politics into legal proceedings. International law does not require that the prosecuting country be neutral or politically impartial in order to exercise its jurisdiction in a given case. The purpose for which universal jurisdiction was created may be a worthy and noble one. However, its current execution is problematic, to say the least.

Referral to the International Criminal Court (ICC)

A few days after the outset of Israel's three-week operation in Gaza that ended on January 18, 2009, a lawsuit was filed by several French pro-Palestinian organizations against the Israeli president, foreign minister and defense minister. The Rome Statute, the founding document of the International Criminal Court in The Hague, was cited as the legal basis for the suit.

The organizations demanded that France, which presided over the UN Security Council at the time of the filing, initiate a discussion of the suit at the council, hoping for a Security Council resolution referring the case to the International Criminal Court.

Yet the International Criminal Court has jurisdiction only over nationals of states that have signed and ratified the Rome Statute. Israel has not ratified the statute, and its citizens are therefore not subject to it. Yet Article 13(b) of the court's statute establishes the court's jurisdiction over cases referred to it by the Security Council in accordance with Chapter Seven of the UN Charter. This article was the legal foundation for the court's authority over crimes committed in Sudanese Darfur. In that case, all the members of the Security Council voted in favor of referring the case to the court, including the United States, which is also not a party to the Rome Statute.

The International Criminal Court began operating in July 2002. Since its inception, it constitutes a permanent tribunal, with supplementary authority to the states' authority to prosecute individuals for crimes of genocide, crimes against humanity, and war crimes. Another crime mentioned in its mandate, whose definition is still under deliberation, is that of "aggression."

Since it was impossible to reach an agreement about the issue of terrorism, that subject is not within the court's purview. Many countries and organizations view the use of terror in a war of self-determination to be a legitimate act of war.

The need to create an International Criminal Court was recognized in the wake of the Second World War and the Jewish Holocaust in Europe. Following the ad hoc tribunals of Nuremberg and Tokyo, the Jewish people and the State of Israel, as part of the international community, had recognized the need for a permanent international court to deal with the recurrent phenomenon of genocide and other such serious crimes.

Israel was very active in the preparatory committee of the International Criminal Court. The former Israeli Attorney General, Judge Eli Rubinstein, spoke at a conference in Rome where he stated that Israel was strongly in favor of trying war criminals responsible for genocide and crimes against humanity. However, Rubinstein added, the inclusion of political bodies into the decision-making process was extremely problematic, and since Israel is a victim of ongoing terror assaults, it hoped that the international community would recognize terror as an international crime and concentrate on practical and effective methods for cooperation designed to bring international terrorists to justice. To this day, the court has yet to institute such measures.

Israel's Problem with the ICC

What happened? Why has Israel refrained from ratifying the statute? One article of the statute, which consolidated the politicization process of the court, is the primary cause for Israel's decision: the article that deals with the transfer of populations.

Article 8(b) 8, the section defining war crimes in the Rome Statute, discusses: "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."

This article was copied almost word for word from the 1977 First Protocol of the Geneva Conventions of 1949.

The article clearly emphasizes forced transfers of populations. Its intentions are even clearer when we remember it was drafted in response to the forced relocation of populations in Europe during the Second World War (e.g., the transfer of Germans into former Czechoslovakia).

In the Rome Statute this article expanded *ad absurdum* the Nazis' forced repopulation program, which was reasonably defined as a war crime under the Geneva Convention. The statute now defined any voluntary movement of people, either directly or indirectly, by any means, as a similar crime under the Rome Statute. But what is the connection between this distortion and the original intent of the Rome Statute, which was to establish

a court to deal with horrible and intolerable trespasses against humanity? Here the intent was to have Israeli settlements in the West Bank internationally acknowledged as a most serious crime which should therefore be subject to the court.

Let us recall that, in general, violations of international law are not, *ipso facto*, war crimes, crimes against humanity, or genocide. There are many violations of international law which are not considered tantamount to these crimes. Furthermore, expanding the definition of "population transfers" in the Rome Statute even beyond that of the First Protocol of the Geneva Convention, while creating a legal construct specific to the issue of the Israeli settlements, seriously diminishes the statute on which the court was founded. Israeli sources claim that the phrasing of this article, inspired and influenced by Arab nations, specifically targets the State of Israel, and therefore is wholly unrelated in severity and content to the other flagrant acts designated by the statute as war crimes.

It is interesting to note that neither the ad-hoc tribunals for Rwanda nor Yugoslavia saw fit to expand the definition in their constituting documents beyond that of the Fourth Geneva Convention, wherein only the deportation or illegal transfer of protected persons are considered to be serious violations of the convention.

At the end of the day, the introduction of this article into the Rome Statute and the connection between the ICC and the UN left Israel no choice but to refrain from joining the statute, and consequently the ICC has no jurisdiction over it or its citizens.

The International Criminal Court isn't the only avenue for the prosecution of these crimes. There have been special UN tribunals in which individuals accused of war crimes and crimes against humanity have been prosecuted. These include the courts established by the UN Security Council to address the crimes committed in the former Yugoslavia, Sierra Leone and Cambodia. Recently, a court was established in [Lebanon](#) with regard to the murder of former Prime Minister Hariri.

Individual States Seek to Exercise Universal Jurisdiction

Yet another way to prosecute suspects for heinous violations of international law may be found in certain states that have adopted laws involving "universal jurisdiction." As noted, the Rome Statute established the primary commitment of states to exercise their jurisdiction and prosecute individuals suspected of responsibility for such crimes in national courts. The emphasis here is on a state's responsibility to bring to justice anyone responsible for such crimes, via adjusted legislation, expanded universal jurisdiction, and improved international cooperation.

Universal jurisdiction refers to the power of a state to legislate, adjudicate, and punish any individual for crimes committed outside its borders, even when those crimes were not committed against that country or its citizens, and even if the accused is not its citizen.

The idea is that anyone who commits such atrocious, internationally condemned crimes will not be able to find shelter or hide from judgment anywhere on the globe.

The definition of these crimes is the result of historical processes. The constituting treaty of the Nuremberg trials, for example, established principles regarding Nazi war crimes, and mandated that individuals accused of crimes against peace, war crimes, and crimes against humanity committed during the Second World War would be prosecuted in an international military court assembled by all the countries party to the treaty (the U.S.A., USSR, England and France), which would operate in Nuremberg. It was further determined that these criminals may be prosecuted by the national justice systems of all the countries party to the established international court. The treaty was ratified by 19 additional countries and in 1946 its principles were unanimously adopted by the UN General Assembly. Therefore, it was determined that crimes against peace, war crimes, and crimes against humanity are crimes in all states, and all states can prosecute individuals who were responsible for committing them. As a result, Nazi war criminals were prosecuted in several countries.

In another example, the Rules of War were expanded by the 1949 Geneva Convention, and demarcate the line between "right" and "wrong" in times of war. They also define what are benign and flagrant violations. They entrust each individual state with the responsibility to locate and prosecute violators, even if the crime was committed outside its jurisdiction and was not directed against it or its citizens. The description of the flagrant violations extended the definition of war crimes beyond their Nuremberg definition and subjected them to universal jurisdiction.

It is important to note that human rights organizations all over the world have been instrumental in the implementation of universal jurisdiction, as they were, for instance, in actions filed against former Israeli Prime Minister Ariel Sharon and others in the case of the massacre of Palestinians by Christian militias in Sabra and Shatila in Lebanon. This has contributed to the entry of politics into the universal jurisdiction process, as may be seen in many actions brought by NGOs that are supported financially by special interest groups or even states for the benefit of their own agendas.

In a more recent example, Turkish prosecutors said in February 2009 that they were investigating whether Israeli leaders should be prosecuted for crimes against humanity over Israel's offensive in Gaza, after Mazlum-Der, an Islamic-oriented human rights organization, filed an official complaint in Turkey. The group asked that the Israeli officials be detained if they enter Turkey.

In addition, a Spanish judge is currently investigating the role of Israeli soldiers and security officials in a bombing in Gaza in 2002 in which a top Hamas suicide bombing planner, Salah Shehada, and 14 other people were killed. In 2005, Israeli Brig.-Gen. Doron Almog was warned not to leave his plane at Heathrow Airport in London after a UK court issued a warrant for his detention.

The case which opened the floodgates of prosecution under international jurisdiction in recent years was that of Chilean General Pinochet. In 1998, England received a request from a judge in Spain to extradite Augusto Pinochet so he could stand trial in a Spanish court for crimes committed against Spaniards in the territory of Chile. Litigators who support universal jurisdiction believe Pinochet's arrest to be a turning point. Yet critics of the case argued that it was wrong to use the principle of universal jurisdiction as a tool to settle political disputes.

Contemporary implementation of universal jurisdiction is very controversial among international law experts. No public discussion as to its proper implementation and enforcement has ever taken place and, as a result, there are no universally accepted rules.

Every state exercises universal jurisdiction authority according to its own domestic laws, which are far from being international common knowledge. Nor are there any unified definitions of the crimes or certainty about the defense the accused must be afforded. The statutes of limitation differ from country to country. In addition, local trial judges are not always well versed in international law. Thus, all these factors are possible hindrances to the execution of universal jurisdiction.

This situation changes when jurisdiction is exercised by international organizations. International courts such as the ICC exercise rules agreed to by all the countries party to their founding treaties. Furthermore, when the UN Security Council appoints an ad-hoc court, it operates within the framework of international conventions and statutes designated for this purpose by the UN, sometimes even in full cooperation with the countries involved. In both cases, the crimes are clearly defined, as are the rules of evidence, available legal protection, and the like. One should also bear in mind that the judges appointed to these courts usually represent a wide spectrum of legal opinions and some of them are international law experts.

No Need for External Intervention in Cases Under Israeli Jurisdiction

It is important to remember that universal jurisdiction and the International Criminal Court are applied when a country does not or cannot act to prosecute. To my regret, since Israeli army officers have been subject to universal jurisdiction in different countries, it appears that some include Israel in the category of states that would not or cannot take action against such crimes.

Here the answer is clear. Israel is a democracy with a well-developed judicial system, as the statistics below prove. The military judicial system is separate from the civilian courts, with the ability to appeal decisions handed down in a lower court. The Israel Supreme Court, sitting as the High Court of Justice, receives complaints against the military courts and against the discretion of the military prosecution.

The military police reported that between 2000 and 2007, Israel's military judicial system conducted 272 investigations of illegal firing of weapons, with 31 indictments and 17 convictions; 330 investigations of property damage, with 36 indictments and 36 convictions; 475 investigations of violence, with 37 indictments and 34 convictions; and 128 investigations of crimes in the Palestinian areas, with 20 indictments and 18 convictions. The case of Salah Shehada, mentioned above, has already been reviewed thoroughly by Israel's Supreme Court, which is widely respected in the international legal community. What would a Spanish court have to add?

In 2008 there was a large increase in the number of complaints, investigations and convictions. This may be due to the establishment in October 2007 of a new unit - the Military Advocate for Operational Affairs. This unit deals with two types of cases: complaints involving Palestinians and training accidents.

Let us recall that during the Lebanese War in 1982, an Israeli investigative panel consisting of two sitting Supreme Court justices and a high army officer was established to investigate the actions at Sabra and Shatilla, while Lebanon pardoned all those responsible for the crimes committed there. As a result of this panel, then-Defense Minister Sharon was removed from his post. Nevertheless, Belgium decided to attempt to prosecute Sharon. Doesn't this have the ring of political influence?

Political Exploitation of Universal Jurisdiction

A particularly problematic aspect of this issue is political exploitation of universal jurisdiction. Dr. Henry Kissinger wrote in 2001 that in the course of less than ten years we have witnessed an unprecedented movement to turn international politics into legal proceedings, an argument mentioned with growing frequency.

When prosecution is initiated by a country not wholly unrelated to a case, there is always the very real possibility that it is doing so for political reasons. International law does not require that the prosecuting country be neutral or politically impartial in order to exercise its jurisdiction in a given case.

An example of this problem can be found in the attempts to prosecute former Israeli Prime Minister Ariel Sharon for actions in Lebanon. When the lawsuit was first filed in Belgium, which indulges in a very broad definition of the principle of universal jurisdiction, Israel's Justice Ministry began receiving many letters describing Belgium's actions in the Congo.

Many countries are likely to find skeletons buried not so deep in the closet of their own past that qualify as crimes subject to universal jurisdiction. Are countries with such tainted pasts really fit to serve as representatives of the international community in adjudicating crimes of which they themselves may be found guilty?

It is interesting to note how some African nations view universal jurisdiction. Recently, Rose Kabuye, director general of state protocol in Rwanda, was arrested in Germany in accordance with a French extradition warrant. This is an example of why some African nations refer to universal jurisdiction as Western judicial imperialism, because they do not see cases brought by one Western nation against another Western nation. Could you envision a European state bringing action against U.S. generals and politicians for war crimes in [Iraq](#)? Belgium considered it, but was deterred by the U.S. threat to remove NATO headquarters from Brussels.

There is no doubt that the will of a country to arrest and prosecute is affected by its relationship with the country where the crimes had been committed and by its military and economic strength. For example, former British Prime Minister Margaret Thatcher's strong criticism of Pinochet's arrest was influenced by the aid he offered Great Britain during the Falklands war.

Many countries are careful to limit their view of universal jurisdiction to a demand that either the suspect or the victim be in their territorial jurisdiction for such a process to begin. The purpose for which universal jurisdiction was created may be a worthy and noble one. However, its current execution is problematic, to say the least.

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Irit Kohn, Esq., joined the Israel Ministry of Justice in 1989 and from 1995 to 2005 was director of its International Affairs Department. In that position she was involved in one of the first cases involving universal jurisdiction as head of the legal team defending Prime Minister Sharon in Belgium in 2001. In 2004, she was elected Vice-President of the International Association of Jewish Lawyers and Jurists. This [Jerusalem Viewpoints](#) is based in part on her presentation on November 26, 2008, at a conference in London on "Averting Abuse of Universal Jurisdiction."