

# ADDRESS TO THE AMERICAN INTERNATIONAL LAW ASSOCIATION

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It is a pleasure and an honor for me to participate in this panel discussion.

In my day job, I serve as the legal adviser to Israel's mission to the United Nations, and most of my comments today emerge less from academic research into the field of universal jurisdiction, and more from practical experience in issues related to international criminal justice both at the UN and outside it.

I should make clear though, that my comments are made in a personal capacity and do not necessarily represent the views of the Government of Israel.

When Dave invited me to participate in the panel, he noted that Israel was in the unique position of having relied on something somewhat analogous to universal jurisdiction in the Eichmann case, and having objected to the resort to universal jurisdiction in the recent case involving Prime Minister Sharon in Belgium.

Of course, these cases were very different, both factually and legally. [*The Eichmann case was not, strictly speaking, a case of universal jurisdiction. Jurisdiction there was founded essentially on the passive personality principle, though novel issues were raised because the crimes prosecuted related to events against Jews in Europe during the Holocaust and before the establishment of the State of Israel. Still, the link between the prosecution and the State of Israel was clear, (though it would have made for an interesting legal and diplomatic interchange had Germany also sought the prosecution of Eichmann).*]

*By contrast, the case in Belgium against Prime Minister Sharon and other Israeli officials was based on legislation which, as it then stood, granted Belgium jurisdiction to try persons for certain crimes, irrespective of when, where or against whom such crimes were committed. Thanks to a later amendment introduced by the Belgian Senate, there was at one point no requirement that the alleged offenders even be present in Belgium. In fact, one would be hard pressed to find any link between Belgium and the alleged offenses for which Prime Minister Sharon and other Israeli officials were to be charged.*

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*In that sense, the case involved a clear, if overly and unduly broad, reliance on universal jurisdiction. But I will get to that later.]*

But in the mind of an Israeli lawyer, the Eichmann case and the Sharon case serve as bookends to a discussion on universal jurisdiction and frame at least my thinking about the appropriateness and utility of universal jurisdiction, as a mechanism for enhancing justice and the rule of law.

It is said that a diplomat is someone who thinks twice before saying nothing. Unfortunately, that principle is rarely followed, least of all at the UN. But I will try, at least, to be brief and limit myself to some general observations.

First, universal jurisdiction is concerned above all else with fighting impunity for certain recognized serious crimes. When dealing with the legal intricacies of universal criminal jurisdiction, we must always bear in mind that its moral and legal justification is founded on the notion that certain crimes are so heinous that they affect the interests of all members of the international community and give rise to a right, and some say an obligation, to any state to prosecute the alleged offender, absent any traditional jurisdictional link to the offense.

But when comparing the interests of states with such traditional links with those of the international community as a whole, I don't think it accurate to suggest that these interests are equivalent. In fact, I would argue that there is really a hierarchy of interests involved in any potential exercise of universal jurisdiction. The interests of states wishing to assert universal jurisdiction are lower in that hierarchy to the interests of the state or states with clear jurisdictional links to the case on the basis of traditional criteria. To some extent this is because it is only in the state with traditional jurisdictional links to the offense that broader, but no less important, interests of justice and reconciliation can be served by the prosecution of the alleged offender.

In my mind, therefore, universal jurisdiction should not, and was not intended to, operate on a widespread basis as a system of justice. By its very nature, it is designed to play, at the most, a subsidiary, ad hoc role when offenders of certain serious crimes risk escaping with impunity. In fact in a post-ICC age, we could rethink the role to be played, if any, by remote foreign courts in presuming to judge crimes in relation to which they have no clear interest. At the very least we need to try to understand the desired relationship between these two international criminal justice mechanisms—the ICC and universal jurisdiction—and always bear in mind that from a policy perspective our efforts and resources should primarily be devoted to enhancing the effective operation of the judicial system of the state or states with traditional grounds for jurisdiction.

Along these lines, I think the case could be made at the very least that a notion akin to ICC complementarity applies with respect to the exercise of universal jurisdiction. The first limitation on universal jurisdiction should

arguably be that a state seeking to assert it may only do so if the state with a traditional jurisdictional link is unable or unwilling to investigate the case in good faith. I think a few scholars have recognized this approach and it may be the appropriate conclusion to draw from State practice generally and, after a somewhat tortuous process, from the final version of the Belgium law.

Second, one of the interesting yet less noted aspects of universal jurisdiction is that it shifts the priorities and focus from the ones we are used to seeing in a national criminal prosecution pursued on traditional grounds. As Professor George Fletcher of Columbia University has pointed out, national courts are primarily preoccupied with the rights of the accused. The accused has the most to lose from the trial and national constitutions and criminal codes of procedure impose great limitations on the criminal process so as to protect the accused. In fact, we are so concerned with the rights of the accused that we would rather a guilty defendant go free, than an innocent defendant be wrongly convicted.

Next in the list of priorities in regular criminal trials are the interests of the community itself, as represented by the prosecutor bringing the case. A prosecution conducted in the state with a clear jurisdictional link to the case, reflects the political, social and economic values of that society. The investigation and prosecution itself often plays a role in the healing and reconciliation process of a community after a crime, especially a serious crime, is committed.

Finally, there are the rights of the victims that in most national systems receive, unfortunately, the least attention. The US constitution, for example, contains numerous provisions on the rights of the accused, but not a word on the rights of victims. Victims are often less interested in a fair trial or in the long-term reconciliation process within their community. They are concerned, first and foremost, with seeing the accused convicted, with ensuring that there is no impunity.

Universal jurisdiction flips the order of priorities around. To a greater degree than the ICC, universal jurisdiction is primarily concerned with the rights of the victim and with ensuring that the accused is convicted. Its focus is the fight against impunity.

It is argued that the state exercising universal jurisdiction does so partly due to deterrence considerations. I think the jury is still out on how much of a deterrence role is really played by universal jurisdiction.

In my view, the central motivation for universal jurisdiction remains that it is simply unconscionable for the perpetrator of so grave a crime to go unpunished. As the International Law Association put it in its report of 2000, "the key rationale of universal jurisdiction, therefore, is not deterrence but justice."

The prominence given to victims' rights and to battling impunity in this way has important consequences, which are both procedural and substantive.

Scant attention has been paid, for example, to the practical and evidentiary problems posed by pursuing a prosecution in a foreign and unconnected court, which can amount in some cases, as one Belgian prosecutor has noted, to conducting “virtual prosecutions.”

I will not enter the debate about *in absentia* prosecutions or the issue of Head of State or diplomatic immunity, which will be discussed by the other panelists and was examined by the ICJ in the Congo v. Belgium case. [*But the fact that some scholars and judges are willing to entertain the idea that universal jurisdiction allows for prosecutions in absentia and does not respect traditional immunities is testimony to the precedence given by some to combating impunity. In the view of these advocates, preventing impunity is more important than guaranteeing the rights of the accused to be present at trial or protecting the immunity granted to state officials for the orderly and smooth conduct of international relations.*]

My comments are concerned more with other consequences of this emphasis on impunity to which I now turn, in my third point.

At the end of September, following a British initiative, the Security Council conducted an open debate on the subject of the UN role in promoting justice and the rule of law. In the context of that debate, several states as well as the Secretary-General made some comments that in my assessment suggest a growing recognition that an overdue emphasis on fighting impunity can actually have negative effects. [*These effects relate both to long-term processes of national reconciliation and to wider efforts aimed at establishing effective, fair and lasting judicial systems that would obviate the need to resort to universal jurisdiction*]. In his comments to the Council, the Secretary-General noted:

At times the goals of justice and reconciliation compete with each other... the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times, and in all places on punishing those who are guilty of extreme violations of human rights it may be difficult, or even impossible, to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice a delicate peace may not survive.

I don't want to overstate the significance of this comment, and it should be noted that the Secretary-General did temper it with other remarks. However, in my mind, this represents a fairly remarkable shift in policy that, when considered together with State practice highlights that universal jurisdiction is on the retreat. It is, I think, the culmination of an evolving trend that has drawn lessons, in particular, from the experience over the past decade of the Yugoslavia and Rwanda tribunals.

If we draw a line from the Yugoslavia and Rwanda tribunals, which were international tribunals pure and simple, through to the introduction of the principle of complementarity in the ICC and finally towards the emphasis on national or mixed tribunals in Sierra Leone, Cambodia and now in discussions regarding transitional justice in Iraq and Liberia we can see a fairly clear trend. The Yugoslavia and Rwanda tribunals have made important contributions to international justice, but they have also suffered from some fairly serious shortcomings. It is somewhat of an embarrassment among some UN circles that hundreds of millions of dollars have been spent on such a relatively small number of indictments.

For all their efforts, I have serious doubts as to the long-term contribution of these tribunals in three areas which should interest all those concerned with international criminal justice: reconciliation within Yugoslavian and Rwandan society, establishment of effective judicial systems that are crucial to preventing these societies from sliding back into conflict, and finally, providing an effective deterrence to future violators.

*[In retrospect, the emphasis on complementarity in the ICC can be seen as an outcome of these considerations. While during negotiations on the ICC complementarity was viewed by many NGOs as a regrettable necessity in order to persuade States to support the project, it has now taken on cardinal significance. As the ICC prosecutor Moreno Ocampo has noted, the success of the Court will not be judged by the number of prosecutions brought before it, but by the number of international prosecutions avoided because of the effective and proper functioning of domestic legal systems. The potential significance of the ICC lies primarily in the role that it may play, as part of a broader network of mechanisms, as a catalyst in encouraging national jurisdictions to enhance the rule of law in their societies.]*

At the end of the day, the international community is recognizing that there can be no substitute for serious efforts to strengthen the rule of law within national societies. Focus on transitional justice and rule of law issues, both during and after a conflict, remain the most important guarantee of lasting peace, democratization and stability in a society and it is here that our resources and energies should be primarily devoted. It is the rule of law, not ending impunity writ large, that helps societies to emerge from conflict and establish orderly system that encourage economic investment, prosperity and the protection of rights. If one takes the long view, such a focus is also really the best way to fight impunity itself.

Universal jurisdiction plays, at best, a fairly marginal role in these efforts and sometimes a counterproductive one. It often makes little or no contribution to internal processes of reconciliation. In fact, sometimes the interests of peace, justice and stability are better served by respecting national reconciliation processes and amnesties at the expense of the pursuit of a "perfect justice." It

would be counterproductive, for example, to pursue the prosecution of individuals who have appeared before the Truth and Reconciliation Commission in South Africa on the basis of universal jurisdiction.

This does not mean that blanket or unjustifiable amnesties should be respected. But it is one thing for the international community to withhold its blessing from a political process involving these kind of amnesties. It is quite another to allow remote judicial mechanisms to interfere and potentially unravel delicate political processes of which they are unfamiliar and ill-suited to repair. *[As always, a balance is required. In seeking to strike that balance we must bear in mind that while the international community can encourage the parties to a conflict to make the "right" choices, few if any conflicts can be solved unless the parties themselves live up to their responsibilities.]*

Universal jurisdiction also makes only a limited contribution to the establishment of fair and effective domestic judicial mechanisms. And sometimes it can even allow parties to pursue or exacerbate their conflict by advancing political agenda in foreign courts instead of settling it around the negotiating table.

The resort to universal jurisdiction can, in addition, and has in practice, been perceived as arrogant interference by States who are hardly in a position of moral authority to judge the conduct of others. It is important to appreciate that any exercise of universal jurisdiction does not only involve passing judgment on the alleged perpetrator, it involves passing judgment on the judicial system of the State that is deemed to have failed to prosecute the offender.

One sometimes gets the feeling that the discussion of universal jurisdiction serves as an easy way out: A way for states to clear their conscience for failing to prevent or reduce serious human rights violations. A way for developed states to avoid the difficult tasks of assisting and guiding others towards enhancing their domestic judicial systems, by purporting to step into their shoes so as to remove the most egregious cases from the headlines. We should also not pretend that the pursuit of universal jurisdiction in countries such as Belgium and Germany for instance is purely altruistic and unconnected with national interest and perhaps more significantly the national legacy.

I am not suggesting that universal jurisdiction and enhancing the domestic rule of law are always or necessarily mutually exclusive. Sometimes universal jurisdiction can play an important and useful role in promoting justice and encouraging interested states to pursue prosecutions. And perhaps I am placing undue emphasis on the limits of universal jurisdiction, to counter-balance the support it has received in academic circles. But I would echo the views of some those who have suggested that the academic focus on universal jurisdiction at the expense of a serious examination of the ways to advance the rule of law within societies may not always be helpful.

Fourth, it is probably appropriate to make some comments about the need for significant safeguards against political abuse, if and when universal jurisdiction is relied upon. Naturally, I am drawn towards using the Sharon case in Belgium as an example, though there are others. The political nature of this prosecution was evident in several ways. As Professor Malvina Halberstam has observed, the prosecution was not instituted in 1993 when the Belgian law was enacted, but only once Sharon had become Prime Minister. It was not brought against those Lebanese who actually perpetrated the massacre at the Sabra and Shatilla refugee camps in 1982, but against those alleged to have failed in preventing something that they *ought* to have known was taking place. This is doubly significant because there is hardly a precedent in the field of international humanitarian law for examining the legal responsibility of individuals for their omissions in relation to the conduct of others who are not operating as *de jure* or *de facto* State agents. Certainly, Lebanon did not examine the possible responsibility of its own forces in failing to prevent, let alone perpetrating, attacks on civilians during the civil war, and instead preferred to grant a blanket amnesty.

The fact that an investigation had already taken place in Israel by a commission, headed by the President of the Supreme Court that held 60 sessions, heard 58 witnesses, considered a mountain of documentary evidence, and led among other things to the forced resignation of Sharon as Defense Minister, was not taken into account. And while Belgium did not institute the prosecution, it was Belgian legislation that made room for it, and it was the Belgian parliament that intervened in order to overturn the decision of a lower court so as to allow for the case to proceed *in absentia*.

Whatever one's view of the events in question, the whole episode in Belgium illustrates the dangers not just to international relations but also to the interests of peace and justice in an overly liberal reliance on universal jurisdiction. The limitations introduced to Belgium's law after complaints were brought against US officials and after elections were held in Belgium are both well advised and indicative, I think, of a growing realization of the dangers and shortcomings of universal jurisdiction, especially in a post-ICC age.

Significant consideration still need to be given to the safeguards that should be introduced in order to prevent the abuse of universal jurisdiction and avoid the harmful use of foreign courts as political or public relations weapons in conflicts that need to be resolved by political dialogue. The adoption of a notion of complementarity into the exercise of universal jurisdiction, as I suggested earlier, may be one of a number of mechanisms that should be expressly endorsed. Other threshold requirements could be introduced, aside from the more familiar ones that have been considered, for example, in the work of the International Law Association and the Princeton Project on this subject.

Before concluding, I would like just to try to contribute to the discussion by raising two questions on issues on which I am somewhat conflicted. First, how should our thinking about universal criminal jurisdiction affect the way we approach universal civil jurisdiction of the kind advanced, for example, by some interpretations of the Alien Torts Claims Act? Second, for those who support the broad use of universal jurisdiction, how do we draw the appropriate balance between cases where it is better for a disinterested state to pursue a prosecution and cases where we would prefer the state or states with a vested interest in the outcome to prosecute? I would be grateful if anyone on the panel or in the audience would like to share his or her views on these questions.