

European Efforts to Apply the Principle of Universal Jurisdiction Against Israeli Officials

by

Silvia Nicolaou Garcia

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Summary Points:

- Universal Jurisdiction is a principle in international law whereby states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country
- Universal jurisdiction is a very powerful tool in the context of the Israel/Palestine conflict, since the Israeli Supreme Court has not adequately conducted investigations of violations of international law. Since 2001 some European countries have tried to prosecute alleged Israeli war criminals under the principle of universal jurisdiction. Belgium, the UK, Spain, Turkey and Norway are some of these countries.
- Below is an account of the how the process of prosecuting alleged Israeli war criminals in European countries has been politicised due to pressure exerted by Israel and the US on the prosecuting countries, to the extent that in Belgium the law has been narrowed down. Similar amendments may follow in Spain.



- These political interferences with the judicial process risk violating the separation of powers and rule of law. What is worse, impunity of Israeli officials will continue and Palestinians will be offered no judicial redress for the war crimes perpetrated against them.

Introduction

The legal basis of Universal Jurisdiction

The principle of universal jurisdiction permits the national courts of any state to try people accused of crimes under international law, including war crimes, crimes against humanity, genocide, torture, extrajudicial executions and “disappearances”, regardless of the nationality of the alleged perpetrators or victims and regardless of where the crimes were committed.

The reliance on universal jurisdiction is nothing new. The idea is rooted in the approach taken against piracy in previous centuries, allowing any country to capture and prosecute wherever a pirate vessel was found and regardless of the nationality of those charged with the crime. International crimes associated with piracy or international slave trading were prosecuted in national courts before the modern tradition of international accountability was launched after World War II in the Nuremberg and Tokyo War Crimes Tribunals.

The main international legal instruments governing the specifications of the basic norms of international humanitarian law and of international criminal law clearly call upon all parties to these international treaty arrangements to take steps, as a matter of legal obligation, to ensure the maximum level of compliance. For instance, in Article 1 of the Genocide Convention the parties undertake the obligation “*to prevent and punish*” the crime of genocide. Similarly, in the Geneva Conventions of 1949, common Article 1 commits the parties not only to respect the treaty, but “*to ensure respect for the present Convention in all circumstances*”. Articles 146 and 147 of the Geneva Convention IV on the Protection of Civilians in Time of War are particularly significant. Article 146 commits the parties “*to enact any necessary legislation to provide effective penal sanctions for persons committing grave breaches of the present Convention*”. The same provision imposes an “*obligation to search for persons alleged to have committed such grave breaches, and shall bring such persons, regardless of nationality, before its own courts*”.

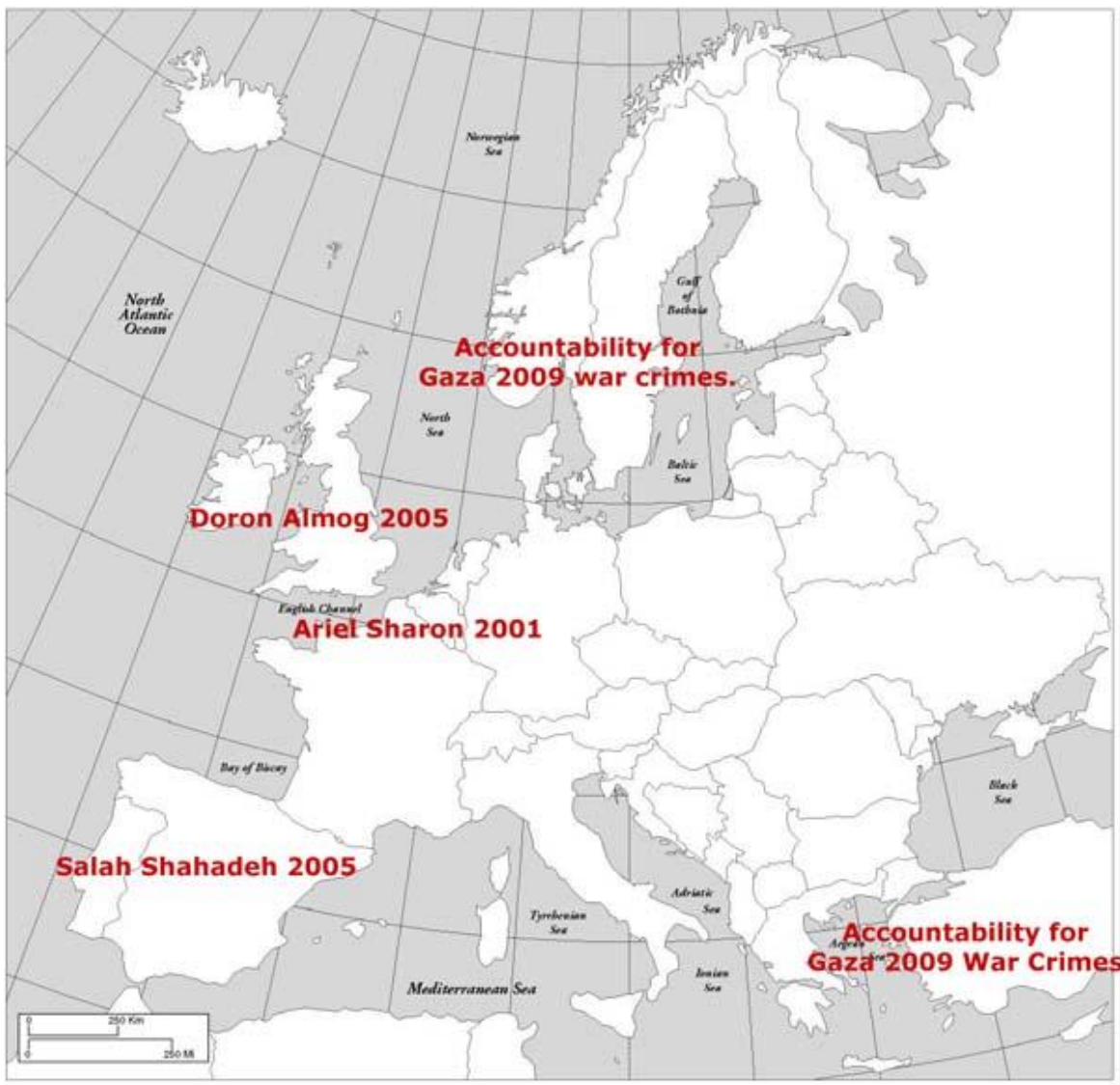


It is against such backgrounds that a trend toward the assertion of universal jurisdiction by national legislation and judicial practice can be discerned. This trend has been encouraged by the detention in 1998 of the former Chilean dictator Augusto Pinochet in Britain to determine whether extradition to Spain for criminal prosecution should be granted. The litigation in British courts affirmed the extradition as appropriate so far as international crimes had been internalized by implementing legislation. Since the end of the Second World War, more than 15 countries have exercised universal jurisdiction in investigations or prosecutions of persons suspected of crimes under international law, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the UK and the United States of America have extradited persons to countries for prosecution based on universal jurisdictions. Significantly, the 1960 capture of Adolf Eichmann in Argentina and subsequent trial in Israel is regarded as the most prominent precedent for universal jurisdiction over genocide.



A commitment to wider goals of justice

Due to the fact that impunity exists, many war criminals remain unaccountable and victims of those war crimes will only be awarded reparations if the national criminal and civil justice systems of all countries step in to prosecute the crimes on behalf of the international community. This legislation therefore enables national authorities to investigate and prosecute any person suspected of crimes, regardless of where the crime was committed or the nationality of the accused and the victim. In doing so, governments will ensure that their countries cannot be used as safe havens by the worst criminals.



Universal Jurisdiction and the prosecution of Israeli War Crimes

Having explained what the basis of universal jurisdiction is, we will now examine how some countries are prosecuting/have attempted to prosecute alleged Israeli war criminals in their national jurisdictions. We will focus on Belgium, the UK, Spain, Norway and Turkey. It will be seen how in these countries the judicial proceedings have been obstructed due to political interference rather than judicial problems.

Belgium and Ariel Sharon (2001)

In 2001 there was a criminal complaint in Belgium on behalf of 21 survivors of the 1982 massacre at the Shabra and Shatila refugee camps in Beirut. The then Israeli Defence Minister (Ariel Sharon) and members of the Lebanese Christian militia were charged with war crimes, crimes against humanity and genocide.

The complaint against Sharon was first lodged with the Belgian Public Prosecutor's Office by a group of 23 Lebanese and Palestinians, who filed the case under Belgian universal jurisdiction legislation enacted in 1993 and 1999. The central argument of the case hinged upon Ariel Sharon's Command Responsibility as Commander of the Israeli Defence Forces (IDF), which was in full control of Beirut when the massacres took place in Sabra and Shatila. Although the killings of the unarmed Lebanese and Palestinian civilians were carried out by Lebanese militia units affiliated with the Israeli-backed Christian Lebanese forces (the Phalange), the legal, military and decision-making responsibility rested with Ariel Sharon under established and recognized principles of international law.

The lawyer representing Israel argued that Belgium lacked the legal authority to try Ariel Sharon, that he was immune as a head of government (2001), that the case had already been considered in Israel by the Kahan Commission of Inquiry (a judicial commission), that the 1993 law could not be used retroactively, and that the case had no connection with Belgium. A Brussels public prosecutor rejected the defence arguments and accepted that the case should go ahead.



On the 13th of June 2003 the Belgian Ministry of Justice announced that it had started the procedure to transfer the Sabra and Shatila case to Israel. This came as the result of and reaction to persistent pressure exerted by the Israeli government. The US government also forced the Belgian government to curtail Belgium's progressive universal jurisdiction legislation (the anti-atrocity law), which had undergone careful reconfiguration in Belgium's parliament. The US feared that this law might also lead to the prosecution of US military or governmental officials, or their possible arrest in Belgium. Donald Rumsfeld kept pressure on Belgium by threatening to withhold funding for NATO operations and building projects, and even warned that the US would move NATO out of Belgium altogether unless the law was watered down.

The pressures increased notably after the Supreme Court of Belgium consecrated the Sabra and Shatila survivors' right to be heard in Belgium, a decision which was confirmed on demand by the Indictment Chamber of the Court of Appeals and endorsed by the offices of the Belgian Prosecutor-General.

This Israeli and US intervention was an unprecedented act of interference in a sovereign state's judicial and political processes which weakened a number of legally sound attempts at attaining international justice in Belgian courts, including cases against the former Chadean dictator Hissene Habre.

The UK and Doron Almog (2005)

In 2005 Daniel Machover and Kate Maynard from Hickman and Rose Solicitors (UK) worked with lawyers from the Palestinian Centre for Human Rights (PCHR), on behalf of mutual clients, on files of evidence for use in England and Wales relating to alleged "grave breaches" of the Fourth Geneva Convention (1949). On 26th August 2005, evidence files relating to Gaza cases were handed over to the anti-terrorist and war crimes unit of the Metropolitan Police.

Grave breaches are criminalised in England and Wales under the Geneva Conventions Act 1957, which was introduced in the UK in order to comply with this country's obligations to provide domestic laws to enable "universal jurisdiction" to be exercised for grave breaches specified in



the four Geneva Conventions of 1949. The alleged victims sought remedies in England and Wales because they were denied any remedy through the Israeli legal system.

The following cases all identify Major General Doron Almog (GOC Southern Command of the Israel Defence Forces from 8 December 2000 to 7 July 2003) as a suspect:

1. The demolition of 59 houses in Rafah, Gaza strip, on 10 January 2002 (it is a war crime to destroy property when it is not justified by military necessity. Even when it is justified by military necessity the owners of the household must be informed)
2. The killing of Noha Shukri Al Makadma on 3 March 2003 as the result of a punitive house demolition
3. The killing of Mohammad Abd Elrahman on 30 December 2001
4. The dropping of a one ton bomb on the Al Daraj neighbourhood of Gaza City on 22 July 2002

Mr. Almog was due to speak at a synagogue in Birmingham on 11 September 2005. After having received the files of evidence as to his criminal liability for the above alleged offences, the police made an application to Bow Magistrates' Court for a warrant. On the 10th of September the Senior District Judge issued a warrant for the arrest of Doron Almog in relation to the complaint regarding the 59 house demolitions. The police waited at the immigration desk at Heathrow airport for Doron Almog to disembark from a flight that had arrived from Tel Aviv some time earlier, but due to leaked information he did not disembark from the plane and the police failed to board the plane to arrest him. Doron Almog then flew back to Israel and escaped justice in the UK.



The case of Salah Shahadeh (2009)

On 22nd July 2002 (around midnight), an IDF airplane dropped a one ton bomb in the district of Al Daraj in the city of Gaza. The military objective of that operation was to kill the Hamas leader in the Gaza Strip, Salah Shahadeh, who was at home in that precise moment. The result of the operation was the killing of Salah Shahadeh and 14 other civilians, the majority of whom were young children and babies. 150 people were wounded and half of them suffered from major injuries. 7 members of the Matar family, whose house was totally destroyed, were among the victims.

In Madrid, 6 years later and a few days after the Gaza invasion of January 2009, judge Fernando Andreu Merelles decided to open a criminal investigation, based on universal jurisdiction, against 7 politicians and Israeli officials and commanders allegedly guilty of war crimes and crimes against humanity (amongst them; Dan Halutz, chief of the IDF, Benjamin Ben-Eiezer, ministry of Defence, Moshe Yaalon, Doron Almog, Giora Eiland, Michael Herzog and Abraham Dichter).

Since Israel did not supply information about the existence of any judicial procedures related to that military operation and showed a lack of will to help the judge, the Spanish tribunal decided that the investigation would be carried out under Spanish jurisdiction. That same day, Israeli civil servants sent a 400 page document to the judicial team in Spain stating that the case was being investigated in Israel and that the Spanish tribunal lacked jurisdiction.

The process in Israel

The internal investigation carried out in Israel concluded that collateral damage was due to a failure in the espionage system, and that it was not envisaged by the Israeli officials. On 17th June 2007, almost 4 years after the incident, Yesh Gvul and 5 other human rights organizations presented a complaint to the Israeli Supreme Tribunal, who finally accepted to prosecute the case.



The Tribunal had to evaluate whether the bombardment was a war crime. Ultimately, it did not make a decision and instead simply stated that an “objective and independent” body would investigate the incident.

On 23rd January 2008 Prime Minister Ehud Olmert named an “impartial and independent” commission of investigation made up of three members, two of them former IDF generals and the other an ex official of the security general services. It is the author’s view that this calls into question the integrity of this “independent” commission. To this day, the commission has not finished its job.

Back in Spain

On 2nd April 2009, the Spanish Attorney General presented a petition to the Spanish Tribunal so that the Israeli investigation would be declared incompetent. On 4th May of 2009 the Tribunal considered that the procedures and adoptions of the Israeli fiscal, the Israeli Supreme Tribunal and the commission of investigation did not comply with constitutional law to provide an effective, impartial and independent tribunal and held that the investigation was not impartial and independent.

On 4th June Israel’s Defence Minister Ehud Barak stated in Haaretz that: “he would do anything to annul the decision”. As occurred in Belgium, the judicial proceedings have been politicised in part due to the pressure which the Israeli government exerted on the Spanish officials.

Universal jurisdiction under threat

Spain is one of the principal countries to have contributed to accountability for the commission of international crimes, due to its modern legislation on universal jurisdiction. (It was the first judicial system to start the extradition of Pinochet and is currently investigating other alleged war criminals).

After political pressure from Israel concerning the Salah Shahadah case, China’s ex-Minister of Foreign Affairs has been accused of genocide in Tibet. Similarly, there are currently two other universal jurisdiction cases against US officials for alleged torture in Guantanamo. Accordingly, the Spanish parliament passed a resolution to approve a reform proposal of Spanish legislation



on universal jurisdiction. This proposal to change the law limits the exercise of the legislation to cases where there have been Spanish victims or other situations where the accused is in Spanish territory. At the moment it is not clear whether the changes in legislation will apply to the cases where investigation was already started.

On 30th May 2009 the Spanish National Court decided to shelve the investigation and drop the charges against the Israelis in the wake of diplomatic tensions that had arisen between Israel and Spain.

Turkey and universal jurisdiction (February 2009)

In February 2009 Turkish prosecutors investigated whether Israeli leaders should be prosecuted for crimes against humanity over Israel's offensive in Gaza after Mazlum-Der, a human rights organization, filed an official complaint in Turkey. The group asked that the Israeli officials concerned be detained if they entered Turkey.

This investigation is specifically against several of senior Israeli officials: Shimon Peres, Ehud Olmert, Tzipi Livni, Ehud Barak and Gabi Ashkenazi, the army chief of staff.

Under Turkish law, prosecutors are obliged to look into all complaints to determine whether there are grounds to initiate a full-scale investigation that could lead to formal charges. The complaint will be dismissed if the prosecutor decides it does not merit a case.



Norway and universal Jurisdiction (April 2009)

In April 2009 a group of Norwegian lawyers filed a complaint accusing 10 Israelis of war crimes in Gaza under the country's new universal jurisdiction law. Former Primer Minister Ehud Olmert and Defense Minister Ehud Barak and opposition leader Tzipi Livni were among those named in the complaint. The charges stem from the Israeli government's attack on the Gaza Strip beginning in late December 2008, which the lawyers say violated international law by illegally targeting civilians, using internationally-banned weapons such as white phosphorus against a civilian population and attacking hospitals and medical personnel. The case is being brought on behalf of three people of Palestinian origin living in Norway and 20 families who lost relatives or property during the attack and is submitted pursuant to Articles 102 and 109 of the Norwegian Penal Code relevant to war crimes and gross violations of international humanitarian law (which were amended last year to allow universal jurisdiction to take place).

The Chief Prosecutor of Norway Siri Frigaard is currently investigating whether there are grounds for charges or a police investigation.

Concluding Remarks

It is an undeniable fact that, despite the clear dispositions of international law, Palestinians living in forced exile since 1948 have never been allowed access to Israel, let alone access to justice in Israel for a crime against humanity under supervision of Israeli officials, past and present. Because Israel did not ratify the Rome Treaty which established the International Criminal Court, universal jurisdiction remains the only mechanism whereby international law can extend to its citizens. This is strengthened by the fact that there is no chance of an ad hoc tribunal being established in the foreseeable future in the case of Israel, as the US would veto such a proposal at the UN Security Council.

Two main trends can be identified from the above accounts of universal jurisdiction cases against Israeli war criminals:



The double standards of universal jurisdiction

The realities of geopolitics are built around double standards when it comes to war crimes. Many critics argue that universal jurisdiction is but a sign of Western judicial imperialism since most of the successful cases have been against war criminals from Africa or other developing countries. Universal jurisdiction is a very powerful tool to bring justice to victims, however it seems to be much harder to bring justice when the alleged war criminal originates from a Western or allied country (be it US, Israel or China).

Another potential source of double standards when looking at universal jurisdiction cases is that many Western countries are likely to find skeletons buried in their own past that could also qualify as crimes.

The politicization of the judicial process

Politics plays a pivotal role in the universal jurisdiction process which normally halts the judicial investigations or makes the parliament of that country change their universal jurisdiction laws.

Further to the amendment of the universal jurisdiction law after the Ariel Sharon case and the subsequent proposals for amendment in Spain due to the Salah Shahadeh case, it is clear that the application of the principle of universal jurisdiction to seek accountability for war crimes committed against Palestinians is more complicated and challenging than it appears.



Recommendations

- In order for international humanitarian law to be relevant, its explicit provisions for individuals and civilian populations must be enforced. So long as States and individuals who violate international law and commit war crimes or crimes against humanity act with impunity, the protected persons of international humanitarian law will continue to suffer the consequences
- Political pressure cannot be allowed to interfere in the work of an independent judiciary. The separation of powers is essential in order to ensure that political concerns and self-interests are not placed above individual legitimate rights.
- Universal jurisdiction for alleged Israeli war criminals is not an issue which affects Palestinian only, but is of concern to all international citizens. If there is no accountability, the rule of law cannot be upheld and impunity will remain. Universal jurisdiction provides the only mechanism whereby international law can extend to all individuals. The fight for justice must continue on behalf of those to whom justice has been denied.



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