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Universal Jurisdiction: Chronicle of a Death Foretold

Rephael Ben-Ari

UNIVERSAL JURISDICTION: CHRONICLE OF A DEATH FORETOLD?

DR. REPHAEL BEN-ARI*

I. INTRODUCTION

At the turn of the century, the doctrine of universal jurisdiction—together with the newly established International Criminal Court ("ICC")—was supposed to have become the bedrock of a multilateral endeavor to create a global system of criminal justice. In the eyes of many, this project was one of the pinnacles of the post-Cold War era, a milestone achievement of modern international law, denoting the Kantian vision of a borderless world unified by neo-liberal ideas of humanism and the rule of law.[1] However, a few commentators were skeptical. These few regarded the possibility of national jurisdictions prosecuting foreign perpetrators for the extraterritorial commission of international crimes to be premature and unrealistic, politically as well as jurisprudentially.[2] Despite the expression of such skepticism being unpopular at the time, it was nevertheless plainly heard by several prominent jurists.

Among these skeptics were then-President of the International Court of Justice ("ICJ") Judge Gilbert Guillaume and Law Lord Nicolas Browne-Wilkinson, who presided over the bench[3] of the House of Lords in the *Pinochet*

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* PhD (Bar-Ilan University); LL.M (Public International Law) (*cum Laude*) (Leiden University); LL.B (*cum Laude*) (Tel Aviv University); 2011-2012 Global Research Fellow & Neil MacCormick Fellow in Legal Theory, Hauser Global Law School Program, New York University School of Law; Adj. Professor of Public International Law & International Criminal Law, Bar-Ilan University Faculty of Law & Netanya Academic College School of Law.

1. *See, e.g.*, ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY 31 (2003). Cooper regards the ICC as a striking example of the postmodern breakdown of the distinction between domestic and foreign affairs, reflecting the vision of a world that is governed by law rather than by force, in which those who break the law will be treated as criminals. In this postmodern world, *raison d'état* is replaced by a moral consciousness that applies to international relations as well as to domestic affairs. The quest for the establishment of international judicial institutions therefore, although being established by conventional treaties between sovereign states, results in "a growing web of institutions that go beyond the traditional norms of international diplomacy." *See also* Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 3-4 (2011).

2. *See, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001; Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 311-12, 356-58, 367-74, 427-28 (2004); Chandra Lekha Sriram, *New Mechanisms, Old Problems? Recent Books on Universal Jurisdictions and Mixed Tribunals*, 80 INT'L AFFAIRS 971, 972, 974-75 (2004).

3. *See* Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 428 (2000).

case.[4] The latter was the only scholar not to have joined in the adoption of the 2001 Princeton Principles on Universal Jurisdiction[5]—the most significant academic attempt to date—to propose model principles on universal jurisdiction. Explaining his reasons for dissenting from the project, Lord Browne-Wilkinson stated:

> I am strongly in favor of universal jurisdiction . . . if, by those words, one means the exercise by an international court or by the courts of one state of jurisdiction over the nationals of another state with the prior consent of that latter state. . . . But the Princeton Principles propose that individual national courts should exercise such jurisdiction against nationals of a state which has not agreed to such jurisdiction. Moreover the principles do not recognize any form of sovereign immunity. . . . If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trail proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit . . . the free interchange of diplomatic personnel.[6]

Judge Guillaume, in his Separate Opinion in the *Arrest Warrant* case,[7] also noted:

> International criminal law has . . . undergone considerable development and constitutes today an impressive legal *corpus*. . . . But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would present not an advance in the law but a step backward.[8]

These dark prophecies were set aside easily, due to the intellectual atmosphere that ruled at the time. Nevertheless, a decade later, they have essentially foretold the course of developments. Interest groups have consistently manipulated universal jurisdiction, as demonstrated in this paper within the context

4. Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), (1999) 2 W.L.R. 827 (U.K.).

5. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

6. *Id.* at 49 n.20.

7. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3, 35 (Feb. 14).

8. *Id.* at 35, ¶ 15 (Separate Opinion of President Guillaume).

of the ongoing Middle-East conflict and the "war on terror."[9] Consequently, leading jurisdictions that had initially adopted ambitious versions of universal jurisdiction-based proceedings were compelled to pass far-reaching modifications to their laws.

This paper traces the way in which the concept of universal jurisdiction has been abused since the late 1990s as part of the so-called "lawfare" against Israel.[10] The following section, Part II, will review briefly the significance of the universal jurisdiction doctrine, and the main complexities involved in its application within the framework of the multilateral endeavor to establish an overall system of international criminal justice. More specifically, Part III will discuss the inherent potential for manipulation and abuse involved in the exercise of universal jurisdiction by national courts. Parts IV-VI will review the various universal jurisdiction-based proceedings initiated against Israeli officials in the legal systems of Belgium, Spain, and the United Kingdom respectively, pointing to the dangers of unrestrained application of the doctrine, as well as the lack of consensus surrounding its implementation. The last part will demonstrate how the intensive manipulation of universal jurisdiction has resulted in a counter-reaction that has, in fact, set back the cause of international global justice, while revealing the risks involved in the application of a largely unsettled legal doctrine. Altogether, this has been a historical milestone that will undoubtedly change the way universal jurisdiction is viewed and dealt with by jurists and politicians alike.

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9. *See also* Luc Reydams, *The Rise and Fall of Universal Jurisdiction* 24-27 (Leuven Ctr. for Global Governance Studies, Working Paper No. 37, 2010), *available at* https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp31-40/wp37.pdf.

10. Originally, "lawfare" was a neutral term, popularized in a 2001 speech at Harvard University by Maj. Gen. Charles Dunlap, who defined it as "a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective." Today, although some argue that "lawfare" involves the positive use of law and legal institutions to achieve strategic objectives without the use of military force, the more common use of the term in popular discourse has a distinctly negative connotation, suggesting abuse, misuse, and exploitation of the law. Thus, the term is used mostly as a label to criticize those who use international law and legal proceedings against the state, especially in areas related to national security, to achieve strategic military or political ends. In any case, it is acknowledged that "lawfare" is "a powerful term that reflects the importance of law in the conflicts of the twenty-first century," and that the "legitimate application of international law against participants in an armed conflict should not be labeled "lawfare" (although there is no agreement on a definition of "legitimate application"). *See Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting Sept. 11, 2010*, 43 CASE W. RES. J. INT'L L. 11, 12-13, 18, 20-21 (2010). "*The Lawfare Project*"—a New York-based organization devoted to exposing alleged abuses of the international legal system—cites as examples of "lawfare" the case brought to the ICJ on the legality of Israel's security barrier; human rights cases sponsored by pro-Palestinian organizations; and litigation in support of terrorist detainees. *See id.* at 12 n.3. In recent years "lawfare" has been associated with the spread of universal jurisdiction, particularly in the case of Israeli officials. *See* Reydams, *supra* note 9, at 26 n.75.

II. THE COMPLEX VISION OF INTERNATIONAL CRIMINAL JUSTICE

The last two decades witnessed an unprecedented and rapid development in the field of international criminal law.[11] With the end of the stagnancy and pessimism that characterized the Cold War era, the path opened for a new "post-modern" era, underlined by the notions of globalization, de-territorialization, and interconnectedness, as well as the upholding of the human interest, which supposedly supersedes national interests.[12] Against this background, the quest for the establishment of a global system of international justice was enthusiastically heard within the diplomatic, academic, and civil-society circles.[13] This intellectual and political atmosphere facilitated the establishment of several *ad hoc* international criminal tribunals,[14] as well as the adoption of the Rome Statute and the formation of the ICC—a long-awaited major achievement.[15] This atmosphere also encouraged renewed interest in the concept of universal jurisdiction, expected to become a cornerstone of a multilateral endeavor motivated by the vision to create a comprehensive system to ensure that perpetrators of the "most serious crimes of international concern"[16] would not find a safe haven, and to deter potential perpetrators—mostly leaders, high-ranking officials, and commanders—from materializing their atrocious schemes.[17]

Universal jurisdiction is by no means a new concept.[18] Nevertheless, despite recurring attempts by various forums to outline the doctrine,[19] it is still difficult to

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11. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 4 (2d. ed. 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 398, 402-03 (6th ed. 2008).

12. *See, e.g.*, COOPER, *supra* note 1, at 50-51, 76 (explaining that in the so-called postmodern international order, as the state itself becomes less dominating, "state interest becomes less of a determining factor in foreign policy: the media, popular emotion, the interests of particular groups or regions (including transnational groups) all come into play." Consequently, the "postmodern state" values above all the individual, and society as a whole becomes more skeptical of state power, less nationalistic. For the "postmodern state" success therefore supposedly means openness and transnational cooperation.). For further discussion of the notions of globalization and de-territorialization in the context of a postmodern normative discourse, *see* REPHAEL H. BEN-ARI, THE NORMATIVE POSITION OF INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS UNDER INTERNATIONAL LAW—AN ANALYTICAL FRAMEWORK 181-221 (2012).

13. *See, e.g.*, Reydams, *supra* note 9, at 4-6.

14. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY] (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR] (establishing the International Criminal Tribunal for Rwanda); as well as mixed/hybrid tribunals such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. *See generally* SHAW, *supra* note 11, at 417-18.

15. Considered by some authors to be the most important institutional innovation since the founding of the United Nations. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT X (4th Ed. 2011).

16. *See* Rome Statute of the International Criminal Court, Preamble, art. 1, UN Doc. A/CONF.183 (July 17, 1998).

17. For a discussion of the objectives of international criminal law, *see* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 22-39 (2010).

18. *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 28-42 (2003); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J.

find a broadly accepted definition that describes the legal notion of the principle of universal jurisdiction.[20] Clearly, this is one of the main reasons for the substantial confusion surrounding this usage. The 2009 African Union-European Union ("AU-EU") Joint Expert Report on the Principle of Universal Jurisdiction suggests that:

> [U]niversal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state, by nationals of another state, against nationals of another state, where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction.[21]

In other words, universal jurisdiction amounts to an exceptional extraterritorial claim by a state to prosecute crimes in circumstances where none of the traditional criminal jurisdictional links that rely on a territorial or national nexus[22] exists at the time of the commission of the alleged offence.[23] It is the heinousness and gravity of the alleged offence—indeed an *international* crime[24]—that theoretically justifies the assertion of jurisdiction by national judges,

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121, 130 (2007); Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 499 (2007).

19. *See, e.g.*, Draft Code of Crimes against the Peace and Security of Mankind, Rep. of the Int'l Law Comm'n, 48th Sess., May 6-July 26, 1996, U.N. Doc. A/CN.4/L.522 and Corr.1, at 15-56, *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996/Add.1; INT'L LAW ASS'N COMM. ON INT'L HUMAN RIGHTS LAW & PRACTICE, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES, REP. OF THE 69TH CONFERENCE (2000); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *supra* note 5; *see also* INT'L COUNCIL ON HUMAN RIGHTS POLICY, HARD CASES: BRINGING HUMAN RIGHTS VIOLATIONS TO JUSTICE ABROAD—A GUIDE TO UNIVERSAL JURISDICTION (1999), *available at* http://www.ichrp.org/files/reports/5/201_report_en.pdf.

20. *See* Jouet, *supra* note 18, at 498-99. *See, e.g.*, Press Release, General Assembly, Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee; Further Guidance Sought from International Law Commission, U.N. Press Release, GA/L/3415 (Oct. 12, 2011) (statement of Mr. Vieria, Brazil) (calling to "find an acceptable definition of universal jurisdiction").

21. *See AU-EU Technical Ad hoc Expert Rep. on the Principles of Universal Jurisdiction*, ¶ 8, Council of the Eur. Union 8672/1/09 Rev 1 (Apr. 16 2009), *available at* http://www.africa-eu-partnership.org/pdf/rapport_expert_ua_ue_competence_universelle_en.pdf.

22. That is, the principles of territoriality, nationality, passive personality, or the protective principle, ordinarily necessary under international law in order to assert jurisdiction by national authorities.

23. *See AU-EU Technical Ad hoc Expert Rep.*, *supra* note 21, ¶ 8.

24. The modern category of "*international* crimes," unlike "*transnational* crimes" (such as illicit trafficking in narcotic drugs, unlawful arms trade, money laundering, etc.), includes breaches of *international rules*, intended to protect *values* considered important by the international community and consequently binding all states and individuals. The heinousness and gravity of the crimes—or in the words of the Rome Statute, the recognition that such grave crimes, being "the most serious crimes of concern to the international community as a whole," threaten "the peace, security and well-being of the world"—underline the universal interest in their repression, and entails the personal criminal liability of the perpetrators. See CASSESE, *supra* note 11, at 11-12; SCHABAS, *supra* note 15, at 89-90; NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3-4, 18-19 (2012); Rome Statute of the International Criminal Court, *supra* note 16, at Preamble & arts. 5-8; Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 19, arts. 1-2, 16-20.

supposedly acting on behalf of the interests of the "international community as a whole."[25]

Universal jurisdiction is not the only international legal doctrine that enables states to assert jurisdiction over foreign nationals with regard to crimes that have not been committed on their soil. Numerous international treaties *oblige* signatory states to exercise their criminal jurisdiction over crimes defined in those treaties[26] or to extradite the alleged offender to states that will prosecute them; this obligation materializes when the suspect is *present* in the territory of the forum state.[27] Unlike this form of *treaty-based* extraterritorial jurisdiction, universal jurisdiction is regulated by *customary* international law. States thus largely accept that customary law *permits*[28] them to exercise their criminal jurisdiction over certain categories of international crimes (such as genocide, crimes against humanity, certain war crimes, piracy, etc.).[29] However, national legislation, jurisprudence, and practice are far from being conclusive regarding the definition of categories of international crimes justifying the assertion of universal jurisdiction.[30] Furthermore, it is unclear whether a state can exercise universal jurisdiction *in absentia*, without the accused being in the custody of the forum state.[31] Another controversial question, which remains open, is the scope of

25. *See* Rome Statute of the International Criminal Court, *supra* note 16, Preamble; *see also* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Preamble, Aug. 8, 1945, U.S.-Fr.-U.K.-U.S.S.R *available at* http://avalon.law.yale.edu/imt/imtchart.asp ("acting in the interests of all the United Nations").

26. Such treaty crimes include grave breaches of the 1949 Geneva Conventions, the crime of torture as defined in the Convention against Torture 1984, the crime of enforced disappearance as defined in the Convention against Enforced Disappearance 2006, as well as certain crimes defined in the so-called set of anti-terrorism conventions.

27. The so-called principle of *Aut Dedere Aut Judicare* ("extradite or sentence"), which is frequently confused with the principle of universal jurisdiction. *See also* Questions Relating to Obligation to Prosecute or Extradite (Bel. v. Sen.), 2012 I.C.J. 422, ¶¶ 68, 89-91, 94-95, 99-100 (July 20, 2012); Zdzislaw Galickki, Special Rapporteur, *Third Report on the Obligation to Extradite or Prosecute (aut Dedere aut Judicare)*, Int'l L. Comm'n, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, UN Doc. A/CN.4/603, ¶¶ 24-25, 30, 40, 42, 45-48, 83, 87, 98, 101-02, 105-06, 116, 123-25, 127 (June 10, 2008).

28. There is no *duty* under customary international law to prosecute all serious human rights abuses under universal jurisdiction. *See, e.g.*, Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 895 (2003); Colangelo, *supra* note 18, at 130.

29. *See, e.g.*, Colangelo, *supra* note 18, at 130.

30. *See* discussion in Arrest Warrant of 11 April 2000, *supra* note 7, at 36 (Separate Opinion of President Guillaume), 63 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal); *see also* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 735-60 (2004).

31. An echo to this controversy can be found in the Joint Separate Opinions of Judges Higgins, Kooijmans and Buergenthal, and the Separate Opinion of President Guillaume. Arrest Warrant of 11 April 2000, *supra* note 7, at 35-46, 63-91. *See also* Jouet, *supra* note 18, at 498-99 (distinguishing between countries (such as Austria, France, and Switzerland) that uphold a so-called doctrine of *conditional* universal jurisdiction, that requires custody of the accused in order to initiate proceedings (including investigation), and countries (such as Belgium and Spain, prior to the passage of amendments to their universal jurisdiction laws) that support the *absolute* universal jurisdiction

universal jurisdiction *vis-à-vis* the immunity recognized for certain high-ranking officials under international law.[32]

III. THE INHERENT PORTENTIAL FOR MANIPULATION AND ABUSE

The ICC and *ad hoc* criminal tribunals are international institutions that act on the basis of broad consensus reflected in constituent international treaties and binding resolutions of the U.N. Security Council.[33] These documents outline a rather comprehensive scheme of jurisdictional checks and balances. Universal jurisdiction, on the other hand, is implemented by *national* authorities. Its application and interpretation is therefore subjected to the discretion of national prosecution and judicial authorities as well as the conceptions of politicians regarding the interests of the international community.[34]

In view of the above, although the modern idea of universal jurisdiction was often discussed after the Nuremberg and Tokyo trials[35] and the judgment of the Israel Supreme Court in the *Eichmann* case,[36] until two decades ago states were

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doctrine, allowing to prosecute a defendant regardless of whether he or she is in custody); *see also* O'Keefe, *supra* note 30, at 747.

32. The ICJ determined, under customary international law, certain holders of high-ranking office in a state, such as the Head-of-State, Head-of-Government, and Minister of Foreign Affairs (as well as diplomatic and consular agents) are entitled, while in office, to an absolute (procedural) personal state immunity from jurisdiction in other states. The Arrest Warrant of 11 April 2000, *supra* note 7, ¶ 51. The list of high-ranking government officials entitled to such immunity is not exclusive, and depends on the function of the state official concerned. *See also Application for Arrest Warrant against General Shaul Mofaz*, Bow St. Mag. Ct. (unreported), ¶¶ 10-15 (Feb. 12, 2004), http://www.geneva-academy.ch/RULAC/pdf_state/Application-for-Arrest-Warrant-Against-General-Shaul-Mofaz.pdf; Anatolevich Kolodkin, Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l L. Comm'n., 60th Sess., May 5-June 6, July 7-Aug. 8, 2008, UN Doc. A/CN.4/601, ¶¶ 30-34, 39, 41, 61-63, 66-67, 109, 117-121 (May 29, 2008).

33. *See also* Sriram, *supra* note 2, at 311-312. *See* Rome Statute of the International Criminal Court, *supra* note 16; ICTY, *supra* note 14; ICTR, *supra* note 14.

34. Kontorovich notes that while all nations are in effect joint owners of a right to prosecute under universal jurisdiction, and may share a common interest in universal jurisdiction offences, they manifestly differ in the valuations they assign to this interest. Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 405 (2008). *See also* Sriram, *supra* note 2, at 309 (noting that national judges have taken radically different approaches to the exercise of universal jurisdiction).

35. *See* Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, T.S. No. 27 (Sept. 30 - Oct. 1, 1946); Judgment of the International Military Tribunal for the Far East, (U.S. v. Araki), (12 Nov. 1948).

36. Israel was one of the first states to enact legislation based on the doctrine of universal jurisdiction for war crimes, crimes against the Jewish people and crimes against humanity. Nazis and Nazi Collaborators Punishment Law, 5710-1950, SH No. 57. The law was the legal basis for the *Eichmann* case, decided by the District Court of Jerusalem and the Supreme Court of Israel in 1961/2. CrimC (Jer.) 40/61 Attorney General v. Eichmann, (1961); CA 336/61 Eichmann v. Attorney General [1962]. As such, the case is considered the starting point in so far as universal jurisdiction as manifested in domestic courts is concerned. *See* SHAW, *supra* note 11, at 671. Although, as the judges in the *Eichmann* case made clear, due to the unique circumstances, the jurisdiction of Israel was also based on the principle of passive personality, due to the fact that the victims were Jewish and were therefore represented by the State of Israel, which was the Jewish state. CA 336/61 Eichmann v.

reluctant to implement it. The high political costs and the risks of infringing upon the sovereignty of other states deterred national authorities from legislating and applying this vague customary doctrine.[37] Nevertheless, in the late 1990s, several countries—mostly Western-European, led by Belgium and Spain, which were probably motivated by the adoption of the Rome Statute and heated discussions about the future of the international rule of law in view of dreadful events such as in Kosovo, Rwanda, and Congo—began to adopt laws enabling their courts to hear claims based on the principle of universal jurisdiction.[38] Such claims, submitted by foreign individuals, mostly victims of atrocities, and various international non-governmental organizations ("INGOs"), on the basis of national legislation that broadly interpreted the principle of universal jurisdiction, brought about a massive number of claims that practically turned certain European capitals into self-appointed international criminal courts.[39] Eventually, only very few of these claims matured into convictions.[40] However, this has not prevented numerous claimants and interested parties to issue complaints against top foreign officials and political leaders, having discovered the possibility of abusing universal jurisdiction-based proceedings as a powerful tool for the promotion of political agendas.

The record of pro-Palestinian groups in this regard has been highly significant. The intensive manipulation of universal jurisdiction in the past few years, within the framework of their so-called "lawfare" campaign against Israel,[41] takes much credit for the fact that within less than a decade, most of the leading countries that recognized an unqualified national version of universal criminal jurisdiction had to modify their legislation to limit the ability of foreign interest groups and individuals to initiate proceedings that abused their courts.[42]

The potential for abuse and politicization of the universality principle is signifiant. It was mainly for this reason that universal jurisdiction was sharply described by one commentator as a "waking giant" that might brutally threaten to smash the already fragile web of interstate relations.[43] As interest groups soon discovered, the costs of initiating a claim were relatively low, while the potential

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Attorney General [1962], ¶¶ 6, 9-12. *See also* Arrest Warrant of 11 April 2000, *supra* note 7, at 40-43 ¶ 12 (considering Israel's legislation and jurisprudence to constitute "a very special case").

37. *See* Byers, *supra* note 3, at 420-21.

38. *See* Jouet, *supra* note 18, at 501; Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO L.J. 1057, 1059-60 (2004).

39. In fact, the jurisdiction of the ICC is considerably narrower than that which was claimed by some states under the doctrine of universal jurisdiction. See SCHABAS, *supra* note 15, at xi-xii, 63-67; Rome Statute of the International Criminal Court, *supra* note 16, art. 12.

40. *See* Reydams, *supra* note 9, at 22; Michele Hirsch & Natalie Kumps, *The Belgian Law of Universal Jurisdiction Put to the Test*, 35 JUSTICE 21 (2003).

41. *See, e.g.*, Edwin Bennatan, *The Use and Abuse of Universal Jurisdiction*, Point/Counterpoint blog, JERUSALEM POST (Nov. 28, 2010 5:53 PM), http://www.jpost.com/Blogs/Point-Counterpoint/The-use-and-abuse-of-Universal-Jurisdiction-368079.

42. *See infra* Parts IV-VI.

43. *See* Yaffa Zilbershats, *Universal Jurisdiction: The Waking Giant*, 35 JUSTICE 15 (2003).

for political and media gains were enormous.[44] Since universal jurisdiction-based proceedings were the exclusive domain of national, rather than international, judicial authorities, in most cases it was sufficient for interest groups or individuals to find a low-level, like-minded judge who was willing to begin an investigation into a case, or worse, to issue an arrest warrant against some senior foreign official.[45] Regardless of the fact that in most cases such a warrant was revoked and the complaint was withdrawn,[46] the harassment caused to the official, the headlines that such an investigation produced, and the political embarrassment that followed had an immediate impact on international public opinion. It also impacted the bilateral relations between the forum state and that of the suspected official. If the latter retaliated, the two governments could very soon find themselves in the eye of an international political storm that could easily get out of hand. For these reasons, bringing suspected perpetrators of international crimes to justice has turned, at best, into a secondary goal; the golden opportunity to interfere in the normal course of interstate relations has become a prominent incentive to filing complaints against foreign officials in third states.

In the following sections, I will review the proceedings initiated against Israeli officials in Belgium, Spain, and the United Kingdom from 2001 to 2010. Lawsuits against Israeli officials were also initiated in other countries.[47] However,

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44. *See, e.g.*, Chibli Mallat, *Special Dossier on the "Sabra and Shatila" Case in Belgium: Introduction: New Lights on the Sharon Case*, in THE PALESTINE YEARBOOK OF INTERNATIONAL LAW VOL. XII (2002-2003) 183, 183 (Camille Mansour, ed., 2004) (admitting that he, as the counsel for the Sabra and Shatila victims in the Sharon and Yaron case in Belgium, could not imagine that the case "would develop into the most serious crisis between Tel-Aviv and a European capital since the establishment of the State of Israel; and that both the U.S. Secretary of State and his defense counterpart would weigh in personality against the law on which the case was based.").

45. *See, e.g.*, Bennatan, *supra* note 41.

46. *See, e.g.*, *Recent Legislation: International Law – Universal Jurisdiction – United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes—Police Reform and Social Responsibility Act, 2011, c. 13 (U.K.)*, 125 HARV. L. REV. 1554 (regarding the arrest warrants issued in the cases of Maj. Gen. Doron Almog (Sep. 2005), and former Foreign Affairs Minister Tzipi Livni (Dec. 2009) in the U.K.). *See also* Reydams, *supra* note 9, at 22 (distinguishing the features of the few so-called universal jurisdiction "hard cases" that did result in trial and conviction). Nicolaou-Garcia also acknowledges that since politics plays a pivotal role in high-profile universal jurisdiction cases, judicial investigations are normally halted and parliaments change their universal jurisdiction law. *See* SILVIA NICOLAOU GARCIA, MIDDLE EAST MONITOR (MEMO, LONDON), EUROPEAN EFFORTS TO APPLY THE PRINCIPLE OF UNIVERSAL JURISDICTION AGAINST ISRAELI OFFICIALS, (2009), *available at* http://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/. Prosor notes that "campaigners targeting Israeli officials know they have no chance of getting a prosecution, let alone a conviction. Instead they are seeking a media circus and PR victory." Ron Prosor, *A Loophole that Must Be Repaired*, JUSTICE, Winter 2011, at 36.

47. In Switzerland (against Binyamin Ben-Eliezer, former Minister of Defense, and others); in New Zealand, 2005 (against Moshe Ya'alon, former Chief-of-Staff of the IDF); in the United States, 2005 (against Moshe Ya'alon); in the United States, 2005 (against Avi Dichter, former Director of the General Security Service); in Holland, 2008 (against Ami Ayalon, former Director of the General Security Service); in Norway, 2009 (against Ehud Olmert, former Prime Minister, Ehud Barak, former Minister of Defense, Tzipi Livni, former Minister of Foreign Affairs, and others); in Turkey, 2009 (against Shimon Peres, former Prime Minister and Minister of Defense, Ehud Olmert, Tzipi Livni, Ehud Barak, and Gabi Ashkenazi, former Chief-of-Staff). The list is not conclusive. JERUSALEM CENTER

abuse of universal jurisdiction proceedings in these particular states was the most far-reaching and thus exemplify the high costs involved in "universal jurisdiction campaigns."

IV. THE PROCEEDINGS IN BELGIUM

The pilot case brought by pro-Palestinian plaintiffs under national universal jurisdiction legislation was the *Sharon Case*.[48] Although this case did not result in a conviction, the public, political, and legal turmoil it caused, which lasted for several years, motivated pro-Palestinian groups to initiate many additional proceedings in various countries in Europe.[49]

In June 2001, twenty-four individuals of Palestinian or Lebanese origin filed a complaint in Belgium against the then Prime Minister of Israel, Ariel Sharon, and the Director-General of the Ministry of Defense, Amos Yaron, for genocide, crimes against humanity and war crimes.[50] The two top government officials were accused of being responsible for the Sabra and Shatila massacres in 1982.[51]

FOR PUBLIC AFFAIRS, PALESTINIAN MANIPULATION OF THE INTERNATIONAL COMMUNITY 40 n.30 (Alan Baker ed., 2014), *available at* http://jcpa.org/wp-content/uploads/2014/04/Palestinian_Manipulation.pdf. *See also* Overview of Lawfare Cases Involving Israel, NGO MONITOR (last visited Aug. 30, 2013), *available at* http://www.ngo-monitor.org/article/ngo_lawfare.

48. H.S.A et al. v. S.A. et al., Cour de Cassation [Cass.] [Court of Cassation], Feb. 12, 2003, No. P.02.1139. F/1 (Belg.), 42 I.L.M. 596 (2003).

49. *See* Mallat, *supra* note 44, at 183. The unique and complex set of circumstances in the Sharon and Yaron affair—the fact that Sharon was an acting Prime Minister entailed to procedural immunity under international law; that Sharon and Yaron were not present in Belgium; that the Sabra and Shatila massacres were already investigated in Israel by a special investigation commission (the Kahan Commission) that was authorized to recommend disciplinary or criminal proceedings; and that the Lebanese authorities had granted a general amnesty to the perpetrators of the massacres—probably made potential claimants believe that under a different, less complicated and contentious set of circumstances, an action against Israeli officials could be successful. *See, e.g.*, Arwa Arburawa, WAR CRIMES IN GAZA 9, 49-51 (Rajnaara Akhtar, ed., Sept., 2009), *available at* http://issuu.com/friendsofalaqsa/docs/gaza_report_web?viewMode=magazine.

50. The complaint was the initiative of Chibli Mallat, Professor in European Law in St. Joseph's University in Beirut, together with two Belgian lawyers, Michaël Verhaeghe and Luc Walleyn. It was the outcome of months of intensive research in the Palestinian refugee camps in Lebanon aimed at identifying the immediate relatives of victims of the massacres, held by Sana Hussein and Dr. Rosemary Sayegh, "friend of the Palestinian cause," dealing with Palestinians in Lebanon. *See* Mallat, *supra* note 44, at 183, 185. The criminal procedure under the Belgian law was based on the system of *constitution de partie civile* ("plaintiff-prosecutors" system), by which the victims initiate cases before an investigating judge. *See* Ratner, *supra* note 28, at 890.

51. The massacres of 700-800 Palestinians occurred in the Sabra and Shatila refugee camps between 16-18 Sep. 1982, during the Lebanon War, by Christian Phalanges in revenge for previous massacres and the assassination of their leader Bashir Jumayil. Following the massacres, the Israeli government appointed an inquiry commission chaired by Justice Kahan to investigate the events and Israel's role in them. The commission did not find any of the relevant Israeli office holders directly responsible, although it criticized several of them for not being sufficiently aware of the possible implications of the Phalanges' advance into the camps; Sharon was required to resign from his post. For a historical account of the events in Lebanon, *see* Yoav Gelber, *The Lawsuit Submitted against*

Clearly, the claimants were encouraged by the November 1998 and March 1999 landmark rulings of the House of Lords in *ex parte Pinochet*[52] that allowed, for the first time, the extradition of a former head of state, the Chilean dictator Augusto Pinochet, from Britain to Spain, following a request made by a Spanish investigating judge on the basis of the Spanish universal jurisdiction law.[53] The very supportive public and academic atmosphere that surrounded the Pinochet proceedings gave the impression that legal history was being made and that victims would finally find redress under the doctrine of universal jurisdiction.[54] It gave the claimants reason to believe that similar proceedings in other countries against acting top officials could be highly successful and attract extensive public attention. Belgium was a strong possibility as a venue for such claims: it was one of the countries which, in addition to Spain, had an arrest warrant outstanding against Pinochet, and it was the only government that joined human rights organizations in challenging the decision by the U.K. Home Secretary not to release the report that led to Pinochet's eventual release on medical grounds.[55]

A. Malicious Forum Shopping

The claimants chose the Belgian forum after careful examination of the various options within a number of western systems.[56] The 1993 Belgian law (as amended in 1999) established the universal jurisdiction of the Belgian courts, which related to the prosecution of gross violations of international humanitarian law, genocide, and crimes against humanity.[57] The law had already been applied once, which in June 2001—just a few days before the complaint against Sharon and Yaron was filed[58]—led to the conviction of four Rwandan defendants who resided in Belgium and were found guilty of participating in the 1994 Rwandan

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Ariel Sharon in Belgium: Historical Background, 35 JUSTICE 25-28 (2003), *available at* http://www.intjewishlawyers.org/main/files/Justice%20No.35%20Spring%202003.pdf . Sharon was the Israeli Defense Minister in 1982, and Yaron was the general in charge of the Beirut sector. For a detailed chronology of the proceedings in Belgium, *see* Hirsch & Kumps, *supra* note 40, at 20-24. *See also* Ratner, *supra* note 28 at 889-92.

52. Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1), (1999) 2 W.L.R. 827 (U.K.); Regina v. Bow St. Metro. (No. 3), at 147. Eventually, despite an executive decision (October 1999) to allow the extradition of Pinochet to Spain, he was found unfit medically to stand trial. The extradition was called off and Pinochet was released and sent back to Chile. *See* Byers, *supra* note 3, at 437-38.

53. *See* Mallat, *supra* note 44, at 183.

54. *See* Jouet, *supra* note 18, at 502; *id.* at 187, 189; *see generally* Byers, *supra* note 3, at 418-22.

55. *See* Byers, *supra* note 3, at 438; Hirsch & Kumps, *supra* note 40, at 21. Belgium's challenge was successful and the medical report was released.

56. *See* Mallat, *supra* note 44, at 186. Recall that although the majority in *Pinochet III* upheld the decision in *Pinochet I* to deny former Head-of-State immunity, the ruling was not based on customary international law, but relied primarily on the Torture Convention and the Criminal Justice Act 1988, thus limiting the denial of immunity to those instances where universal jurisdiction had specifically been accepted by way of treaty and statute. *See* Byers, *supra* note 3, at 434. Therefore, despite the Pinochet precedent in the United Kingdom, it was preferable to go to Belgium.

57. *See* Hirsch & Kumps, *supra* note 40, at 20. *See generally* Langer, *supra* note 1, at 26-32.

58. The filing of the complaint on behalf of the Sabra and Shatila victims immediately after the conviction in the "Rwandan trial" was carefully calculated. *See* Mallat, *supra* note 44, at 184.

genocide.[59] The "Rwandan trial" led to a stream of complaints filed in Belgium[60] against high-ranking foreign government officials.[61] Some of these complaints, however, did not have any link whatsoever to Belgium.[62] Eventually, this led some Belgian politicians and jurists to call for amendments to the law that would limit its unqualified application.[63] The Palestinian complaint filed in the midst of this domestic debate regarding the Belgian law politicized the dispute by provoking NGOs and politicians—who were lobbied intensively—to take a harsher public stance in favor of an extension of Belgian jurisdiction.[64]

The political nature of the complaint in the Sharon case was obvious: none of the complainants resided in Belgium.[65] More significantly, the complaint failed to mention any of the Lebanese citizens who were directly responsible for the massacres.[66] The complaint highlighted the crime of genocide,[67] giving the impression that the defendants were involved in a comprehensive genocidal scheme and bearing the potential for further allegations against other officials involved in the Lebanon War. The claimants strategically timed the filing of the complaint, tailoring it to fit the delicate political circumstances: it was three months after Prime Minister Sharon was elected (March 2001) and right before Belgium was to assume the Presidency of the European Union (July-December 2001).

B. A Universal Jurisdiction Campaign

The filing of the complaint was accompanied by a well-orchestrated press campaign. On the eve of filing the complaint, BBC aired its Panorama program *The Accused*, investigating the role of Sharon in the Sabra and Shatila massacres, of which counsels for the victims had been informed two weeks in advance

59. On the significance of the "Rwandan trial" and its possible consequences as a leading universal jurisdiction precedent *see* Ratner, *supra* note 28, at 892; Jouet, *supra* note 18, at 528-29.

60. Which turned Belgium into the uncrowned "world capital of universal jurisdiction." *See* Jouet, *supra* note 18, 501 (quoting Orentlicher, *supra* note 38).

61. *See* Hirsch & Kumps, *supra* note 40, at 21; Langer, *supra* note 1, at 30.

62. In the beginning, either the suspect or the victims were living in Belgium. In a later stage, complaints did not even possess such links. *See* Hirsch & Kumps, *supra* note 40, at 21.

63. Although Belgium's law was not the world's first domestic statute on universal jurisdiction, it was certainly the broadest in terms of the crimes it covered and the lack of any required link to Belgium. *See* Ratner, *supra* note 28, at 889. Evidently, the original law was passed without taking into account the various serious issues entailed by the enactment of such law and its application. *See* Hirsch, *supra* note 40, at 21. *See generally* Adrien Masset, *The Supreme Court of Belgium Puts an End to the Prosecution of Sharon*, 35 JUSTICE 29-30 (2003), *available at* http://www.intjewishlawyers.org/main/files/Justice%20No.35%20Spring%202003.pdf.

64. *See* Hirsch & Kumps, *supra* note 40, at 21, 23. A group of six NGOs was established to participate in the drafting process, in an effort to ensure the adoption of an interpretative legislation that extended the scope of the universal jurisdiction law.

65. *Id.* at 21.

66. *Id.*

67. *Id.*

through an Amnesty International friend.[68] Counsel for the claimants distributed the lengthy text of the complaint at a press conference held immediately after it had been formally filed; the text was later posted on the Internet and translated into six languages.[69] A special website dedicated exclusively to the case launched the "International Campaign for the Victims of Sabra and Shatila,"[70] while supportive "Sabra and Shatila committees" sprang up across the world.[71] All of this attracted massive media attention as well as the active involvement of academics and human-rights activists.[72] Massive financial support and the backing of leading INGOs, including Amnesty International, Human Rights Watch, and *Avocats Sans Frontières*, were assured in advance,[73] coloring the proceedings as a battle, pitting Israel against universal jurisdiction and the global "fight against impunity."[74]

Belgian politicians were also motivated to get involved in the proceedings. A group of Belgian senators intervened several times before the Prosecution Chamber.[75] A delegation of senators, headed by J. Dubié, Head of the Justice Commission at the Belgian Senate, along with leading journalists, even flew to Lebanon to meet with Elias Hobeika, the leader of the Phalangist forces who had been accused of directing the massacre in the camps.[76] A meeting with victims of the massacres, who were flown to Belgium, was organized at the Belgian Senate following a hearing before the Prosecution Chamber.[77] During the hearing, invitations to journalists to attend a press conference at the Senate were distributed.[78]

C. Legal Turmoil and Political Embarrassment

From the moment that the Belgian prosecution invited the investigating magistrate to begin the examining procedure and the State of Israel got involved in the proceedings, challenging the legality of the unqualified Belgian law under

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68. Mallat, *supra* note 44, at 185-86. *See also The Accused* (BBC Television broadcast Jun. 17, 2001), *available at* http://news.bbc.co.uk/2/hi/programmes/panorama/1381328.stm.

69. *See* Mallat, *supra* note 44, at 185.

70. The International Campaign was coordinated by the leading pro-Palestinian activist, Dr. Laurie King-Irani, who later co-founded the '*Electronic Intifada*.' *See Laurie King-Irani*, UNIV. COLLEGE CORK PALESTINE SOLIDARITY CAMPAIGN, http://cosmos.ucc.ie/cs1064/jabowen/IPSC/php/authors.php?auid=842 (last visited Nov. 25, 2014); *see also* Mallat, *supra* note 44, at 184.

71. Mallat, *supra* note 44, at 184.

72. Mallat acknowledges in particular the active support of Yale Law School Human Rights Clinic, under the direction of Deena Hurwitz and Jim Silk, as well as of Leah Tsemel and Raef Verstraeten. *Id.*

73. *See id.*; *see also* Hirsch & Kumps, *supra* note 40, at 22.

74. Mallat, *supra* note 44, at 186.

75. Hirsch & Kumps, *supra* note 40, at 23.

76. *See id.*; *see also* Mallat, *supra* note 44, at 186-88. Hobeika, former Lebanese MP, was assassinated the morning after his meeting with the Belgian delegation, near his home in a Beirut suburb. Clearly, Hobeika, who was encouraged by the counsels for the victims to take part in the proceedings, saw a golden opportunity to clear his name as the perpetrator of the massacres. *Id.* at 186.

77. *See* Hirsch & Kumps, *supra* note 40, at 23.

78. *Id.*

international law,[79] the "Sharon affair" evolved rapidly, encompassing many twists and turns. The critical issues about whether the presence of the accused was a precondition for the application of universal jurisdiction by national judges—and whether an incumbent Prime Minister was entitled to procedural immunity under international law[80]—were reviewed by the full chain of Belgian courts as well as the most senior prosecution officials, reaching the Supreme Court in 2003 following an appeal by the plaintiffs.[81] Much of the sting of the case was removed once the ICJ ruled in the *Arrest Warrant* case[82] in 2002 that a Prime Minister, while in office, was entitled to procedural-personal (*ratione personae*) immunity from any criminal proceedings under customary international law.[83] Later, although the Appeals Court ruled that the presence of the accused in Belgium was required in order to allow the proceedings, the *Cour de Cassation* overruled the decision, allowing the proceedings against Amos Yaron to proceed, rejecting the position of Israel, and upholding the position that the application of the Belgian universal jurisdiction law was indeed unlimited.[84] In light of this development, and after intensive legal and diplomatic efforts, Israel recalled its ambassador from Brussels.[85]

It was not until a complaint was filed against former President of the United States George H.W. Bush and other high-ranking American officials by several Iraqi families preceding the second war against Iraq,[86] and the American administration threatened to take far-reaching political steps in response—including the closure of the NATO headquarters in Brussels—that the Belgian authorities were finally "convinced" to introduce significant amendments to their law on universal jurisdiction, limiting its scope and proceedings.[87] The amended

79. *See id.* at 22; *see also* Masset, *supra* note 63, at 29-30.

80. Another question was the application of the *non bis in idem* principle, regarding the absence of criminal proceedings in Israel following the publication of the Kahan Commission report and the amnesty granted by the Lebanese authorities to the perpetrators of the massacres in Sabra and Shatila. Masset, *supra* note 63, at 35.

81. A full review of the legal proceedings in Belgium, and the arguments of the State of Israel, is beyond the scope of this paper. *See generally* Hirsch & Kumps, *supra* note 40, at 22-24; *see also* Masset, *supra* note 63, at 29-30.

82. In 2000, the Democratic Republic of Congo contested before the ICJ the legality of an arrest warrant issued by a Belgian judge against Yerodia Ndombasi, the Foreign Minister at the time of the warrant. In 2002 the ICJ found the warrant to be inconsistent with the procedural immunity to which an acting minister of foreign affairs is entitled under customary international law. Case Concerning the Arrest Warrant, *supra* note 7.

83. *See supra* note 32.

84. Ratner, *supra* note 28, at 890.

85. The culmination of what was described by the counsel for the Sabra and Shatila victims as "the most serious crisis between Tel-Aviv and a European capital since the establishment of the state of Israel." Mallat, *supra* note 44, at 183; *see also* Ratner, *supra* note 28, at 890.

86. Vice President D. Cheney, Secretary of State C. Powell, and former general N. Schwartzkopf.

87. Orentlicher, *supra* note 38, at 1062. In view of the American warnings that Belgium was risking its status as a diplomatic capital, G. Verhofstadt—the Belgian Prime Minister leading a pro-human-rights coalition of Liberals, Socialists, and Greens—who during the Sharon trial expressed support for the unqualified application of the law, immediately proposed the amendments to limit its

law essentially required a link between the victim or the accused to Belgium and invested the Federal Prosecutor with wide authority to oversee the proceedings, thus effectively barring foreign individuals and interest groups from filing abusive complaints.[88] Israel's main argument before the Belgian courts—that the initial unqualified version of the law was designed to grant Belgium "virtual and surrealistic jurisdiction over all offences against international humanitarian law in the world,"[89] thus diverting from the scope of universal jurisdiction under customary law and allowing manifestly political claims to proceed—was finally resolved.

Thus, the "Sharon saga" showed the international community that:

> Universal jurisdiction does not operate in a vacuum. The process. . . raises interstate tensions in ways that even the most vociferous criticism by one state of another's human rights practices does not. . . [W]hen justice becomes personal, so does foreign policy. And when private prosecutors are part of the mix, the match can get very ugly.[90]

Unfortunately, although the Sharon case could serve as a laboratory for the future of universal jurisdiction by highlighting the myriad of international actors who had a direct interest in these laws and the steps they would take to advance their claims,[91] some states had yet to learn the lesson.

V. THE PROCEEDINGS IN SPAIN

The Belgian experience, while failing to reach the stage of a court trial, proved to be very fruitful in terms of its political and propaganda impact. Once the Belgian door closed, it was, therefore, a matter of time before more plaintiffs initiated proceedings in countries that still allowed their legislation to be manipulated by foreign complainants. Indeed, as a report issued by the U.K.-based *Friends of Al-Aqsa* revealed, filing lawsuits against Israeli officials was a very high priority for Palestinian activists:

> The momentum is growing and resistance is mounting. Each of us who participates in the Palestinian cause is part of that resistance. Thus far, thousands of us have risen up and taken action. We are working to file arrest warrants for war crimes and crimes against humanity against Israeli military personnel in every jurisdiction around the world that allows it.[92]

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application in order to prevent "manifestly abusive political use of this law." Ratner, *supra* note 28, at 890-91; Langer, *supra* note 1, at 26.

88. The law also acknowledged the immunities of senior officials recognized under customary law; for a review and analysis of the amendments to the Belgian law, *see* Ratner, *supra* note 28, at 890-92. *See also* Hirsch & Kumps, *supra* note 40, at 24.

89. Hirsch & Kumps, *supra* note 40, at 24.

90. Ratner, *supra* note 28, at 893-94.

91. *Id.* at 889. *See also* Jouet, *supra* note 18, at 528.

92. Ismail Patel, *Forward*, in WAR CRIMES IN GAZA, *supra* note 49, at 9.

Spain, the leading country at the time in terms of promoting the notion of an unlimited universal jurisdiction,[93] was an obvious option.[94]

A. The Tyranny of Interested Judges and Activists' Groups

Although the Spanish law on universal jurisdiction, first enacted in 1985, was not as broad as the initial Belgian law,[95] courts still interpreted it as allowing investigations against foreign defendants to be held *in absentia*[96] without any link to Spain.[97] This gave the investigating judges of the *Audiencia Nacional* ("National Audience")[98] expansive jurisdictional power to hear complaints brought by various human rights organizations and private litigants against foreign officials and to open criminal investigations accordingly. Such was the case with the *Pinochet* affair, which brought world fame to the Spanish investigating judge. Baltasar Garzón, who in 1998 demanded the extradition from Britain of the former dictator, within his investigations into the mass atrocities that took place in Chile.[99] Clearly, Garzón set an example for other judges of the *Audiencia*, who were encouraged by various INGOs and human rights purists to continue their "crusade to vindicate gross human rights violations" in Spanish courts.[100] Nevertheless, much like the case in Belgium, and despite the success of the *Pinochet* case, the zealous atmosphere and the fact that several states whose citizens were being prosecuted protested vehemently against the violation of their sovereignty,[101] provoked a public debate in Spain. Pragmatists warned against the adoption of a "radical form of universal jurisdiction devoid of strong procedural footing that could violate international customary law and harm diplomatic relations."[102] This debate was followed by a clash between Spain's two high courts—the Supreme Court and the Constitutional Tribunal—over the correct interpretation of the Spanish law regarding universal jurisdiction.[103] In 2005, the Constitutional Court

93. Jouet, *supra* note 18, at 501.

94. As was predicted by some commentators. *See id.* at 531.

95. *See id.* at 499, 512, 522. *See generally* Langer, *supra* note 1, at 32-41.

96. Jouet, *supra* note 18, at 512 (The Belgian law originally allowed trials *in absentia*, not only investigations).

97. *Id.* at 497, 510.

98. *Id.* at 504 (This is the Spanish trial court responsible for matters of international and national interest, including international crimes and terrorism).

99. The same set of investigations, dealing with the junta reign in Argentina, led in 2004 to the arrest in Spain of Adolfo Schilingo, an Argentine navy officer charged with mass-murdering during Argentina's Dirty War. This was one of the very few and probably the most famous case brought under a universal jurisdiction law that ended in a conviction after passing a complete series of appeals. *See generally id.* at 502, 505

100. *Id.* at 501; Soeren Kern, *Spain, Israel and War Crimes*, GATESTONE INSTITUTE (Apr. 8, 2009, 6:30 AM), http://www.gatestoneinstitute.org/455/spain-isreal-and-war-crimes.

101. Jouet, *supra* note 18, at 502-03.

102. *Id.* at 503.

103. *See id.* at 505-07 (The Supreme Court in 2004 interpreted the law as requiring a link to national interests, clarifying that the Spanish courts could only exert a narrow form of universal jurisdiction. The court explained that a broader form of universal jurisdiction would be unreasonable

eventually overruled the decision of the Supreme Court, thus upholding the unqualified version of the Spanish law.[104] This effectively provided the judges of the *Audiencia* a carte blanche to initiate unrestrained investigations *in absentia*, without having to wait for an alleged culprit to enter Spain's territory.[105]

As in Belgium, the pro-Palestinian lawyers took advantage of the loud, ongoing public debate over the scope of universal jurisdiction in Spain to bring in a controversial complaint against former Israeli officials. In June 2008, the Palestinian Center for Human Rights ("PCHR")[106] filed a complaint before *Audiencia* Judge Fernando Andreu Merelles against seven high-ranking officials for suspected "crimes against humanity" for their involvement in the July 2002 targeted killing of Salah Shehadeh, the commander of the military wing of Hamas in Gaza.[107] The PCHR, acting on behalf of some of the families of civilian casualties, hoped that "universal jurisdiction would become a real avenue for Palestinians to seek redress for Israeli crimes" following this case.[108] To this end, the PCHR hired the services of the Spanish lawyer Gonzalo Boyé—a Marxist

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and would violate the principle of non-intervention in another state's affairs as enshrined in Art. 2(7) of the U.N. Charter).

104. *Id.* at 508.

105. The Constitutional Tribunal essentially held that a procedural link to national interests was not required since universal jurisdiction was exclusively based on the substantive nature of grave crimes affecting the entire international community. *See id.* at 508-10, 512.

106. The PCHR was founded in 1995 by a group of Palestinian human rights lawyers. It mainly operates from Gaza. According to the center's definition, its work includes the documentation and investigation of human rights violations. The center was behind most of the lawsuits against senior Israeli officials abroad: Shaul Mofaz (U.K., 2002); Doron Almog (U.K., 2005); Avi Dichter (U.S., 2005); Moshe Ya'alon (New Zealand, 2006); Binyamin Ben-Eliezer and others (Spain, 2008); Ami Ayalon (Holland, 2008). According to the center's 2008 report, and the reports of the organizations that support it, the main donors to the PCHR are: the *Welfare Association* (financed by the World Bank, among others); the *NGO Development Center* (financed by the World Bank, among others); the *Open Society Institute* (U.S.); *Grassroots International* (U.S.); the *Ford Foundation* (U.S.); as well as the E.U. and several European governments. *See* KELA RESEARCH & STRATEGY, THE FINANCING OF WELFARE ASSOCIATION (WA) AND NGO DEVELOPMENT CENTER (NDC) BY THE US GOVERNMENT VIA THE WORLD BANK 18-19 (on file with the author); *see also* THE MEIR AMIT INTELLIGENCE AND TERRORISM INFORMATION CENTER, THE PALESTINIAN CENTER FOR HUMAN RIGHTS PLAYS A LEADING ROLE IN ANTI-ISRAELI WARFARE AND IS PLANNING TO EXPLOIT OPERATION PILLAR OF DEFENSE TO SUE SENIOR ISRAELI FIGURES 6-8 (2013); *Palestinian Center for Human Rights (PCHR)*, NGO MONITOR, http://www.ngo-monitor.org/article/palestinian_center_for_human_rights_pchr_ (last visited July 2, 2012).

107. *See* WAR CRIMES IN GAZA, *supra* note 49 at 50. For a brief history of the proceedings in Israel, *see* Ido Rosenzweig & Yuval Shany, *Universal Jurisdiction: Spanish Court Initiates an Inquiry of the Targeted Killing of Salah Shehadeh in Gaza*, TERRORISM AND DEMOCRACY NEWSLETTER, no. 3, Mar. 2009 (Salah Shehadeh was a member of the Hamas. He masterminded numerous terror attacks against Israeli civilians and soldiers in the Gaza strip and within Israel; he was involved in the production of Qassam rockets fired against Israeli civilian targets, and in the smuggling of arms into the Gaza strip. As the leader of the Izz ad-Din al-Qassam Brigades military wing of the Hamas in Gaza, he was responsible for suicide attacks that caused the death of hundreds of Israeli civilians. On July 22, 2002, Israel executed a targeted killing operation directed at Shehadeh. An IDF aircraft dropped a one-ton bomb on Shehadeh's house, killing him and 14 other people, and injuring many civilians. The attack was widely criticized by governments and human rights organizations, including in Israel.).

108. *See* WAR CRIMES IN GAZA, *supra* note 49 at 50.

revolutionary who had served a ten-year sentence in Spanish prison for collaborating with the Basque terrorist group Euskadi Ta Askatasuna ("ETA") and was involved in most of the universal jurisdiction lawsuits filed in Spain, including those against U.S. officials.[109] By the end of January 2009, following Boyé's petition, the Spanish magistrate, Andreu, who identified an opportunity to follow his colleague Garzón[110] and to gain international publicity, issued a decision to open a criminal investigation against Benjamin Ben-Eliezer, former Minister of Defense; Dan Halutz, former Commander of the Israeli Air-Force; Moshe Ya'alon, former Chief of Staff of the Israeli Defence Force ("IDF"); Avraham Dichter, former Director of the General Security Service; Doron Almog, former General of the Southern Command of the IDF; Giora Eiland, former Chairman of the National Security Council and National Security Advisor; and Michael Hertzog, former Military Secretary of the Israel Minister of Defense.[111] Andreu determined that "the events may and *must* [emphasis added] be investigated by the Spanish courts" as the evidence suggested that Israel had engaged in a "disproportionate attack," based on the Spanish law of universal jurisdiction as interpreted by the Constitutional Tribunal to provide absolute jurisdiction.[112]

B. A War on the "War on Terror"

As in Belgium, the complainants carefully calculated the timing of the filing of this particular lawsuit, leaving no doubt as to its political nature: Operation Cast Lead, the IDF ground invasion of the Gaza Strip (December 2008-January 2009), ended a few days before Judge Andreu released his decision to open an investigation into the case.[113] World attention was focused on the Gaza Strip.[114] Israel was desperately "trying to fend off foreign censure over the civilian death toll" during that operation.[115] The U.N. Human Rights Council called for an international fact-finding mission to investigate the conduct of Israel,[116] while a network of European lawyers and pro-Palestinian activists prepared a list with the names and personal data of some two hundred Israeli soldiers, which was made

109. *See* Gregory Gordon, *Spanish UJ – From Pinochet to Purgatory?*, OPINIO JURIS (Jul. 24, 2009, 1:26 AM), http://opiniojuris.org/2009/07/24/spanish-uj-from-pinochet-to-purgatory/; *see also* Kern, *supra* note 100.

110. *See* Kern, *supra* note 100.

111. See Rosenzweig & Shany, *supra* note 107.

112. *Id.*

113. Preliminary Proceedings 157/2008, *Central Magistrates' Court Number Four of the High Court in Madrid* (Jan. 29, 2009); Kern, *supra* note 100.

114. PALESTINIAN CENTRE FOR HUMAN RIGHTS (PCHR), THE PRINCIPLE AND PRACTICE OF UNIVERSAL JURISDICTION: PCHR'S WORK IN THE OCCUPIED PALESTINIAN TERRITORY 7 (2010).

115. Kern, *supra* note 100.

116. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the U.N. Fact-Finding Mission on the Gaza Conflict, ¶ 1975, U.N. Doc. A/HRC/12/48, (Sept. 25, 2009) [hereinafter Report of the United Nations Fact-Finding Mission on the Gaza Conflict] (The Report of the U.N. Fact Finding Mission on the Gaza Conflict (the so-called "Goldstone Report") indeed recommended states parties to the Geneva Conventions to "start criminal investigations in national courts, *using universal jurisdiction*." (italics added)).

available on a special website called *Israeli war criminals*.[117] A complaint dealing with an alleged war crime amounting to a "crime against humanity" that would lead to a foreign criminal investigation into the conduct of the IDF in the Gaza Strip in the past was a perfect legal ambush; it could set a significant precedent and focus maximum international attention that would put Israel under heavy public and diplomatic pressure at home and abroad.[118] Furthermore, unlike the complaint against Sharon and Yaron in Belgium, the specific context of the current complaint was meant to showcase the role of international criminal law in reviewing the legality of counter-terrorism measures employed by states involved in the "War on Terror" led by the United States and Israel.[119] The application of universal jurisdiction as a "weapon" to review counter-terrorism strategies[120] was meant to attract the sympathy and support of human-rights activists and INGOs as part of an "anti-western globalism [movement that used] international law to eat away at national sovereignty."[121] In this respect, an unfolding investigation would send a clear message that a state's response to terrorist attacks represented "a more serious violation of international law than the original act of terrorism."[122]

C. Delegitimizing Domestic Proceedings

Most importantly, plaintiffs filed the complaint in Spain while proceedings in Israel regarding the Shehadeh affair were still pending. The Israeli High Court of Justice ("HCJ"), which had determined that targeted killing operations were not forbidden as such,[123] nevertheless had recommended the establishment of a special, independent examination committee with a mandate to examine the collateral damage caused by the killing of Shehadeh and its possible implications.[124] The committee, which was authorized to recommend disciplinary or criminal proceedings, had yet to conclude its investigation when the complaint in Spain was filed.[125] In fact, just a few days before the submission of the lawsuit by the PCHR

117. Anshel Pfeffer, *Lawyers in EU draw up list of alleged IDF war criminals*, HAARETZ (Oct. 27, 2009, 1:36 AM), http://www.haaretz.com/print-edition/news/lawyers-in-eu-draw-up-list-of-alleged-idf-war-criminals-1.5386.

118. *See* Kern, *supra* note 100.

119. *See* Rosenzweig & Shany, *supra* note 107.

120. For a discussion of the risks of such strategy and its legal implications, *see id.*, at "Conclusions."

121. Kern, *supra* note100.

122. Rosenzweig & Shany, *supra* note 107, at "Conclusions."

123. The HCJ further determined that every case that involved civilian casualties had to be examined by a special committee. *See* HCJ 769/2 Pub. Comm. Against Torture in Israel v. Gov't of Israel (2) PD 459, 511 [2006] (Isr.).

124. The legality of the Shehadeh operation has been discussed in several cases before the HCJ, but was challenged directly in HCJ 8794/03 Yoav Hess et al. v. Judge Advocate General et al. [2008] (Isr.). Pursuant to the Court's recommendation, the Israel Prime Minister established the Special Examination Committee, headed by Z. Inbar, the former Judge Advocate General and the Knesset Legal Advisor.

125. The Committee started its work in January 2008, and presented its final conclusions in February 2011. The Committee's Chairman, Z. Inbar, passed away during the Committee's work, and was replaced by former Supreme Court Judge T. Strasberg-Cohen. For the conclusions of the special examination committee on the targeted killing of Shehadeh, *see A Summary Report of the Special*

in Madrid, the HCJ rejected a petition calling for a criminal investigation of the Shehadeh affair due to the fact that the examination committee was still investigating the matter.[126] Obviously, the PCHR was trying to bypass the Israeli legal system by inviting an unprecedented foreign scrutiny of, and possible intervention in, its proceedings. Aside from establishing a dangerous precedent, a court trial in Spain would have implied that Israeli authorities were "unable or genuinely unwilling"[127] to handle the matter, while at the same time focusing public attention on the examination committee and exerting considerable pressure on its members.

As one could have expected, once Judge Andreu decided to take on the investigation, matters unfolded rapidly, attracting a great deal of international attention and causing political turbulence in and outside of Spain. The day after Andreu's preliminary decision, Spanish Foreign Minister Miguel Angel Moratinos, being aware of the far-reaching implications of the decision against U.S. officials, was quick to declare that the Spanish government would consider a proposal to amend the law on universal jurisdiction.[128] Andreu, backed by other prominent politicians who upheld Spanish judiciary's absolute independence,[129] was determined, however, to continue the official investigation in the case.[130] Israeli politicians protested in strong language against what they considered a conspicuous intervention by the Spanish court in the ongoing legal proceedings in Israel.[131] They were outraged further by the "ridicule and absurdity" of accusing a "democracy legitimately protecting itself against terrorists and war criminals," instead of going after the terrorists themselves.[132] In addition, they were incensed by the possibility that Andreu could decide to issue international arrest warrants for

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Committee to examine the action of prevention-focused Salah Shehadeh, PRIME MINISTER'S OFFICE (Feb. 27, 2011), http://www.pm.gov.il/PMO/Archive/Spokesman/2011/02/spokeshchade270211.htm.

126. See HCJ 8794/03, *supra* note 124.

127. Rome Statute of the International Criminal Court, *supra* note 16 at art. 17(1)(a) & (b) (following the wording of the article). Recall in this regard that, although the "Goldstone Report" had initially raised "serious doubts about the willingness of Israel to carry out genuine investigations as required by international law" (*see* Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *supra* note 116, at ¶ 1961), in an April 2011 Washington Post Op-Ed, Goldstone admitted, "If I had known then what I know now, the Goldstone Report would have been a different document." Furthermore, Goldstone determined that Israel had fulfilled "to a significant degree" its responsibility to investigate "transparently and in good faith the incidents referred to in our report," while the "Hamas ha[d] done nothing." Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASHINGTON POST, (Apr. 1, 2011), http://articles.washingtonpost.com/2011-04-01/opinions/35207016_1_drone-image-goldstone-report-israeli-evidence.

128. Kern, *supra* note 100; Ido Rosenzweig & Yuval Shany, *Update—Universal Jurisdiction: Spanish Court's Inquiry of the Targeted Killing of Salah Shehadeh*, TERRORISM AND DEMOCRACY NEWSLETTER, no. 5, May 2009 [hereinafter Rosenzweig & Shany, Spanish Court's Inquiry]; Langer, *supra* note 1 at 38.

129. Kern, *supra* note 100 (such as Deputy Prime Minister Maria-Teresa Fernandez de la Vega).

130. *See* Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 128.

131. *See* Nicolaou Garcia, *supra* note 46 (quoting Ehud Barak, then Israel Defense Minister, "he would do anything to annul the decision").

132. Kern, *supra* note 100 (quoting incoming Prime Minister Netanyahu).

any of the Israeli senior officials and military officers, who could then be detained upon arrival in any E.U. member state.[133]

In April 2009, the Spanish prosecution requested that the Madrid Court dismiss the investigation, due to the ongoing, parallel investigation in Israel.[134] Judge Andreau refused, declaring that Israel was not conducting a criminal investigation and that Spanish law provided for simultaneous jurisdiction to investigate "war crimes."[135] The prosecution immediately appealed the decision to the Spanish Court of Appeals, which decided to revoke the investigation due to lack of universal jurisdiction over the matter in June.[136] Backing the position of the prosecution, the Court determined that a substantial, minimal link or national interest was required in order to implement universal jurisdiction that was otherwise incompatible with the fundamental principle of non-intervention in other states' affairs.[137] The court further concluded that Israel had jurisdictional priority in this case and that a genuine investigation that was subject to a judicial review was already underway.[138]

D. Déjà Vu . . .

During this time, in March 2009, just before the Spanish prosecution requested that Judge Andreu halt his investigation, a group of human rights lawyers filed a lawsuit with Judge Garzón of the *Audiencia*, against six senior U.S. Bush-administration officials, including the former U.S. Attorney General, Alberto Gonzales.[139] The complaint charged the so-called "Bush Six" with giving legal cover for the torture of terror suspects at Guantanamo Bay.[140] The case, which was one of several legal actions taken against U.S. administration officials overseas but the first to go to court thus far, exerted tremendous pressure on the Spanish political and legal systems.[141] In conjunction with the lawsuit against the Israeli officials, it threatened to turn Spain's national court into a "global court,"[142] serving as a plaything for competing political interests.[143] Finding itself in the very

133. *See id.*

134. Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 128.

135. *Id.*

136. Ido Rosenzweig & Yuval Shany, *Update on Universal Jurisdiction: Spanish Court of Appeals Decides to Close the Inquiry into the Targeted Killing of Salah Shehadeh*, TERRORISM AND DEMOCRACY NEWSLETTER, no. 8, July 2009 [hereinafter Rosenzweig & Shany, Spanish Court Closes Inquiry].

137. *Id.*

138. *See id.* (reviewing the minority opinion).

139. *See* Paul Haven, *Spain: No Torture Probe of US Officials*, ASSOCIATED PRESS (Apr. 17, 2009), http://www.realclearworld.com/news/ap/international/2009/Apr/17/spain_no_torture_probe_of_us_officials.html. Another judge of the *Audiencia* was already investigating whether secret CIA flights to or from Guantanamo entered Spanish airspace or landed at Spanish airports.

140. *Id.*

141. Gordon, *supra* note 109.

142. *Id.*

143. *See* Haven, *supra* note 139 (using the words of Candido Conde-Pumpido, Spain's top law-enforcement official).

awkward position of the Belgian authorities just a few years earlier and risking its role as a player on the international stage,[144] the Spanish government proposed new legislation in May 2009, intended to limit the law on universal jurisdiction.[145]

Despite all of the above, the PCHR had yet to give in, zealously deciding to appeal the decision of the Court of Appeals to the Spanish Supreme Court.[146] Backed by INGOs, such as Human Rights Watch, that were witnessing the beginning of the fall of Madrid as the capital of global justice,[147] in the beginning of 2010, the PCHR published a report entitled *The Principle and Practice of Universal Jurisdiction*.[148] This report outlined the "inadequacies of the Israeli judicial system" that "does not meet necessary international standards with respect to the effective administration of justice."[149] It concluded that "universal jurisdiction constitutes an essential, long established component of international law" and "it does [not] represent an attempt to interfere with the legitimate affairs of the State; it is enacted as a last resort" and "is the only available legal mechanism capable of ensuring Palestinian victims right to an effective judicial remedy. In the broader context, universal jurisdiction is also an essential tool in the fight against impunity. . . . [It] is a stepping stone on the road to universal justice."[150] However, the PCHR's argument did not convince the Spanish Supreme Court, and in April 2010 the Spanish Supreme Court affirmed the decision of the Court of Appeals to dismiss Judge Andreu's investigation.[151] A further appeal to the Constitutional Court, although possible, was useless, particularly in view of the Spanish parliament passing a bill in November 2009, presenting far-reaching amendments to Spain's law that practically barred private litigants wishing to file politically sensitive lawsuits.[152]

The Spanish saga was instrumental—evidently more than the Belgian one—in demonstrating the high risks and costs involved in allowing individual magistrates

144. Gordon, *supra* note 109.

145. Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 128; WAR CRIMES IN GAZA, *supra* note 49 at 50.

146. Rosenzweig & Shany, Spanish Court Closes Inquiry, *supra* note 136.

147. Gordon, *supra* note 109.

148. Palestinian Centre for Human Rights, *supra* note 114.

149. *Id.* at 8.

150. *Id.* at 9-10. S*ee also* Langer, *supra* note 1, at 4.

151. *See Tribunal Supremo Sala de lo Penal*, AUTO 550/2010 (Mar. 4, 2010), http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf; Ido Rosenzweig & Yuval Shany, *Update on Universal Jurisdiction: Spanish Supreme Court Affirms Decision to Close Inquiry into Targeted Killing of Salah Shehadeh in Gaza*, TERRORISM AND DEMOCRACY NEWSLETTER no. 17, Apr. 2010 [hereinafter Rosenzweig & Shany, Spanish Supreme Court Affirms Decision] (the Court pointed out, *inter alia*, that the fact the appellants had initially filed their complaint before the Israeli courts inferred that they accepted the genuineness of the Israeli proceedings).

152. The reform to the Spanish law included three non-cumulative requirements for the application of universal jurisdiction: presence of the accused on Spanish territory; Spanish nationality of the victims; or other relevant connection to Spain. *See* Carlos Espósito, *Shrinking Universal Jurisdiction*, ESIL NEWSLETTER, Feb. 2010, at 2, *available at* http://www.esil-sedi.eu/sites/default/files/ESIL_SEDI_NEWSLETTER_Feb_2010.pdf.

to selectively decide on the application of universal jurisdiction proceedings,[153] particularly in complex contexts such as the global fight against terrorism and ongoing political and military conflicts.[154] The combination of activist judges, hungry for publicity, with the lack of legal safety valves proved to offer a very futile soil for the breeding of manipulative lawsuits by politically motivated interest groups and individuals. The powerlessness of the executive to review or to prevent malicious forum-shopping by alleged victims further emphasized the responsibility of states to exercise procedural rigor in enforcing their laws as well as the need to create appropriate mechanisms to resolve competing jurisdictional claims.[155] The next state to learn these lessons the hard way—that is, through manipulation of its legal system and ensuing diplomatic pressures—was the United Kingdom.

VI. THE PROCEEDINGS IN THE UNITED KINGDOM

The law allowing universal jurisdiction proceedings to be initiated in the United Kingdom was considerably narrower than the Belgian or the Spanish laws, requiring the presence of the accused on British soil before proceedings could effectively commence.[156] In any case, under the system of "private prosecution," the law allowed any individual to initiate a criminal proceeding, even without having any connection to the alleged offence, before a magistrate who could then issue a summons or an arrest warrant to a visiting foreign official; all that was required was mere *prima facie* evidence.[157] Practically, such arrangements could hardly lead to actual court trials against Israeli officials within the United Kingdom.[158] Nevertheless, pro-Palestinian groups realized the great potential of manipulating the British legislation in an endeavor to disrupt the diplomatic relations with Israel. Harassing Israeli officials and top generals thus became part of the "well organized, well resourced and concerted attempt" that was "taking place in Britain to demonize, criminalize, and delegitimize Israel in every area of public life,"[159] and it was publicly supported by British politicians,[160] as well as by judges.[161]

153. Some commentators pointed out that the *Audiencia* judges had never sought to prosecute any Hamas or Fatah terrorists, or crimes against humanity committed in Chechnya or Darfur, for example, or any suspected Nazi war criminals who had sought refuge in Spain after WWII. *See* Kern, *supra* note 100.

154. See, *e.g.*, Jouet, *supra* note 18, at 528, 531.

155. *Id.* at 513-14, 526, 531, 535.

156. *See Recent Legislation*, *supra* note 46, at 1554-55; *see generally* Langer, *supra* note 1, at 15-19.

157. *Recent Legislation*, *supra* note 46, at 1555.

158. WAR CRIMES IN GAZA, *supra* note 49, at 50; Prosor, *supra* note 46, at 36.

159. Prosor, *supra* note 46, at 36, 46.

160. WAR CRIMES IN GAZA, *supra* note 49, at 5-8.

161. Prosor, *supra* note 46, at 36.

A. Challenging Customary International Law

In early 2004, an application for an arrest warrant against then Israeli Defense Minister Shaul Mofaz was submitted to the Bow Street Magistrates' Court.[162] The application was based on a complaint initiated by the PCHR, on behalf of families who had been affected by what was described as "'[t]he assassination policy of Israel' or the 'Policy of Shooting with Impunity'," accusing Mofaz of committing "grave breaches" of the Fourth Geneva Convention.[163] Mofaz was believed to be visiting the United Kingdom at the time.[164] Clearly, the PCHR meant for the complaint to challenge the decision of the ICJ in the *Arrest Warrant* case, which did not explicitly mention an incumbent Minister of Defense among the high-ranking officials enjoying absolute state immunity under customary international law.[165] Eventually, the magistrate concluded that Mofaz, as a Defense Minister, was also entitled to immunity, based on an analogy to the position of Minister of Foreign Affairs and the logic of the ICJ's decision.[166] Nevertheless, despite the fact that he was therefore barred from reviewing the application, the District Judge, C.L. Pratt, did not hesitate to indicate that "the extensive evidence" supplied to him "could certainly amount to 'grave breaches.'"[167] This was a clear signal that applications against *former* officials would be welcomed by the British judiciary, which led pro-Palestinian groups to compile extensive evidence files against top Israeli generals and former leaders.[168]

B. International Legal Ambush

In August 2005, the PCHR[169] handed over evidence to the Metropolitan Police relating to alleged "grave breaches" of the Fourth Geneva Convention supposedly committed by Major General Doron Almog, former General of the Southern Command of the IDF.[170] Following an application to the Bow Magistrates' Court, an arrest warrant against Almog was issued in September by a Senior District Judge in relation to "The demolition of 59 houses in Rafah, Gaza strip, on 10 January 2002."[171] Due to leaked information, Almog, who was scheduled to speak at a synagogue in Birmingham on the day after the arrest warrant was issued, did not disembark from the plane, but instead flew straight back to Israel, escaping the police awaiting him at Heathrow airport.[172] Israeli

162. *Application for Arrest Warrant against General Shaul Mofaz*, *supra* note 32.

163. *Id.* at ¶ 1-2.

164. *Id.* at ¶ 1.

165. Case Concerning the Arrest Warrant, *supra* note 7, at ¶ 51.

166. *Application for Arrest Warrant against General Shaul Mofaz*, *supra* note 32, at ¶¶ 10-15.

167. *Id.* at ¶ 3.

168. Nicolaou Garcia, *supra* note 46.

169. *Id.* (in collaboration with Daniel Machover and Kate Maynard from Hickman and Rose Solicitors (UK)).

170. *Id.*; *Recent Legislation*, *supra* note 46 at 1555.

171. Nicolaou Garcia, *supra* note 46; Langer, *supra* note 1, at 17.

172. Nicolaou Garcia, *supra* note 46. Ali Abunimah, *Israeli War Crimes Suspect Cancels London Visit*, ELECTRONIC INTIFADA (July 2013), http://electronicintifada.net/blogs/ali-abunimah/israeli-war-crimes-suspect-cancels-london-visit (it was reported that Almog had decided to cancel another visit to

generals, as well as top officials and politicians, were subsequently advised to refrain from visiting the United Kingdom.[173]

In December 2009, a British magistrate issued another arrest warrant against former Foreign Minister Tzipi Livni upon pro-Palestinian activist groups' allegations that she had commissioned "war crimes" in Gaza.[174] Livni, then leader of Israel's opposition, cancelled her planned visit to the United Kingdom.[175] The diplomatic rift between Israel and the United Kingdom was mounting, as Israel retaliated by halting its routine, high-level "Strategic Dialogue" with the British government[176] and by cancelling Deputy Prime Minister Dan Meridor's visit to Britain.[177]

C. Déjà Déjà Vu

Livini's near-arrest marked a turning-point in dealing with the abuse of British proceedings,[178] leading to intense political and academic debate, domestically and abroad. Both Labour and Conservative leaders, having realized the high costs of maintaining the system of "private prosecution" in universal jurisdiction proceedings and fearing their further implementation by low-level judges against U.S. and other foreign officials, vowed to change the law.[179] U.K. officials admitted that exploitation of the criminal procedure could "bring [the U.K.] legal system into disrepute."[180] The Legal Task Force of the Scholars for

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the UK in June 2013, despite an assurance of immunity by British authorities, following an action by PCHR lawyers challenging the decision of the U.K. government to grant Almog's visit the status of "special mission" that in effect put Almog beyond the reach of the law). The PCHR challenged the decision "given the fact that it was made by the UK government despite the existence of a warrant for Almog's arrest on war crimes charges."

173. In September 2005, a complaint against Moshe Ya'alon and Dan Chalutz was filed in the U.K. by the human rights group Yesh Gvul for their involvement in the Shehadeh targeted killing operation. Ya'alon, who was invited to London in 2009, was advised to cancel his trip. Such was the case with Minister of Defense Ehud Barak, and Minister of Public Security, Avi Dichter. Maj. Gen. Aviv Kochavi, Military Intelligence Director, and Maj. Gen. Yohanan Locker, Military Secretary to the Prime Minister, also canceled their visits to the U.K. *See* Chris McGreal, *Israeli Ex-Military Chief Cancels Trip to UK over Threat of War Crimes Arrest*, GUARDIAN (Sept. 16, 2005, 6:56 PM), http://www.theguardian.com/world/2005/sep/16/israelandthepalestinians.warcrimes.

174. *See Recent Legislation*, *supra* note 46, at 1555 n.15.

175. *Id.* at n.16.

176. *Id.* at 1555-56.

177. Bennatan, *supra* note 41.

178. Reydams, *supra* note 9, at 26; *Recent Legislation*, *supra* note 46 at 1555.

179. *See* John Bellinger, *Britain Amends Universal Jurisdiction Law*, LAWFARE BLOG (Sep. 19, 2011), http://www.lawfareblog.com/2011/09/britain-amends-universal-jurisdiction-law/; Langer, *supra* note 1 at 18-19. John Chapin, *Universal Jurisdiction is Abused and Leads to International Friction, say Legal Scholars*, THE CUTTING EDGE NEWS, (Apr. 12, 2010), http://www.thecuttingedgenews.com/index.php?article=12101 (in March 2010, the British government declared that "the Crown Prosecution Service will take over responsibility for prosecuting war crimes and other violations of international law, ending the current system in which magistrates are obliged to consider a case for an arrest warrant presented by any individual.").

180. *See Recent Legislation*, *supra* note 46, at 1555 (quoting *House of Commons Fourth Sitting*, 20 Jan. 2011, Parl. Deb., H.C. (2011) 126 (UK)).

Peace in the Middle East also released a statement condemning the misuse of universal jurisdiction in the United Kingdom and elsewhere "in light of recent harassment of Israeli officials" and insisted upon reform.[181]

On the other hand, extensive lobbying by pro-Palestinian advocacy groups and politicians,[182] backed by various INGOs and human rights groups, such as the London-based Amnesty International, Human Rights Watch and the International Federation for Human Rights,[183] prolonged the political debates surrounding the passage of amendments to the law.

Nevertheless, in September 2011, the U.K. Parliament accepted the Police Reform and Social Responsibility Act, requiring approval by the U.K. Director of Public Prosecutions—the head of the U.K.'s Crown Prosecution Service—before a British court could issue a privately-sought arrest warrant for universal jurisdiction offences.[184] This practically meant that the issuance of a warrant required consultation with the Attorney General—the chief legal advisor to the Crown—as well as the Cabinet Ministers, for their views on "such an arrest and the impact that that might have on the U.K.'s national interest."[185] With this reform, the United Kingdom joined Belgium and Spain, both which, within less than a decade, drastically changed the scope of their laws on universal jurisdiction. Evidently, even the United Kingdom—a country that had not enacted too permissive a law in the first place—still could not resist the abuse of its legal system by politically interested groups, as well as the selectivity of interested judges.

VII. THE UNBEARABLE LIGHTNESS OF MANIPULATION: LESSONS AND FUTURE PROSPECTS

A. Universal Jurisdiction—A Simple Concept?

"Universal jurisdiction is a simple concept;"[186] it "constitutes an essential, long established component of international law"[187]—so goes the message

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181. Chapin, *supra* note 179.

182. *See* Bennatan, *supra* note 41; *see also* Oliver Miles, *How International Law Affects the Palestine 'Peace Process'*, THE GUARDIAN (Nov. 22, 2010, 6:59 AM), http://www.guardian.co.uk/commentisfree/2010/nov/22/international-law-palestine-peace-process.

183. *Universal Jurisdiction*, LIBERAL DEMOCRAT FRIENDS OF PALESTINE (Feb. 16 2011), http://ldfp.eu/universal-jurisdiction/. These organizations, as well as Liberty, Redress, Global Witness, and Justice (the British section of the International Commission of Jurists) issued a joint brief on Universal Jurisdiction in the U.K., expressing their grave concern that "any changes to existing law . . . will undermine the capacity of victims of serious international crimes to hold accountable alleged perpetrators . . . by making all arrest decisions in such cases subject to political considerations rather than being based on the legal merits." *See also* Richard Irvine, *UK Rewrites War Crimes Law at Israel's Request*, ELECTRONIC INTIFADA, (Oct. 1, 2011), http://electronicintifada.net/content/uk-rewrites-war-crimes-law-israels-request/10446.

184. *Recent Legislation*, *supra* note 46, at 1554. (thus separating universal jurisdiction proceedings from the arrest warrant procedures for domestic crime).

185. *Id.* at 1557. *See also* Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee; Further Guidance Sought from International Law Commission, *supra* note 20 (statement of Douglas Wilson, U.K.).

186. Irvine, *supra* note 183.

delivered by the PCHR, echoing some prominent INGOs.[188] Nothing is more remote from the truth,[189] as a quick look into the discussions on universal jurisdiction, which were held at the U.N. Sixth Committee (Legal) within the last few years, demonstrates. Across the board, delegates note "the divergent views and practices, the evolving nature of the principle, and new substance being given to it," and the need for a "cautious approach [to] be taken" in dealing with the complex issues involved.[190] They warn that the "limitless application" of universal jurisdiction might lead to "conflicts of jurisdiction between States, to subjecting individuals to procedural abuses, or to politically motivated judicial prosecutions."[191] They call for an "unbiased application" of the principle in order to "prevent its selective application or exploitation . . . for settling political scores"[192] and note the need for "[f]urther clarification and consensus-building" to "strengthen the application of universal jurisdiction" and "give legitimacy and credibility to its usage."[193] Paradoxically, it has been the particularly extensive activity of pro-Palestinian interest groups that has exposed just how complex and unsettled the principle of universal jurisdiction is; this activity has been highly instrumental in demonstrating to all and sundry within the international community—legislators, politicians, judges and the general public—the dangers of its unrestrained application, as well as the lack of consensus surrounding its implementation.

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187. Palestinian Centre for Human Rights, *supra* note 114, at 9.

188. *See, e.g.*, INTERNATIONAL FEDERATION OF HUMAN RIGHTS, FIDH POSITION PAPER TO THE UNITED NATIONS GENERAL ASSEMBLY AT ITS 64TH SESSION 10 (2009), *available at* http://www.fidh.org/IMG/pdf/FIDH_Position_Paper_to_the_GA_-_64.pdf (claiming that universal jurisdiction is "*firmly enshrined* in international treaty and customary law") (emphasis added); *see also* Reydams, *supra* note 9, at 28; *Basic Facts on Universal Jurisdiction*, HUMAN RIGHTS WATCH (Oct. 19, 2009), http://www.hrw.org/print/news/2009/10/19/basic-facts-universal-jurisdiction ("[T]he *vast majority* of states recognize *the validity* of the concept of universal jurisdiction, as they are parties to *conventions that provide for it*.") (emphasis added); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: STRENGTHENING THIS ESSENTIAL TOOL OF INTERNATIONAL JUSTICE 8 (Oct. 2012) (Amnesty International calls upon states to "uphold their commitment to universal jurisdiction, *a long-established rule of international law*, and reaffirm the *duty* of every state to exercise its jurisdiction over crimes under international law . . . *regardless where they have been committed and the nationality of the suspects and victims*.") (emphasis added).

189. *See* Reydams, *supra* note 9, at 10-24.

190. Meetings Coverage, General Assembly, Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, U.N. Doc. GA/L/3441 (Oct. 17, 2012) (statement of Anniken Enersen, Norway); *see also* Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee; Further Guidance Sought from International Law Commission, *supra* note 20 (statements by representatives of Brazil, Tunisia, and the U.S.) (noting the "ambiguity surrounding the concept"); Legal Committee is Told 'Principle of Universal Jurisdiction' Needs to be Refined, to Avoid Possible Abuses, Politicization, U.N. Doc. GA/L/3372 (Oct. 21, 2009) (statement of Hossein Sadat Meidani, Iran).

191. Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, *supra* note 190 (statement of Fernanda Millicay, Argentina).

192. *Id.* (statement of Grace Eyoma, Nigeria).

193. *Id.*

B. The High Price of Manipulation

Within a very short period of time, the three leading states that had adopted *different* modules of laws which allowed their courts to establish universal jurisdiction proceedings had to amend their legislation. Due to political manipulation, mostly against Israel, and later against the United States, all three came to realize that such proceedings could be a double-edged sword.[194] They consequently limited the scope of their laws in a way that either altogether barred foreign individuals and groups from bringing lawsuits which bore no link to the forum state or provided for substantial executive scrutiny of judicial decision-making. Unfortunately, some of these far-reaching amendments might eventually undermine the original notion of universal jurisdiction and thereby defy the interests of international justice by preventing the application of the principle, even in appropriate cases of exceptional character, where the prosecution of international crimes and mass atrocities is truly warranted and justified.[195] In particular, the requirement of a certain link to the forum state—that is, beyond the mere presence of the accused—seems to be irrelevant to the original concept of universal jurisdiction, thus undermining its fundamental idea of prosecution on the basis of the universally acknowledged heinousness of the criminal conduct.

Manipulation of universal jurisdiction has thus created a backlash against human rights organizations and activists, which provided broad, unqualified support to pro-Palestinian groups' abuse of proceedings in their "lawfare" campaigns against Israel.[196] In the words of Reydams, such activity thus showed, "[U]niversal jurisdiction was anything but universal in practice. As an almost exclusively European affair [it] represented a curious mixture of *mission civilisatrice and resistance against United States Hegemony and Israeli exceptionalism*."[197] Supporting—or downright manufacturing—headline-making "virtual cases"[198] against former senior officials, rather than strengthening international criminal law, made a mockery of it.[199] Instead of promoting a transnational worldview and upholding global victimhood principles, it facilitated the introduction of state-centric mechanisms and domestically-centered valuation of international claims.[200] West-European "universal jurisdiction campaigns" should therefore serve as a resounding lesson for groups seeking either to promote one-sided political agendas and gain publicity under the guise of promotion of

194. *See, e.g.*, Bennatan, *supra* note 41.

195. *See, e.g.*, Espósito, *supra* note 152.

196. *See Basic Facts on Universal Jurisdiction*, *supra* note 188 (some leading INGOs still insist that there is no abuse and manipulation of the doctrine in the case of Israel).

197. Reydams, *supra* note 9, at 27. *Cf.* Langer, supra note 1, at 46 (suggesting that although "politics necessarily plays a role in universal jurisdiction . . . universal jurisdiction criminal proceedings . . . have tended to be true adjudicatory processes").

198. Reydams, *supra* note 9, at 24. A term coined by Reydams to describe headline-making NGO-driven cases against a host of (former) senior officials, which, with the exception of Pinochet, "produced little more than headlines and diplomatic headaches (and fame for a Spanish judge)."

199. *Id.* at 28.

200. *Recent Legislation*, *supra* note 46, at 1557.

human-rights and a global rule of law or to push too hard towards the "end of nationhood" by undermining the sovereignty of certain states.[201]

C. Unsettled Doctrine

In 2001, in their Joint Separate Opinion in the *Arrest Warrant* case,[202] ICJ Judges Higgins, Kooijmans, and Buergenthal presented a very supportive position regarding the evolving *right* of national jurisdictions to exercise universal jurisdiction *in absentia*. In their opinion—probably the most powerful formal statement in favor of universal jurisdiction coming from prominent international lawyers—the Judges in fact suggested that, according to contemporary customary international law, a state may *choose* to assert jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with that state.[203]

This observation, stated in the course of reviewing the legality of the Belgian law before it was amended, was remarkable in view of the fact that—as the Judges noted—there was no established practice at the time, in which states exercised universal jurisdiction.[204] The Judges thus admitted that "virtually all national legislation envisaged links of some sort to the forum State" and that "no case law exist[ed] in which pure universal jurisdiction had formed the basis of jurisdiction."[205] This, however, did not necessarily indicate, in the eyes of the Judges, that such an exercise would be unlawful, since "a State is not required to legislate up to the full scope of the jurisdiction allowed by international law."[206]

Further relying on "contemporary trends, reflecting international relations as they stand at the beginning of the new century,"[207] the Judges jointly determined that:

> [W]hile none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law—that is, State practice—is neutral as to exercise of universal jurisdiction.[208]

In view of the developments that followed, such an assertion would be impossible to sustain today. It would amount to a proposition that customary law—

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201. *See, e.g.*, Kern, *supra* note 100; *see also* Mallat, *supra* note 44, at 189-90 (who framed his petition in Belgium in the context of the fight for a so-called Kantian "cosmopolitan justice" in the face of economic forces that "wreak havoc with peoples' lives.").

202. Case Concerning the Arrest Warrant, *supra* note 7, at 63 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

203. *Id.* at 80, ¶ 59.

204. *Id.* at 76, ¶ 45.

205. *Id.*

206. *Id.*

207. *Id.* at 76, ¶ 47. According to the Judges, "contemporary trends" outline a "movement towards bases of jurisdiction other than territoriality."

208. *Id.* ¶ 45.

or in the words of the Judges, "the full scope of jurisdiction allowed by international law"—develops in complete detachment from evolving state practice. Furthermore, the fact that the main—and only—jurisdictions that allowed for the exercise of universal jurisdiction "in its pure form," or close to that, later revised their legislation to require a certain link to the forum state is a clear indication regarding the evolving *opinio juris* on the matter. It thus became clear that state practice is no longer neutral regarding the possibility of exercising universal jurisdiction *in absentia,* without even some connection to the forum state. This has now become obvious not only as a matter of legal doctrine, but also as a matter of political reality, in a way that indicates an evident change in "contemporary trends reflecting international relations."[209]

It is also important to note that even Judges Higgins, Kooijmans, and Buergenthal required certain safeguards that were essential in their view to prevent abuse of universal jurisdiction-based proceedings. These included the protection of international immunities, as well as giving the national state of the prospective accused the first opportunity to act upon the charges concerned.[210] More significantly, the Judges determined that "such charges may only be laid by a prosecutor or *juge d'instruction* who acts in full independence," without links to or control by the government of the forum state.[211] Reality, however, proved that reliance on the independence of the judiciary—although logical as a matter of legal theory—was one of the main causes for manipulation and abuse of universal jurisdiction. This led most national legislators to require the strict review and approval by relevant government or prosecution officials as a pre-condition for the exercise of jurisdiction by national authorities.

Altogether, it is obvious today that, although the general concept of universal jurisdiction is generally recognized under international customary law, its meaning and application cannot be left to evolve customarily. Rather, it requires an explicit, meticulous determination within a comprehensive international effort, most likely in the form of a draft international treaty that would, first and foremost, settle in detail the issue of jurisdictional priorities that have proved to be highly sensitive and delicate. This would most likely impact other controversial matters that remain largely unresolved, such as the authority to exercise jurisdiction—or even to initiate a criminal investigation—*in absentia*, as well as the scope of sovereign immunity that restricts national proceedings. Such an international instrument may also provide some guidance regarding the level of national authority—whether judicial, political, or both—that should be vested with the discretion to decide on national proceedings.[212] Evidently, despite what was advocated by certain

209. *See* text accompanying *supra* note 207.

210. *Id.* at 80, ¶ 59-60 (they also considered it necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community).

211. *Id.* ¶ 59.

212. *See, e.g.*, Langer, *supra* note 1, at 46-47 (considering the issue of the desirable level of prosecutorial discretion and control by the executive branch over prosecutors to be critical; it is particularly crucial in view of the fact that "selectivity is such a structural feature of universal jurisdiction.").

publicists,[213] decisions regarding these and related issues, that bear a tremendous impact on inter-state relations, cannot be left to national legislators to make.

D. Asymmetric Application and Political Agendas

Most of the complaints brought against Israeli (and United States) senior officials were intentionally framed in the context of, and as a means for undermining, the fight against terrorism. They consequently exposed the normative paradoxes involved in the asymmetric application of international criminal arrangements. The fact that universal jurisdiction typically deals with so-called "crimes of state" and the liability of state officials,[214] not with offences committed by non-state actors and terrorists, still presents a significant challenge that shadows the lofty goals underlying the doctrine. This is all the more true in a world where the fight against the malignant phenomenon of global terrorism is not shared evenly by states, and where there is still no broadly accepted definition—let alone political consensus—regarding terrorist activity.[215] It also raises deep

213. *See, e.g.*, SHAW, *supra* note 11, at 672 (regarding the requirement of the presence of the accused in the forum state). Since in the case of universal jurisdiction, the national authority to initiate proceedings derives from international law, all issues that bear a direct impact on the extent of such authority—and therefore on the rights of the defendant—must be settled and determined under international law, and cannot be left to the discretion of the national authorities (unless mitigating factors are concerned). *See, e.g.*, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal with Commentaries, Rep. of the Int'l L. Comm'n, 2nd Sess., Y.B. Int'l L. Comm'n, 1950, Vol. II, at 374-75, ¶ 99, 102, 104, 106.

214. Much like the ICC in this regard. Paradoxically, as Schabas notes, one of the strongest arguments for excluding crimes such as terrorism from the jurisdiction of the ICC is that they "do not suffer from a problem of impunity in a manner similar to that of other categories," such as genocide, crimes against humanity, war crimes, and aggression, being typically "state crimes," perpetrated by governments themselves or with their complicity, and therefore went unpunished. SCHABAS, *supra* note 15, at 98. Universal jurisdiction, on the other hand, was originally predicted on the ground that certain crimes (such as piracy, slave-trade and traffic in children and women) were often committed by non-state actors and in *terra nullius*, where no state could exercise territorial jurisdiction. *Id.* at 64.

215. *See* BRYNJAR LIA, GLOBALIZATION AND THE FUTURE OF TERRORISM: PATTERNS AND PREDICTIONS 9-15 (2005). Lia acknowledges that terrorism has long been a controversial term and that, although "there has been a considerable resurgence in terrorism studies during the 1990s, and especially after 9/11," as well as a growing consensus in academia on the definitional issue, "[s]till basic conceptual and methodological questions remain unresolved" and no generally accepted definition of terrorism exists. *Id.* at 10-11. He further acknowledges the "strong tendency to label anti-Western and anti-Israeli violence, including attacks on military targets, as terrorism." *Id.* at 11. According to Lia, the most widely used definition of terrorism is the one used by the U.S. Department of State in its annual report, *Patterns of Global Terrorism*, where terrorism is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience." *Id.* at 11 (quoting U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM xii (2003)). He also notes that, "[g]iven the definitional and conceptual problems of studying terrorism generically, one has argued that it is better to use a political definition of terrorism, namely illegal violent activities practiced by groups listed as outlawed terrorist organizations by the USA and more recently by the European Union." *Id.* at 14. Schabas notes that, proposals at the Rome Conference to include terrorism as a category of international crimes under the jurisdiction of the ICC did not meet with sufficient consensus. SCHABAS, *supra* note 15, at 96. He foresees that, since it becomes increasingly evident that the ICC will only be able to deal with a very limited number of cases, it is "entirely unrealistic to think that new criminal law paradigms, such as . . . terrorism could be added

concerns regarding the future application of universal jurisdiction in the context of other controversial "state crimes," such as that of aggression.[216]

Furthermore, in this regard, some commentators wanted to use universal jurisdiction-based petitions against Israeli officials abroad as an incentive for the conduct of "genuine and effective" *domestic* legal proceedings that would allegedly defend officials from foreign claims.[217] There is surely no doubt that prompt, objective, and effective domestic proceedings and investigations into alleged violations of human rights and humanitarian law are of crucial importance, a national interest indeed. Nevertheless, if anything, the short but highly dense history of proceedings against Israelis abroad suggests that domestic proceedings are *not* an effective barrier against the abuse of foreign proceedings.[218] Once lawsuits abroad are motivated, first and foremost, by political and propaganda considerations, anything less than maximal prosecution will always leave room for the argument that domestic proceedings are conducted "unwillingly" and "ineffectively," or designed to get the defendant "off." In this way, as Kontorovich observed, "while a prosecution" by the home state "cannot be undone by others, decisions to *not* prosecute can be nullified by other states' decisions to prosecute," and extra-judicial settlements can easily be ignored.[219] Consequently, a state showing the slightest sign of being inclined to conduct domestic proceedings due to fear of foreign lawsuits will most probably be inviting even more complaints from abroad, risking foreign scrutiny of, and even possible intervention in the conduct of domestic proceedings.[220] Such a development is particularly dangerous in the context of the fight against terrorism, due to the "limited appreciation of the unique dilemmas posed by terrorism and counter-terrorism."[221]

E. Controversial Involvement of INGOs and Interest Groups

The conduct of "universal jurisdiction campaigns" against Israelis abroad also demonstrates the potential risks involved in the participation of certain INGOs and interest groups in the conduct of future domestic proceedings and investigations.

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to the jurisdiction." *Id.* at 97. Schabas further acknowledges that the problem with a distinct crime of terrorism lies in definition, explaining that "[t]errorism seems to have more to do with motive than with either the mental or physical elements of a crime, and this is something that is not generally part of the definitions of offences." *Id.* Some argue that terrorist acts may fall within the scope of crimes against humanity or even war crimes, but there is no consensus on this point. *Id*, at 15.; *See also* CASSESE, *supra* note 11, at 162-64, 171-77.

216. *See generally* Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357 (2012).

217. Rosenzweig & Shany, Spanish Supreme Court Affirms Decision, *supra* note 151.

218. *See, e.g.*, George P. Fletcher, *Against Universal Jurisdiction*, 1 J. OF INT'L CRIM. JUST. 580, 582-83 (2003).

219. Kontorovich, *supra* note 34, at 404 (on the problematic application of the principle of *non bis in idem* ("double jeopardy") in the context of universal jurisdiction).

220. This is all the more so today, once there is no international agreement on the complex issue of competing proceedings, and probably until a comprehensive multilateral treaty on universal jurisdiction is concluded. *See, e.g.*, Esposito, *supra* note 152; REYDAMS, *supra* note 18, at 16.

221. *See* Rosenzweig & Shany, Spanish Court's Inquiry, *supra* note 107.

Undoubtedly, these actors benefitted greatly from their intense involvement in universal jurisdiction high-profile, politically controversial cases, gaining publicity, funds and membership.[222] Today, when most of the relevant countries have effectively closed their doors before foreign private litigants,[223] the motivation of interest groups to find and apply alternative channels of prosecution, such as the ICC and home-state domestic legislation, is probably high. This means that any consideration of new domestic investigation and prosecution proceedings will certainly require serious evaluation of the proper procedural mechanisms and legal safety valves required to ensure that such proceedings are not easily abused and manipulated. Such an endeavor will probably require consideration of complementary legislation regarding, *inter alia*, interest groups' sources of funding and support for terrorism. At the same time, international judicial institutions, such as the ICC, should be highly aware of not letting themselves be manipulated by parties to political conflicts and by their proponents, thus undermining their legitimacy and credibility.[224]

VIII. CONCLUSION

Despite the enduring controversy regarding its content, limits, and modus operandi, universal jurisdiction is an important concept and is here to stay. It could—and should—evolve into a cornerstone of the multilateral endeavor to end impunity and to bring justice to victims of the most atrocious of crimes. It is therefore all the more unfortunate that "lawfare" in the form of universal jurisdiction campaigns has set back the cause of international global justice in this regard. Indeed, some commentators argue that universal jurisdiction had become a mere "self-feeding hype generated by NGOs, activist lawyers and judges, academic conferences and papers, and mass-media."[225] This may go too far. Nevertheless, it is a powerful reaction in the face of the unbearable lightness of political manipulation. If universal jurisdiction is to be meaningful in the future, the lessons regarding the ease with which international law can be exploited and

222. *See* Byers, *supra* note 3, at 439-40.

223. Still, the amended Belgian law, for example, can be easily abused by litigants who are Belgian nationals or residents, although this is not considered anymore a universal jurisdiction case due to the link of the alleged victims to Belgium. Such was the case with the two Belgian activists who were reported to file a war crimes complaint over the "flytilla" incident, against Prime Minister Binyamin Netanyahu, former Minister of Interior, Eli Yishai, former Minister of Defense, Ehud Barak, and former Chief-of-Staff, Gabi Ashkenazi, in January 2012. *See* Ali Abunimah, *Two Belgians File War Crimes Complaint against Israeli Leaders over 'Flytilla' Abuse*, ELECTRONIC INTIFADA (Jan. 18, 2012, 1:57 PM), http://electronicintifada.net/blogs/ali-abunimah/two-belgians-file-war-crimes-complaint-against-israeli-leaders-over-flytilla-abuse/.

224. *See, e.g.*, Eugene Kontorovich, *Israel/Palestine—the ICC's Uncharted Territory*, 11 J. OF INT'L CRIM. JUST, 979 (2013); David Kaye, *Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set it Straight*, FOREIGN AFFAIRS, May/Jun. 2011, http://www.foreignaffairs.com/articles/67768/david-kaye/whos-afraid-of-the-international-criminal-court.

225. Reydams, *supra* note 9, at 27. *See also* Langer, supra note 1, at 5.

diverted from its true objectives,[226] turning it into an "international lynch-law,"[227] must resound.

226. *See, e.g*, Hirsch & Kumps, *supra* note 40, at 24.

227. Jouet, *supra* note 18, at 537 (quoting the former British Prime Minister, the late Margaret Thatcher); *see also* Kissinger, *supra* note 2.