

***University of East London***

***“Ten Years After Pinochet: The future  
of Universal Jurisdiction”***

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It is quite extraordinary to think that it is now almost 10 years since I received a telephone call one Saturday morning asking me to represent Senator Augusto Pinochet in connection with a warrant for his arrest and extradition to Spain.

I often say that I achieved something that weekend which I have never achieved since -- I received more telephone calls than my teenage daughter!

There is no doubt that the various Human Rights groups, through their involvement in the Pinochet case, brought to everyone's attention that no one should be above the law and there should be no hiding place for those accused of alleged international crimes.

I remember Professor Christopher Greenwood QC (who was the CPS International Law expert) saying that before *Pinochet* the subject was an addendum to military law publications but that since the case there are many books now published on the subject. Such was the impact of the case in which I stress that Human Rights groups must receive credit.

I use a phrase "international crimes" because I believe that we should use this norm rather than "universal jurisdiction".

Let me make my submission to you and then seek to justify it over the next few minutes.

Universal jurisdiction as a concept has not advanced in the last decade but the coming into force of the International Criminal Court, albeit in its emerging stages, has given a chance for heinous crimes to be tried by the international community when domestic tribunals' fail or refused to do so. And it may be that the powers of the ICC, if it is allowed to pursue its aims, will advance beyond the boundaries of universal jurisdiction. For example there will be no immunity from prosecution.

Let me seek to make good my submission, raising 5 overlapping issues.

1. Atrocities throughout the world are continuing. e.g Congo, Sudan, Uganda. It is said that the *Pinochet* case sent shivers down the spine of some Heads of State who felt they might be facing a similar fate to him. There were stories of some notable Heads of State remaining in their so called "safe havens" at home, but has it really prevented those in the western world from

travelling? Many would have no difficulty prosecuting Robert Mugabe arising out of conditions in Zimbabwe -- what about leaders of the Russian Federation in connection with Chechnya?

2. I remember on the eve of *Pinochet No 2* in the House of Lords watching the news broadcasts of the bombing raids in the Balkans initiated by NATO countries. Any potential prosecutions under the cloak of "universal jurisdiction" of western world leaders? It may well have been argued that the United Nations gave a mandate to order bombing raids in Iraq but some would ask what was the authority for the bombing raids in Kosovo. At the very least was there some international investigation? No.

3. We have had a plethora of ad hoc tribunals following the event, limited in their scope, recognized as some kind of Victor's justice, and controversial. Name me one that hasn't been? The Yugoslavia and Rwanda tribunals were set up to try atrocities. No one will have sympathy for Milosevic but do remember he was taken to the tribunal with the help of the British and Americans, he exposed substantial flaws in the procedure, the trial process ran into the sand and was never completed. And consider how do you bring the tribunal to a conclusion? It will be difficult enough for the Yugoslavia Tribunal: Rwanda will return this year to domestic hearings in its own country -- in an attempt to achieve this there has already been an international conference (in Tanzania). Rwanda does not have its own infrastructure at the present time. Remember also that the starting point in the modern era for these tribunals - Nuremberg was described by one of the Law Lords in *Pinochet* as "a kangaroo court".

4. So what of the countries who have set themselves up as the international policeman or international saviour to try the crimes that are so heinous they must not go unpunished? The starting point was of course Spain. They sought to try Pinochet even though the events did not happen in Spain, Pinochet was not Spanish, and none of the alleged victims were Spanish. Have countries succeeded in further trials? Was Belgium right to set itself up to seek to try Ariel Sharon for the events at Sabra and Shatila? Did it succeed. The Kahan commission had already (domestically) determined he was not criminally liable. Indeed take Belgium and Israel. Does one have the right to reopen a decision when another has domestically taken the view that no criminal liability arises? If the answer is it does, you can see the ramifications throughout the whole of the Western world.

Consider also the sheer complexities of seeking to do so. It was Israel who probably have asserted “universal jurisdiction” most powerfully since the 2<sup>nd</sup> World War by (kidnapping) and trying Adolf Eichmann. Most will say that they were certainly morally correct but looking back it is now a controversial trial. There were protests at the time from Argentina:(I think at the time they broke off diplomatic relations with Israel). Had Argentina decided that Eichmann should not stand trial, could Israel (or indeed Germany) have over-ridden that? Where would it have left international affairs if it did?

Interestingly also in the UK we have brought in to domestic law the Torture Convention so that those who have authorised this treatment, wherever it has taken place, can be prosecuted in this country (section 134 of the Criminal Justice Act 1988). You may remember the dates were of significance in *Pinochet no 3*. A move forward on the road of “universal jurisdiction”? One prosecution in 10 years (of Faryadi Sarwar Zadad in 2005 for conspiring to torture and take hostages in Afghanistan – interesting ruling – although Zardad was not a de jure public official, he was to be treated as a public official on a de facto basis). The Taking of Hostages Act 1986 similarly has universal jurisdiction of a kind. As far as I know it has only been used on one occasion and that in Scotland.

War Crimes arising out of the Second World War in Europe, for example, can be tried in the England. One prosecution – in 1999: Anthony Sawoniuk tried at the Old Bailey in London in 1999 and given two life sentences for the murder of 18 Jews in his occupied hometown in 1942.

5. Have countries been able to show to the international community that high profile trials can properly take place elsewhere outside domestic courts? The Scottish court sat in Holland in 2000 and 2001 to try the alleged Lockerbie bombers. Why if it was a domestic matter did it not sit in Scotland? Hans Köchler, an international observer at Camp Zeist appointed by the Secretary-General of the United Nations, described the decisions of the trial and appeal courts as a "spectacular miscarriage of justice".

The decision was controversial and is now subject to a further review. The Charles Taylor trial has been moved from Sierra Leone to The Hague. It has run into problems. And was the trial of Saddam Hussein free of controversy? Great credit must go to the judiciary in Baghdad to get any trial off the ground but many observers have voiced concern about its fairness and unease at the way the sentence was carried out.

Having identified a number of issues that raise doubt as to whether the concept of universal jurisdiction is one that has advanced over the last decade I do believe that the coming into being of the International Criminal Court is by far the greatest advancement in this field. It is legally and functionally independent of the United Nations. The importance of this feature highlighted all the more when we look at the prosecutions before ad hoc tribunals so far. The ICTY's jurisdiction covers crimes committed within the territory of Tito's Yugoslavia. To date, only citizens from the Balkan states have been prosecuted, the prosecutor has refused to investigate cases of officials from NATO countries. This begs the question of the partiality of such arrangements particularly as it is predominantly NATO countries that finance ad hoc tribunals.

The ICC is not saddled with the problems of being set up after the event, who did so and for what reason and I believe that those who think that these crimes should be tried should place their support behind the ICC and abandon other ad hoc tribunals.

Some of the reasons why I support the ICC are obvious from what I have already said. I would hope this major step will lead in time to the enforcement of international criminal law. Those who are against my thinking and believe that this has been advanced through some form of universal jurisdiction at the present time -- ad hoc tribunal's, domestic and international trials might wish to analyse why these have been controversial, have seldom brought those who perpetrate the crimes to book and that more importantly we still see across our television screens every week atrocities throughout the world. They are on any view "war crimes" and go unpunished. Article 8 of the ICC charter could help here.

Of course the ICC would not be the panacea for all the world's ills. It is a catalyst, but an important one, encouraging domestic courts to actively prosecute those accused of committing heinous crimes. But it is a start and one which should be given the support of all those who themselves advocate universal jurisdiction as a norm civilised country should adhere to.

We know that investigations and indeed trials starting in front of the ICC - Congo, Sudan and Uganda. It does have its problems. Some would say it is politicised. There are difficulties for defence advocates. But I do not know of any system that in its embryonic stages has been free from criticism. It is a learning curve but one which I think will be thoroughly worthwhile.

Lord Hope, one of the judges in *Pinochet No 3*, recalled recently his judgement that as far as the law of the UK was concerned that the only country where Senator Pinochet could, at that time, be put on trial for the full range of the offences which had been alleged against him by the Spanish judicial authorities was Chile.

Perhaps you can test my submission by the fact that you could not possibly have contemplated 10 years ago that someone in this position could or should be tried by another country or at an ad hoc tribunal. Today a world leader, who stands accused, could, with sufficient safeguards, face trial before an independent international court, without immunity, and after the domestic court had refused to do so.

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