

Episode 5 (June 2020)

Universal jurisdiction: the unthinkable becomes thinkable

Welcome to Justice Visions, the podcast about everything that is new in the domain of Transitional Justice (TJ). Justice Visions is hosted at the Human Rights Centre of Ghent University. For more information visit Justicevisions.org.

Tine: Hello Brigitte, how are you?

Brigitte: I'm fine. Thanks. And what about yourself?

Tine: I'm fine. And I'm super excited to be back at our studio. Isn't that great.

Brigitte: It's fantastic. And there's so much to talk about today. There's a lot of things happening with regard to victim participation in transitional justice, and especially when it comes to universal jurisdiction.

Tine: True. We were talking about this before we started recording and I thought it might make sense before we dive into the principles, that you tell us a bit more, for those listeners who are not too familiar with it, what universal jurisdiction is, before we start to talk about how it's working and what it's looking like right now.

Brigitte: Well under the principle of universal jurisdiction, internationally recognized crimes, such as war crimes, genocide, and crimes against humanity that are committed in other states can also be prosecuted in domestic trials. And this happens when it's impossible to get justice in the territory where the crimes have been committed and when a referral to the International Criminal Court or other courts are not possible, for political reasons mostly. So today we are really witnessing a lot of developments with regards to the prosecution of international crimes under universal jurisdiction.

Tine: And that is really interesting for your work on Syria. Isn't it?

Brigitte: Yes, it's super exciting because for the first time we are actually seeing a lot of possibilities for victims to seek justice for crimes that have been committed. And for perpetrators to be finally held accountable.

Tine: What we wanted to do today in a way, is to really zoom out from what is happening now, and talk also a bit more about the general logic of universal jurisdiction and where it comes from.

Brigitte: Yes, and it's really inspiring because for a long time, it seemed that people had kind of given up on universal jurisdiction.

Tine: For our listeners to understand, maybe give us a little bit of context, some historical context about that remark. We often hear that, that a lot of people had kind of given up on the universal jurisdiction. So where does the idea come from?

Brigitte: Well, as a Belgian I also witnessed how there was a lot of enthusiasm in Belgium in 1993 when Belgian courts could prosecute international crimes under universal jurisdiction. And this really became very important after the Rwanda genocide in 1994. And it also opened doors for survivors of the massacres in Sabra and Shatila committed in 1982, to file a complaint against a former Israeli Minister of Defense, Ariel Sharon, for his responsibility during these massacres. This caused a lot of international upheaval and also triggered cases against American officials for their role in the 2003 Iraq war. And there was a lot of pushback and finally, secretary of state Donald Rumsfeld threatened to move the NAVO headquarters. And the law was amended.

Tine: That does sound quite familiar to those of us. Who've been following the ICC and the US position on the ICC today. Doesn't it?

Brigitte: Yes, indeed. In general there was also globally, I think, much more skepticism on universal jurisdiction because people said it circumvented sovereignty and it was mainly applied to former colonies of Western States. And, actually, in spite of all the skepticism, universal jurisdiction, somehow quietly expanded, but really very quietly and silently, for almost two decades. And now we are witnessing a kind of public rebirth just this year with the surge of cases on the universal jurisdiction in Germany, where survivors of Syrian state torture filed complaints. And we are reading much more about universal jurisdiction again today.

Tine: And so you're specifically referring to the Al-Khatib case, right?

Brigitte: Yes. This case is very important because it's the first criminal trial worldwide against former Syrian state officials. And two of these state officials were charged with crimes against humanity. One of whom is suspected of being complicit in the torture of at least 4,000 people and the death of 58 people. And it also included cases of sexual violence. And actually the investigation that has led to the arrest was also the result of complaints filed by the well-known German human rights organization, ECCHR, and they worked together with Syrian lawyers, human rights activists and survivors, and among whom are Syrian lawyer Anwar al-Bunni who is very known in the Syrian community and film director Feras Fayyad, who testified in court.

Tine: Feras Fayyad actually spoke on this really excellent podcast, which I know you're also a fan of, which is Branch 251, right? Where he gave us really disconcerting and unsettling account of his treatment actually, as he was being sexually abused and experiencing other kinds of violence. And what I thought was really interesting, is that his testimony both in court and in the podcast really also shows the importance of criminal proceedings to allow survivors to speak in a judicial avenue. And then in a way, I think it's also very representative of this other case, which I believe in mid-June was also about the survivors of sexual and gender-based violence who also filed a complaint or the support of the European Center for Constitutional and Human Rights.

Brigitte: Yes, indeed. In this case, four women and three men have submitted a criminal complaint, supported by NGOs. And these people were actually held in a very notorious air force intelligence prison between 2011 and 2013. And they were also survivors of diverse forms of sexual and gender-based violence.

Tine: Yes, and now we are talking about Syria again anyway, and we always ended up doing that. But I think for what really we wanted to do today, it's also really, as I said to zoom out and you spoke to Naomi Roht-Arriaza from University of California, Hastings

Law, who wrote this seminal book, the 'Pinochet Effect', on transitional justice in the age of human rights, which was so impactful because she talks about the efforts under universal jurisdiction to bring the former Chilean dictator Pinochet to justice. And then you also talked to Thijs Bouwknecht, whose work the work of the ICC, mostly in Africa, I am also a big fan of. So I'm super excited to also have both of them here today. And you talked to them about the difficulty of prosecuting international crimes and how universal jurisdiction actually offers some kind of progress in situations where otherwise there would be, or there would have been, a deadlock or a de facto situation of impunity otherwise.

Brigitte: They were very rich conversations because both Naomi and Thijs have the gift of making very complicated legal cases tangible.

Tine: Yes.

Brigitte: Because they focus on concrete stories, and they relate to them to bigger principles and evolutions within criminal law.

Tine: What I really like is for Naomi's for example, she really spent a long time living in Chile and in Latin America more generally. So when she talks about the Pinochet effect, she doesn't only tell the story about how the case against him opened and what the possibilities were to prosecute perpetrators, et cetera. But she also really presents and captures, voices and realities of victims, of communities who've been involved in the story for such a long time. And maybe this is a good point to start listening to what she sees as the most important reason to embark on writing that seminal book.

Naomi: It's often very hard to see progress in international human rights law and international justice. You're going up against very powerful people. The legal system tends not to be particularly friendly. If nothing else, powerful people can delay the proceedings so long that the defendants either die or are incapacitated. And it's very, very hard for victims to have their day in court. And so the activity around the Pinochet case, which in the end, he never did have his day in court, but he certainly never got to live out the rest of his life in quiet retirement. And the story of what he had done and how he had done it was told, not just in Chile, but to the whole world. So I thought this was an important story to tell.

Brigitte: What is so touching in this book, is that Naomi demonstrates how a small, seemingly insignificant case can have such wide repercussions.

Naomi: One of the virtues of universal jurisdiction, is that it can under the right set of circumstances, have a catalytic effect on cases in the country where the crimes took place as well as in other countries. So, when I wrote the Pinochet effect, what I was looking at, is the way in which the cases brought outside of Chile, first in Spain, and then when Pinochet is found in the UK, the case before the house of Lords, starts triggering and accelerating, rather than, maybe better than trigger, accelerating, an effect within Chile on cases involving gross human rights violations and international crimes committed during the dictatorship years. There are a number of ways in which this catalytic, or accelerating, or concentrating effect happens. It becomes politically more feasible to say, you know, we want to try this guy at home because we don't want some foreign court trying him. It becomes more of interest to the media.

Tine: And the way she talks about this, is really beautiful. It's almost like this butterfly effect, no? And how an almost unexpected away the unthinkable, all of a sudden does become possible. And she talks more about this.

Naomi: The courts say, wait a minute, if the house of Lords, a venerable institution in London, thinks that our former military leader has committed international crimes, maybe we need to take this seriously because after all we are the natural judges here, not some judge in a foreign court, and this starts pushing against the amnesties, the statutes of limitations, the immunity doctrines that have kept these cases from going forward in domestic courts. And most importantly, as one of the people I interviewed told me, they had been trying to bring cases in Chile against Pinochet for years, and had been told that it was absolutely impossible. It was just laughable. He was too powerful and there was no way the national courts were ever going to take action, but once the case had come to the UK, all of a sudden the unthinkable became thinkable and the cases that had been filed, some of them before his arrest in Chile, that had languished in the Chilean courts, all of a sudden started moving forward and new cases were filed. And these grew to hundreds of cases, which as I said, kept Pinochet occupied until the day he died. We've seen this effect in Argentina. We've seen it in Guatemala. We're seeing it now, hopefully, in El Salvador.

If you look at the number of universal jurisdiction cases now, there are more cases than there were during the late 1990s or during the early two 2000s. What's happened, is that the number of cases has increased the number of places where those cases are happening has increased, but who the defendants are, has changed. So that, whereas the early cases tended to go after heads of state, heads of the military, et cetera, this new round of cases with some exceptions, tends to go after much lower ranked people who are present in the jurisdiction where the courts are located. And so, the whole notion of universal jurisdiction has, to some extent, changed. And the German cases in Syria may change this, but it's from a notion of a global enforcer to a notion of No Safe Haven.

Brigitte: Of course, trials under universal jurisdiction are always linked to political agenda, as Thijs argues. He goes back to what is considered the mother of universal jurisdiction, the Nuremberg trial, where state parties next to making a judicial point, also wanted to make a political point, saying that "these types of crimes, we really don't want them and we don't want them to happen."

Thijs: There should be something as justice afterwards. And of course this evolved then quite easily, perhaps even more complicatedly, into the Eichmann-trial in Israel in 1961, where you have a new state, which then of course was created by the survivors and some of the victims of the Holocaust, that kidnaps a person from Argentina who was also not from Israel, which of course was Eichmann and tried him in an Israeli court, under new laws, under a foreign judges, which then in the end, of course became really the first real case or semi-real case of universal jurisdiction. And here again, I think it was incredibly political, in the sense that the Eichmann-case was one of those cases that was incredibly clear in terms of the evidence. The man was basically a bookkeeper of his own crimes. So there were so many records that would have him convicted without the necessity of calling any witness, for instance. But of course the trial was used as a show trial, and not in a negative sense but within the positive sense, to show the Israeli population also the history of the Holocaust and today had mostly done so by calling witnesses to talk about their experiences that happens to them many, many years before, and also the consequences of it. And, of course, in that sense also politicizing the trial in order to make and also tell lessons to a new generation about what had happened and also what, what justice then would actually mean.

Tine: This is really beautiful, I think, because it also goes back to last month's episode where Zinaida Miller, of Seton Hall, she talked about how international criminal justice, and how transitional justice also, is in a way also a definitional project, right? That it has this expressive function. Thijs also actually builds up on that when he talks about the function of deterrence of these cases.

Thijs: Deterrence is one of the, scholarly, one of the biggest, problems to prove. How do you prove that a court of law deters people from committing crimes? Yes, it's a genuine hope. Is there any evidence to support for instance, that the International Criminal Court has deterred crimes in Congo? I think the alternative case scenario is actually the case sometimes. I think also for prosecutors and judiciaries, it's also important to be realistic about what court cases are about. Perhaps we can go back to Hannah Arendt, who, of course famously said that courts are only about rendering justice, and to see whether the alleged perpetrator is guilty or not guilty. And if he's guilty to address the question of what punishment he should be given and nothing else. And I think especially the "and nothing else" part of her famous quote, is sort of important because I think the actual 'doing justice' is already complex enough. But, of course, you can't take away people's expectations. And everybody has their individual or collective expectation of what a trial would bring to them. And some would see deterrence, or some would see closure, some would see nothing at all. I find it really difficult to make a general assessment of it.

Brigitte: And he touches also very nicely on agency and victims' activism.

Tine: Yes, he does, in the next piece as well.

Thijs: Of course it starts by the question: who are you going to do justice for? Usually those are the victims or survivors, or even a generation that comes after them. So we were talking about the demand side. And I think actually when you think about it and look into history, Pinochet's was actually not really the real first case. If you look at your own country, Belgium, of course had some history of colonialism in Rwanda, but also sent peacekeepers to the country. And in 1994, several paratroopers were killed. Actually, the Belgian judiciary immediately started investigations in Rwanda against Colonel Théoneste Bagasora, who of course is the alleged mastermind behind the genocide that happened there. But one of the instances and triggers for the investigation in Belgium, was of course that there were a Belgian victims, which then of course led the Belgium investigative magistrates to pick up the case and start to investigate it. So this led of course, then to the set-up of the special unit, although never, nobody was tried, only one case *in absentia*. Pinochet of course made a much bigger impression internationally because he's a much more prominent figure. The other ones were perhaps smaller fish, or not so well known in the international community. And, of course, with Pinochet was, many people had already been looking for any type of justice against him. And I think it was also very well picked up, not only by victim groups, but also by groups that support victims.

Brigitte: This is similar to what is happening in the Syria case now, where universal jurisdiction is applied more ambitiously to prosecute crimes, committed by state officials.

Tine: It's applied more ambitiously, at least it's much more visible after what we just refer to, this period of at least relative silence about it and the political and the public discourse. I guess some people do call it a backlash. And we also talked about that with

Naomi how in a way universal jurisdiction was almost at risk of becoming a victim of its own success.

Naomi: I think this was something to be expected. When you start going after powerful people and powerful institutions, they push back. So there were a number of amendments to universal jurisdiction laws in Belgium, in Spain, the laws were restricted quite severely, in part because plaintiff's attorneys and attorneys for victims started going after some of the most powerful people on the planet, including the heads of China, the United States and Israel. And so, it's not surprising that there was a backlash. What's more surprising is that the backlash did not continue, on the contrary.

Brigitte: This addressed the backlash that occurred in response to the perception that Belgium was going too far in terms of integrating universal jurisdiction in its national legislation.

Thijs: But I think mostly it had to do with allegations against the US government. It's exactly the same debate we see now with the US government in terms of the ICC and investigations in Afghanistan: is that once you start investigating US citizens, you have a problem. People will start working against you and will try to block anything. And I think the biggest reason for Belgium to sort of retract on the law, next to being perhaps overburdened with so many complaints, because there were more than 50, 60 in the first year. It was of course that the US at a certain point says, okay, but there is a NATO headquarters in Belgium, and if you want to maintain that operation there, you should basically not prosecute us, and perhaps change the law.

Brigitte: This turn to universal jurisdiction can also be an indication of the weakness of the international legal mechanisms, especially in the case of Syria. And Naomi addresses this very elegantly.

Naomi: UJ is in a sense a backstop to those other mechanisms. And I would note that the drafters of the International Criminal Court room statute thought of national courts, including national courts under universal jurisdiction, as backstops that would come into play before the ICC does. Having said that, there are some ways in which current situations, like Syria and Myanmar, are more difficult. One has to do with the fact that the same government is in power in Syria as the government that committed the violations. And that's also true in Myanmar. In Latin America, there had almost always been some sort of process of change of government. When you look at Chile, it's no longer the Pinochet dictatorship that's in power when Pinochet is arrested in the UK, that's not true of the current cases. Also, I think the cases are more murky now. In the Pinochet case, in a number of the early cases, even in the Habré case, you had a very clear, bad guy. Pinochet was the poster child for nasty dictators around the world. The picture of Pinochet with his arms crossed and his dark glasses on and full military regalia, was a statement of what's wrong with dictatorship. And I don't think you can say the same thing about a lot of the conflicts that we're seeing now. We can agree perhaps that Assad is not a good guy, but there are a lot of other actors involved in Syria, same in Myanmar. And so I think that makes people more confused. And so that also makes it more difficult. I think that, yes, in one sense, the turn to UJ reflects the inability to go to a different forum, but I'm not sure that's a great impediment to the use of universal jurisdiction, in a sense that's exactly what it's for.

Tine: There's this tension here, that on the one hand universal jurisdiction is quite often presented as this fall back option. This kind of plan B, the second best if no other mechanisms are available, or if they are impaired. And at the same time, what I've also been observing with the Syria trials, there's this narrative of hope, there is this kind of creative entrepreneurial justice, which is also very inspiring.

Brigitte: Maybe hope is taking a bridge too far. Thijs also nuanced that rhetoric.

Thijs: I'm a historian. So usually I perceive these things as historical phenomena which happen and can recur afterwards, although I think nowadays with the international community, but also prominent political figures, basically turning their backs against judicial options after mass atrocities, I don't see it happen so soon again. However, I think this was a really interesting and also beautiful case of universal jurisdiction where you Hissène Habré, who was the president of Chad between 1982 and 1990, flee to Senegal and basically linger in impunity, unprosecuted, in Dakar, in the capital of that country. Meanwhile, you see a group of victims, and I think this was really important in the case, pursuing many judiciaries, including Senegal, but also in Belgium, to have a prosecution of Habré, irrespective of where it could take place, actually. They knew that it wasn't going to take place in Chad, but elsewhere. And what you see, is that the persistence and the resilience of these group of victims, and of course, they were helped by Reed Brody from Human Rights Watch and some international organizations, is that in the end, actually they pursued, I would say the international communities through litigations, it's so many different courts as well. So it was the ECOWAS court, it was the International Court of Justice. I mean, even, even the UN committee against torture, to basically have Senegal with the help of the African Union, but also of several European countries, including Belgium and the Netherlands, to set up a Special Chamber to make the trial happen. And I say happen, because it was actually a historical event in terms that this was a one-time thing. My impression of it was, was that it was really genuine, in terms of that the victims brought the case, but also they were very much part of the trial.

Brigitte: But what is the window of opportunity within the international community? There's a lot of creativity on behalf of justice actors and the community of victims. But to what extent is there internationally an opportunity to think differently about universal jurisdiction?

Tine: That's a good question. And Thijs actually also talks about this again with regards to the Syrian case, I think.

Thijs: So this leaves us no other options than to be creative. And I think the international community already is somehow creative by establishing all these kinds of investigative commissions and mechanisms, at least to collect evidence and testimonies and conduct exhumations of mass graves, for instance. But then the question is, of course it, who is going to use that evidence in the absence of an international tribunal or the International Criminal Court. And I think many countries are now picking up on the idea to then use universal jurisdiction, especially in Europe, Northwestern Europe. So you've been talking about Germany, but also here in the Netherlands, France, Finland, even Hungary, where actually quite a lot of Syrians would flee to. And then these countries take the opportunity to start cases. This can happen because the victims are in those countries or because the perpetrators are in those countries. And I think, especially from the political angle, there's quite some interest. And I think genuine interest, to pursue justice for Syrian atrocities. And I actually will include Iraq as well and the situation of

Islamic State, of course, because there are so many alleged European perpetrators that actually were fighting in those conflicts as well. I find it very interesting is that Syria as well is a European broad issue. So for instance, if you look at what's, Eurojust does, they have a genocide network and the case where they work together the most, is the situation in Syria. So you also see that these countries are actually working together and they all have their own international crimes, police units and prosecutors.

Tine: And this is also quite interesting, is that universal jurisdiction is no longer just about the small fish, but also about actual state officials. And for victims, this of course provides some hope for finally criminal accountability also at that level. And not just the trials in Germany, as Thijs also explained.

Thijs: As this happens in the Netherlands, is that most of these people are now, next to being tried for terrorism, are also being tried for a war crime or a crime against humanity for instance, also to give more substance to the cases because for terrorism, the level of proof, as you can imagine, of course, is very, very low. It can be a couple of likes on Facebook, but for an international crime, you need to reach a threshold of beyond any reasonable doubt, which of course makes the case bolder. It also makes them more complicated. That then is another element that we should consider. And when you look at Germany, I think a lot of people have anticipated that the trials can take very long. So it will also take very long for justice to be seen to be done.

Tine: So this is, I think, quite beautiful because it shows on the one hand that justice really takes a long time to arrive at, but it also shows the importance of the process. And it also shows that in the end, some changes can actually happen quite rapidly, quite unexpectedly even, and this is what Naomi also mentions in the next piece, if it has become much harder today for victims, for people just to be able to figure out pathways to get support for these cases.

Naomi: Well, I think these cases are one of focusing international solidarity. Of course change happens when you have movement both inside and outside. And so international solidarity by itself isn't enough. There has to be something for there to be solidarity with, inside the country. Having said that, I think one of the things these cases do is they allow a focus on a specific set of people who have names and faces and a specific set of proceedings that people can relate to and that people can use to focus their support for change within the country. I think it's especially important for exiles refugees and immigrants who are living outside the country. What we saw in the Pinochet case, was that one of the main drivers of the case were exile communities, both in Spain and in the UK, that were involved in the legal proceedings, but also in the demonstrations in London supporting the Pinochet case there, et cetera. So I think we can see that now, for instance, in the work of exiles from Myanmar bringing a case under universal jurisdiction in Argentina that was approved by the Argentine courts a couple of weeks ago. So I think that universal jurisdiction is important as an expression of international solidarity. I think now we're in a very different period though. The climate of xenophobia, a climate of anti-refugee attacks, attacks on international institutions, attacks on UN agencies and all of that, which has affected human rights in general, has made it much harder for people to be able to figure out pathways, to get support for these cases. I think that affects some of the response that you see. And I think that too, is a temporary phenomenon. What we see, is that these things tend to go in cycles and that a period of backlash and a period of retrocession and a period of human rights being attacked on all sides, is followed by a period of response and of trying to learn the lessons and move forward towards justice in the future.

Tine: So does it bring us actually to what we always ask people as the last question, which is where are they looking for the future, both in terms of what they see as the most important challenges, but also where they are looking for answers or what they feel we should be addressing, in the near future. So this was what Naomi mentioned about it, but it's also quite interesting, what I think we overlook maybe sometimes too often, is what Thijs brought into the discussion about what we should now really be thinking about, not just in terms of criminal accountability, but especially, you know, what happens after the trials.

Thijs: This then again is a new debate. So it's, what is the aftercare of international justice, and what happens when people are released and what happens when, when the judges basically close up shop and throw their judgment on the table and say, well, there you have it, this was our work. It's a question that we have to think of much more. The first ICC convicts were released: Thomas Lubanga and Germain Katanga. And we haven't thought about the question of what to do with people who have been convicted for international crimes and are then released and basically quite welcomed in some of their communities.

Tine: And this, I think was also a beautiful stepping stone towards the next episode, where we will be talking about non-legal avenues and about in a way, broader victim-driven understandings of justice, right? Which very much ties into that question of how do you ensure after care, after care not just in criminal justice processes, but also how do you ensure that the entire process really becomes genuinely victim-driven? What other kinds of notions of justice and accountability can we start to think about in these kinds of cases? So I think that's what we should be talking about next month, right?

Brigitte: Yes. I'm very much looking forward to that.

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