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THE CONCEPT OF UNIVERSAL JURISDICTION A Reality in the Making

LUIS PERAZA PARGA
GEORGE WASHINGTON SCHOOL OF LAW, WASHINGTON D.C

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LUIS PERAZA PARGA

LLB (Universidad Complutense de Madrid, 1991), LLM (Universidad Rey Juan Carlos, Mexico City), PhD (Law Faculty, Universidad Complutense de Madrid, 2009)

Abstract

Traditional thinking shows that jurisdiction of prosecution will depend on the laws of State of which such perpetrator (active personality) or victim (passive personality) is citizen, or the place where the crime was committed (ideally where the perpetrator would be tried by the territorial state); or where the suspect physically located (the custodial state).

In the 1980's, a new concept however emerged. It has been known as the principle of universal jurisdiction which allows states to examine and prosecute persons who committed a serious crime under international law, regardless of the perpetrator's nationality, either of the victims; or where the crime was committed.

For example, in the case of the genocide, the International Court of Justice (ICJ), the highest judicial body of the United Nations, since 1951 has recognised that the 1948 Convention against Genocide codified relevant customary law. The principles of the Convention "were principles recognised by all nations which obligate all states outside of any conventional relationships, possessing a universal character". It is specifically recognised that the crime of genocide can be pursued through the courts of any nation, without regard to the fact that such State has not signed up to the 1948 Convention against Genocide.

Furthermore, the ICJ Judge Lauterpacht clearly says that "the Convention against genocide creates two separate obligations: one of prevention and the other of sanction or punishment. If either is not met, the obligation is contravened". Therefore, it is easy to conclude that for a certain of crimes the ICJ has recognised the universal jurisdiction of any national court.

Universal jurisdiction will apply in any case of genocide, crimes against humanity, war crimes, torture, extrajudicial execution and forced disappearances, which are considered the most serious crimes under international law. This universal jurisdiction may be even referred in cases of ordinary crimes under domestic laws such as murder, kidnapping, assault and abuse. The recognised non-governmental organisation - Amnesty International, an integral part of civil society, formed to defend human rights, has carried out a world investigation into domestic laws which showed that no fewer than 125 nations have adopted and incorporated the principle of universal jurisdiction in their national laws, regarding at least one of the aforementioned crimes.

Introduction

Traditional thinking shows that jurisdiction of prosecution will depend on the laws of State of which a perpetrator (active personality) or victim (passive personality) is citizen, or the place where the crime was committed (ideally where the perpetrator would be tried by the territorial state); or where the suspect is physically located (the custodial state).

However, since the 1980s a new concept known as the principle of universal jurisdiction has been developed. This principle of universal jurisdiction consists of a provision that allows states to examine and prosecute persons suspected of serious crimes under international law, regardless of the nationality of both the perpetrator and their victims or where the crime was committed.

According to Gómez-Robledo Verduzco¹ and the Principles of Universal Jurisdiction from Princeton², it is possible to list the following fundamental principles within the concept of universal jurisdiction:

- States should ensure that their national courts can exercise universal jurisdiction and other forms of international jurisdiction against human rights violations.
- The official position of any accused shall not relieve them from criminal responsibility (Nuremberg principle).
- No immunity exists for crimes committed in the past.
- Investigations and prosecutions should be initiated without waiting for charges to be brought (The principle of imprescriptibility for persons responsible of serious crimes under international law).
- Orders from superiors, coercion and hardship should not permit exemption.
- Domestic legislation and precedents passed with the aim of preventing the trial of a person cannot bind the courts of other nations or international courts.
- The absence of political interference. (subject minus predicate???)
- Internationally recognised guarantees for fair *trials*, consisting of public trials in the presence of international monitors.
- Taking into account the interests of victims, witnesses and family members when reaching a decision.
- Prohibition of the use of the death penalty and other cruel, inhumane, or degrading punishment.
- International cooperation in investigations and prosecutions. The effective training of judges, lawyers, prosecutors and investigators.

The definition of the concept being analysed, as held by the author, is that *the criminal competence of a national jurisdiction extends to criminal deeds committed outside the domestic*

¹ Alonso Gómez Robledo-Verduzco “El crimen de genocidio en Derecho Internacional”, september december 2002, Boletín Mexicano de Derecho Comparado number 105 (page 16)

<http://www.juridicas.unam.mx/publica/rev/boletin/cont/105/art/art6.htm>

² The Princeton Principles on Universal Jurisdiction 28 (2001),

<http://www1.umn.edu/humanrts/instree/princeton.html>

competence and is independent of the nationality of the persons concerned. Luis T. Díaz Muller³ clearly points out that this principle is practically applied under Resolution 978⁴ passed in 1995 of the United Nations Security Council. This urges states to arrest and detain those persons found on their territory, against which there is sufficient evidence of their responsibility for acts within the competence of the Court, pending trial by the International Criminal Court for Rwanda or by national authorities.

The obligation on the state to try or extradite someone to an International Court or to the state that claims them, imposed by international law in the Geneva Convention of 1949, was manifested in a definitive manner, almost turning a court custom into law. For example, in the case of the crime of genocide, the International Court of Justice, the highest judicial body of the United Nations, has recognised, since 1951⁵, that the 1948 Convention against genocide is a treaty that codifies customary law. Enshrined in the Convention “were principles recognised by all nations which obligate all states outside of any conventional relationships, possessing a universal character”. It is specifically recognised that the crime of genocide can be pursued through the courts of any nation, regardless of whether it had signed up to the Convention of 1948.

It is also apparent that the World Court recognises the universal jurisdiction of any national court for certain crimes. The personal opinion of Judge Lauterpacht⁶ of the International Court of Justice is crystal clear: “The Convention against genocide creates two separate obligations: one of prevention and the other of sanction or punishment. If either is not met, the obligation is contravened.”

There is no ground to doubt the positive and purposeful effect that this obligation has created for domestic justice, which is considered the best *fora* from an evidence perspective. This is due to the immediacy of the witness statements, the efficiency and familiarity with the legal system and the language used on the part of those involved in the trial. Clearly, the trials that raise the highest expectations are those that involve a head of state. These are model trials which define the guidelines to be followed in the future, when faced with proceedings of similar or lesser importance. The most laudable work is carried out by certain domestic courts that use the latest texts of their national legislature to try individuals responsible for large-scale and heinous crimes.

Universal jurisdiction decisively influenced, through discussion, the signing and ratification of the Treaty of Rome, which, set in motion the International Criminal Court in The Hague since the 1st of July 2002. The doctrinal debate has been bubbling over the extraterritorial nature of criminal law and the transformation of a domestic or common crime to an international one from

³ Díaz Muller, Luis T. “Globalización y principio de jurisdicción universal: un estudio de caso” september december 2002 Boletín mexicano de Derecho Comparado number 105.

<http://www.juridicas.unam.mx/publica/rev/boletin/cont/105/art/art4.htm>

⁴ February 27 1995 <http://www.un.org/ictt/english/Resolutions/978e.htm>

⁵ Advisory Opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1950-1951) <http://www.icj-cij.org/icjwww/idocuments/issummaries/ippcgsummary510528.htm>.

⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) http://www.icj-cij.org/icjwww/idocket/ibhy/ibhy_summaries/ibhysummary19930913.html.

the perspective of the active participant or perpetrator of the crime and that of the passive participant, the victim.

The principle of universal jurisdiction has reached such enormous levels of popularity, thanks to the efforts of certain judges and countries, that some authors feel it has completely altered its meaning. Universal Justice implies overturning the old fashioned concept of the state pursuit of crimes on a territorial basis. Now, supported by international law, progressive states can pass national laws allowing their domestic courts to investigate and try any person entering their territory, who is suspected of having committed certain crimes, regardless of where the crime took place or the nationality of either the victim or the accused.

Universal Jurisdiction will apply to war crimes, crimes against humanity, genocide, torture, extrajudicial execution and forced disappearances among others that are considered the most serious of crimes under international law, as well as to ordinary crimes under domestic laws such as murder, kidnapping, assault and abuse. Amnesty International for instance carried out a world study⁷ on domestic laws incorporating the principle of universal jurisdiction and found that no fewer than 125 nations adopt it in at least one of the aforementioned crimes.

*Although the September 2001 Amnesty International global study of universal jurisdiction in 125 countries demonstrated that approximately 125 countries around the world have legislation or jurisprudence permitting them to exercise some form of universal jurisdiction over ordinary crimes, crimes of international concern or crimes under international law, all of that legislation is procedurally flawed in some respect.*⁸

It is interesting to note that the Canadian Law of Crimes against Humanity has decided to put the principle of universality into practice when prosecuting war criminals and those who have committed crimes against humanity. By setting out the crimes in a detailed manner, in the form of a list, the authorities can reduce the unbearable burden of proving that crimes had taken place to the point of disappearance. Now they possess a clear definition. If the crimes are proved to have been committed by an individual, Canada is faced with only two options, which can be defended by supporters of International Humanitarian and Human Rights Law, being to prosecute or to extradite.

Based upon this principle, since the Second World War, more than twelve states have investigated, tried, sentenced, or detained the alleged perpetrator with a view to extradition to the State which claims and will subsequently prosecute him or her.

Let us take a quick look at the domestic courts that exercise universal jurisdiction in a more or less open manner. As outstanding examples of the possibilities available to domestic courts to utilise the latest legislation, a prime example is the Belgian courts. In 2001, they tried and subsequently sentenced four Rwandan civilians for war crimes committed in Rwanda, 1994, under the heading of genocide. Acting on a French arrest warrant on November 9, 2008, German

⁷ “Universal Jurisdiction: the duty of states to enact and enforce legislation”

http://web.amnesty.org/web/web.nsf/pages/legal_memorandum

⁸ European Union Using universal jurisdiction as a key mechanism to ensure global accountability

<http://www.amnesty.org/en/library/asset/IOR61/013/2007/en/dom-IOR610132007en.html>

authorities detained Rose Kabuye during an official visit and she was sent back to France to face investigations about Ruanda genocide: Kabuye was a collaborator of the Rwanda Head of State, Paul Kagame. A Swiss court sentenced another Rwandan citizen to fourteen years in prison for war crimes in May 2000. In Denmark, a Bosnian Moslem seeking asylum was likewise sentenced to eight years imprisonment in 1994 for murdering and torturing prisoners in a concentration camp in Bosnia-Herzegovina. From 1997 to the end of 1999, four people were tried in Germany for genocide and the serious abuse of muslims.

Belgium has at its disposal, a “Universal Competence” Law, adopted in 1993, reformed in 1999 and later on in 2003. The law granted the possibility of trying war criminals or those accused of genocide and crimes against humanity, regardless of the nationality of the victims and the accused. However, the reform of the law in June 2003, due to pressure from the United States of America relates to the fact that persons can only be prosecuted in Belgium if there is a clear link to Belgium. This exists if the accused is Belgian or is a Belgian resident and if the affected is Belgian or has lived there for at least three years. A safeguard clause has been established inspiring some optimism. The clause states that Belgian courts will intervene anytime there is no likelihood of the case being dealt with by the affected country and where no guarantees exist for a judicial process in that nation.

On the 20th of November 2000, the Court of Appeal in Amsterdam, Holland, put forward a very interesting and progressive argument in order to try Desire Delano, the former Head of State of Surinam. This was the first time that a court in Holland had been granted “ultra” territorial jurisdiction, for crimes against humanity committed outside situations of armed conflict. Although the Convention against Torture was not in existence in 1982, and furthermore was not open to being applied in a retroactive way, it was based upon the principle that the planned and systematic torture of civilians constitutes an international crime, via an implemented and established international custom. It took into account that in that year international law had authorised already to a state the possibility to exercise universal jurisdiction over a non-national suspected of such a crime. This interpretation introduces a new and useful distinction between retroactive application, going against the principle of legality and retrospective application of a law, enabling the courts in Holland to grant criminal jurisdiction over acts already recognised as crimes under international law at the time they were committed. Although the difference is subtle, it serves the principal objective: to achieve justice not impunity.

On the other hand, it reinforces the concept of universal jurisdiction, whose punishable crimes can count on humanity as a whole to act as the expectant vigilant victim, a reason for which any domestic court is competent to try the acts as found and determined by the liability of the perpetrators, without the need for legislative certification.

Let us also briefly examine the concept of the crime of genocide. In order to generate imputability for genocide, it is necessary to find special intent of a psychological nature on the part of the perpetrator, a *dolus specialis*, which is very difficult to prove in a trial. A factor, already considered by the Rwandan Tribunal that is taken into account by the International Criminal Court (ICC) when finding intent for genocide, is “the act of committing certain crimes, including the killing of members of a group or causing serious physical or mental harm to members of a group with the intent to destroy, in whole or in part, a national, ethnical, racial or

religious group⁹”. According to criticism made by Antonio Cassese, a well-known international judge: “persons accused of genocide should be tried by a competent court in the state in whose territory the act was committed. It is really hard to prove they are perpetrators with the intention of destroying a specific group”.

Looking at the Inter-American Court of Human Rights, which goes against states not personal responsibility as the ICC does, the issue of intentionality can be implied from other factors. International jurisdiction has always been known for a more flexible approach to evidence and for granting irrefutable evidential character to mere presumptions. Furthermore, it has been the first to demonstrate the framework of systematic practices of forced disappearances brought about by a government. When there is little chance to get conclusive evidence and the discovery of the body, the international human rights tribunal concludes that the responsibility lies with the state for prima facie evidence and presumptions, not valid under domestic laws.

However, it would appear that shifting international responsibility to a state is a different matter to prosecuting a specific individual for an international crime. Criminal Law is the last line of defence available to society to protect it from particularly serious crimes, whose consequences are a prolonged loss of liberty or even the death penalty. It is for this reason that any authority trying the subject should be examined beyond all reasonable doubt, before the accused can be validly sentenced. If it is accepted that the same authority may be derived from a certain number of acts, such as it has been, erroneously in some cases, by the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Former Yugoslavia (ICTFY), serious crimes would be examined within a given context. They would derive from the combination of acts and statements made by the accused, in the general context under which the other acts were perpetrated by the accused or other reprehensible acts not carried out by the accused, the scale of atrocities committed and their general character in a single region or in an entire country. Needless to say, it is not thought that the accumulation of factors can wholly satisfy the criteria for specific intent on behalf of the accused. The laxity of providing evidence in international courts of human rights cannot be attributed to the individual responsibilities of international criminal courts.

Universal Jurisdiction and Heads of State

The judgement¹⁰ passed by the International Court of Justice in The Hague on February 14th 2002, which condemned Belgium for an international arrest order directed against the Foreign Minister on active service in the Democratic Republic of the Congo should not constitute a precedent that limits the exercise of universal jurisdiction in terms of genocide. The petition formulated by the Congo expressly concerned the fact that the International Court did not declare itself over the question of determining whether international customary law authorises the

⁹ Article 6 Rome Statute of the International Criminal Court.

¹⁰ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) <http://www.icj-cij.org/docket/files/121/8126.pdf>

exercise of universal criminal jurisdiction over international crimes. It was limited however to the question of determining the possible violation of international laws of immunity which protect Foreign Ministers in office.

they do not define the immunities of Ministers for Foreign Affairs, the Court finds that it must decide the questions relating to these immunities on the basis of customary international law (...). The Court states that, in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. After an examination of the nature of those functions the Court concludes that they are such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability.

(...)It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs.

Consequently, the ICJ judgement does not go against the principle of universal jurisdiction, widely adopted by the Belgian Law July 16, 1993 and reformed by the Law February 19, 1999. It is restricted to imposing the adherence of international principles concerning diplomatic immunity, on which the decision of the court is based, to annul the international order for arrest.

It is appropriate to highlight that in their joint dissenting vote¹¹, the Judges Higgins¹², Kooijmans and Buergenthal reached a declaration that under determined conditions, international customary law authorises the exercise of criminal competence over international crimes in accordance with the principle of “absolute” uniformity.

Pursuant to the ruling passed by the ICJ, it was resolved that Belgium could not issue an international detention order *in absentia*, against the acting Foreign Minister of the Republic of the Congo, Yerodia Ndombasi. The United Nations apex court ruling states that the issue of the order and its international circulation constitutes a violation by Belgium of the immunity of criminal jurisdiction and immunity possessed by the foreign ministers under international customary law. Belgium is internationally responsible for the wrong doing committed by its magistrate and should cancel the order, whilst also informing every authority about it.

In accordance with international common law, the Court judge considers that foreign ministers, prime ministers and heads of state possess immunity before an order of arrest dispatched by a foreign court for war crimes and crimes against humanity committed during the discharge of official duties.

¹¹ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) <http://www.icj-cij.org/docket/files/121/8136.pdf>

¹² Later to become the first female president of the ICJ.

The immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. The Court then spells out the circumstances in which the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution.

Consequently, the Court allowed four exceptions to the principle sustained for the first time by this authority. These appear obvious. A minister in active service can be tried before the courts on a criminal charge in his or her own country and in accordance with the law of that country. His or her immunity can be waived, in a particular case, by national authorities in favour of a foreign jurisdiction and in the case whereby the process is proved before an international court, where it's basic statutes so allow. Finally, the most obvious assumption, where upon ceasing to act as foreign minister the person will forfeit immunity before foreign competent courts for acts committed prior or subsequent to the term of office and also for these acts committed during this period, but in a private capacity. Regarding this last exception, it raises the question as to why not considering a person in the capacity of minister who would incite genocide¹³ against the same population he or she governs and had promised to serve is an act carried out undoubtedly in a private capacity.

The International Court of Justice was categorical and went down into details. As a result, it has clarified the nature and scope of immunities enjoyed by foreign ministers. Furthermore it carefully examined state practice, including domestic legislation and the decisions made by the highest domestic courts. These include the Pinochet case in the House of Lords and the Gadaffi case in the French High Court. Finally, it analysed statutes and the jurisprudence of international criminal courts, undoubtedly reaching the following mistaken conclusion that there is no exception to the rule within international law, which establishes immunity and inviolability in relation to criminal proceedings before foreign national courts.

The Prosecution division of the Belgian domestic court decided¹⁴ that the examining judge was not competent to either continue examining the accused or to issue a new warrant for arrest. On account of a literal interpretation, the Belgium parliament in passing the law of 1993 reformed in 1999, claimed that Belgian courts could initiate a criminal investigation for these types of conduct only when and only if, the accused was in Belgium soil, in accordance with the application of article 12 of the Preliminary Title of the Code of criminal proceedings in Belgium.¹⁵

¹³ Case Barayagwiza

<http://69.94.11.53/ENGLISH/cases/Barayagwiza/judgement/Summary%20of%20judgment-Media.pdf>

¹⁴ April 16, 2002, Judgement Salle de Mises en Accusation, Brussels.

¹⁵ The crimes committed outside Belgium soil are only to be prosecuted by Belgium courts in the event that the persons are in Belgium territory.

The same occurred in June, 2002, in relation to charges brought against the Former Israeli Prime Minister Sharon and the president of the Ivory Coast. On February 12, 2003 the ruling of the Belgian Supreme Court (*Cour de Cassation de Belgique*) ratifies the exercise of universal jurisdiction over crimes of genocide. This was carried out in accordance with the established Belgian law of July 16, 1993 and reformed by that of February 10, 1999, which establishes a similar regulation as article 23.4 of the Spanish basic judicial law (from now on LOPJ Ley Orgánica del Poder Judicial). It describes genocide as a crime under international law and affirms the competence of the Belgian courts to try such crimes, “wherever they have been committed”, highlighting that criminal prosecution “does not require the presence of the accused on Belgian territory.”

It would appear that the effect of applying this article assumes the annulment of the wide spectrum of Belgian courts practicing universal jurisdiction and serves to go against the criteria of the legislator when this law was passed. The interpretation by the Belgian courts seems to go beyond the intention of the International Court. It is quite the contrary, and with the exception of the four magistrates that expressly demonstrated their opposition, the International Court of Justice implicitly accepted Belgian competence to issue orders even though the accused not being on Belgian territory at the time. Part of the doctrine contradicts this judgement which obviously serves to limit universal jurisdiction in domestic courts despite many benign interpretations which they attempt to apply to it. It has been criticised for not having provided convincing data to prove the existence of a norm of International Customary Law availing this immunity *sui generis* and demonstrates the existence of state practice and *opinio iuris*.

Alternatively, if an investigation is carried out into the conventional instruments adopted by the international community since the Second World War, it is possible to prove consistent neglect for the provision of immunity to government authorities. Reforms have been negotiated to clarify this point against universal jurisdiction without reservations in Belgian courts and to adapt domestic legislation in accordance with the resolution of the International Court of Justice, as in the case of Ariel Sharon(?). In 2003, a law was passed in Belgium meaning a step backwards in progressive jurisprudence for a broader universal jurisdiction.

Looking forward the same verdict the Democratic Republic of the Congo took legal action against France¹⁶ before the ICJ on February 9, 2002 submitted under the condition that the aforementioned accepts the jurisdiction of the Court in this particular type of case. The interesting point is that the Congo repeats practically all the acts and legal arguments that resulted in the Court ruling in their favour in the case against Belgium, as previously mentioned. Here, if the object of the action is the same and the legal points to be clarified are identical, even though the parties involved are not the same, the Court by analogy and procedural economy could be satisfied by remitting *in integrum*, to their relevant jurisprudence. In this manner, it would avoid spending a lot of money and reinforce the prestige and force of its own resolutions.

¹⁶ The Republic of the Congo seizes the International Court of Justice of a dispute with France <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d2&case=129&code=cof&p3=6>

In this case, the person accused of crimes against humanity and torture is the Interior Minister of the Congo, Pierre Oba. The Congo alleges¹⁷ that "in attributing to itself universal jurisdiction in criminal matters and arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country", France violated "the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations . . . exercise its authority on the territory of another State". Here, the African country cannot appeal against the previously considered judgement because on that occasion, the Court clearly defined the charges from which they could be considered immune from. This includes foreign ministers, prime ministers and heads of state. Homeland security secretaries are not listed.

It further states that, in issuing a warrant instructing police officers to examine the President of the Republic of the Congo as witness in the case, France violated "the criminal immunity of a foreign Head of State, an international customary rule recognized by the jurisprudence of the Court". The Republic of the Congo accordingly asked the Court to declare that the French Republic shall be caused to "annul the measures of investigation and prosecution taken" by the French judicial officers concerned.

Without doubt, it legally challenged the order issued by the French national court requesting a witness statement from the then actual President of the Congo, Sassou Nguesso, completely based upon the jurisprudence of the relevant court. France "violates a foreign head of state's right to criminal immunity, a rule of international character recognised by the jurisprudence of the Court." Therefore, no case exists as such, until France consents to the jurisdiction of the Court in this particular case, according to that which has been established and alleged by the Congo based upon article 38.5¹⁸ of the Rules of the Court.

France could have declined but did not want to lose the unique opportunity in which the world court rectifies or ratifies its radical jurisprudence.¹⁹ On the 28th and 29th of April 2003 public hearings took place to decide whether or not to admit provisional measures solicited by the Congo with the aim to decree the "immediate suspension of the procedure led by the examining or instructing judge of the *Tribunal de Grande Instance de Meaux (High Court of the Tribunal in Meaux)*." The Congolese delegation interestingly drew an analogy between the inconceivability that, during his term of office, the President of the French Republic could be called to appear in a national court, and the petition of the same motion in the case whereby the head of state is foreign. It aims to establish the theory of implicit powers and the radiation of those privileges from a French president to a foreign one.

¹⁷ Application instituting proceedings and Request for the indication of a provisional measure <http://www.icj-cij.org/docket/index.php?pr=60&p1=3&p2=1&case=129&p3=6&PHPSESSID=d9b215fe09dd85c919abdd360fa6f014>

¹⁸ 5. When the applicant State proposes to found the jurisdiction of the Court upon consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case. <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

¹⁹The French Republic consents to the jurisdiction of the International Court of Justice to entertain an Application filed by the Republic of the Congo against France. April 11, 2003. <http://www.icj-cij.org/docket/index.php?pr=61&p1=3&p2=1&case=129&p3=6>

On June 17, 2003, the court rejected²⁰ the request for the indication of a provisional measure submitted by the Republic of the Congo determining in an almost unanimous way, by 14 to 1 that “the circumstances, such as they currently present themselves before the court, are not sufficiently important to require the exercise of power to issue the provisional measures of article 41 of its statute.” These are used to preserve the rights of the parties until a decision is made on the merits of the case when irreparable damage and extreme urgency at stake. These are referred to as the *periculo in mora* (danger of delay) and *fumus boni iuris* or appearance of good law.

The Congolese arguments are disregarded in relation to, the irreparable damage to the honour and reputation of the highest authorities in the Congo, domestic peace, international prestige and French /Congolese relations. There is no practical effect implied or evidence of this supposed damage.

It is analysed, whether French criminal procedure risks irreparable damage to the immunity of the Congolese President as a Head of State. It relies upon the words of the French representative at the public hearings “France does not deny the immunity of civil and criminal jurisdiction which the president possesses as a head of state.” As such, it deduces that there is no existing risk of irreparable damage either to the President or General Oba, the Interior Minister.

In addition, it is examined as to whether this same risk arises from the position of France unilaterally assuming universal jurisdiction on criminal matters and the violation of the principle of International law. The court denies this in three cases. With respect to the President, the petition for a written testimony has not been transmitted to the Court Officer of the Congo as indicated by the French Foreign Minister. Moreover, the Interior Minister and the Head of the Presidential Guard have not been subjected to any procedural measure by the examining judge or investigator, whereby the requisite for urgency is not met.

The criminal procedure established in Meaux has had a certain impact on the personal legal position of General Dabira, due to various factors. These include French residency and, on his return to the Congo, testifying and refusing to respond to the requirements of the examining judge, who ordered the search and international detention *mandat d’amener*. A provisional measure in this context would have a symbolic and not necessarily practical effect, enabling the General to enter France without fear of legal consequences. This is because the Congo has not demonstrated that there could be even the slightest possibility of irreparable damage to the general’s rights.

The Judge *ad hoc*²¹, Jean-Yves de Cara, chosen by the Congo, issued the dissenting vote²² justifying that the president of an African country incarnates the nation and the circumstances and fragility of the state where civil peace is gradually making progress, merits consideration by the World Court. It is alleged that a domestic criminal procedure has been initiated by the same acts and that continuation of the French procedure would violate the principle that no-one can be tried

²⁰ Order of 17 June 2003

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d2&case=129&code=cof&p3=5>

²¹ Judges ad hoc <http://www.icj-cij.org/court/index.php?p1=1&p2=5>

²² Dissenting Opinion by Judge ad hoc de Cara Order of 17 June 2003 Request for the Indication of a Provisional Measure Certain Criminal Proceedings in France (Republic of the Congo v. France)

<http://www.icj-cij.org/docket/files/129/8210.pdf>

twice for the same acts, known as *non bis idem*. French proceedings are described as a violation of the independence, sovereignty and dignity owed to the Congo. The Judge feels that all the requisites are present for the Court to issue provisional measures and concludes that it is the only course which can be taken to avoid the aggravation of the disagreement and to maintain the *status quo* without altering the equilibrium of the parties' rights. No comments are required. No rule has been issued on the merits of the case yet.

Without doubt, the International Court of Justice, leading judicial organ of the United Nations, wholly rejects the order for the solicited provisional measures, an act which does not affect its jurisdictions at the merits of the case. This is seen as good news for International Justice and an opportunity for foreign courts to recognise and prosecute heads of state who might have violated human rights. The aim of progressive and creative arguments put forward by the national and international courts is to strike fear in the hearts of the violators, so that they are aware that the protection of human rights cannot or should not, observe physical, political, legal or cultural boundaries.

Another example of the currently prolific World Court can be found in relation to Liberia. In the midst of the chaotic position of being the first country to be independent of Africa, whose territory was purchased by freed American slaves in 1821, Taylor's government brought an action against Sierra Leone²³ as a result of the Special Court for Sierra Leone²⁴ issuing an international order of arrest against the then president Taylor²⁵ in March 2003, bearing the "the highest level of responsibility" for war crimes, crimes against humanity and other serious violations of international humanitarian law. In this context, an abiding international law state is before three alternatives. One is to detain them and hand them over to the Special Tribunal, two is to open an investigation to initiate criminal actions, or three is to initiate an extradition procedure before Liberian courts. Nigeria and Ghana, as Contracting Parties to the Geneva Convention, are obliged to try those who have committed or ordered the commission of serious infractions of the Conventions before their national courts, and be willing to extradite them to other countries where possible, or hand them over to an international criminal court. None, including heads of state, under any circumstances, possesses immunity for the most serious crimes covered by international law.

Liberia alleges, in the action before the International Court of Justice, that this order of international arrest violates a fundamental principle of international law. It provides heads of state with immunity for criminal procedures under foreign jurisdictions, as established by the jurisprudence of the Court. The order also contravenes the internationally recognised principle that judicial powers or powers of authority cannot be exercised on the territory of another state. It is argued that this order of arrest violates customary international law and damages the honour and reputation of the presidency and sovereignty. Furthermore, it is alleged that the Special Court

²³ Liberia against Sierra Leone before ICJ http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipress2003/ipresscom2003-26_xx_20030805.htm

²⁴ The Prosecutor vs. Charles Ghankay Taylor <http://www.sc-sl.org/Taylor.html>

²⁵ After a golden exile in Nigeria he was handed over to the Special Court of Sierra Leone in March 2006 and face charges at The Hague before the Special Court of Sierra Leone sitting for the first time by security reasons outside Freetown.

for Sierra Leone, cannot impose legal obligations on states not party to the Agreement between Sierra Leone and the United Nations on January 16, 2002.

Based on all these allegations, the then fading and almost ghostly presidency of Liberia asks the Court to declare that the emission of this order of international arrest and its international circulation does not respect the immunity owed to matters of criminality of heads of state, enjoyed by an active President of the Republic of Liberia under International law. As a result, it solicits the Court to order the immediate cancellation or withdrawal of the order of March 2003, and the communication of this to all the authorities aware of its circulation.

Liberia has based itself upon the ICJ jurisprudence. It is well advised to take note of the Congolese arguments, regarding irreparable damage to the honour and reputation of the highest authorities of the Congo, domestic peace, international prestige and French/Congolese relations, which were thrown out. The case was finally taken off the case law list.

Various international and domestic sentences denote this period in International jurisdiction. The first is the ruling passed on July 11, 1996 by the International Court of Justice in the case of *Bosnia v The Federal Republic of Yugoslavia*.²⁶ It expressly recognised the right of States to exercise universal jurisdiction under the heading of genocide.

Secondly, the sentence of the French Supreme Court (*Cour de cassation*), in the case of Klaus Barbie, established that the crimes against humanity are imprescriptible or unable to be legally taken away or abandoned. They are susceptible to judicial procedure in France, regardless the date or the place the crime was committed.

Finally, the sentence of the Court of appeal, passed by the House of Lords on the 24th of March 1999 regarding the case of Pinochet, recalls that the international law stipulates that crimes of “*ius cogens*” including that of genocide can be punished by any State. This is because the criminals are common enemies of humanity and all nations share an equal interest in their capture and prosecution.

The Spanish Issue

The Spanish legislation is among the most progressive but, at the end of the day, the domestic courts interpret this legislation. The universal jurisdiction of Spanish courts is based on the fundamental article 23.4 (a) LOPJ set out below:

²⁶Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) <http://www.icj-cij.org/docket/files/91/7349.pdf>

“The Spanish courts shall also be competent to try acts committed by Spanish nationals or foreigners outside the national territory which could be deemed to constitute any of the following crimes in Spanish criminal law:

- a) Genocide
- b) Terrorism
- c) Piracy and the unlawful seizure of aircraft
- d) Counterfeiting of foreign currency
- e) Crimes related to prostitution and the corruption of minors or disabled individuals
- f) Unlawful trafficking of psychotropic, toxic and narcotic drugs
- g) And any other crime, which, under international treaties or conventions, should be prosecuted in Spain. The criminal should not be acquitted, pardoned or convicted in a foreign country. With a single exception: that all persons accused have not been tried in another state for the same acts.

In Spain there is an obvious tension between judges of the Spanish National Criminal Court (Audiencia Nacional, AN), and its Prosecution Office and the Spanish Public Prosecution Service, because they differ in their interpretations of the concept of genocide and universal jurisdiction. It is due to the fact that they ‘read’ the article, set out above, from more than one perspective. The Spanish National Criminal Court, a special tribunal responsible for certain crimes, such as narco - trafficking, terrorism and those which cause social unrest, for example money laundering, delinquency, economic and organised crime, extraditions and crimes against the crown, can be found outside the hierarchal scheme of Spanish tribunal structure.

In 1996, the Progressive Spanish Prosecutors Union presented before the AN a report concerning the acts occurred in Argentina during the former military dictatorship (1976-1983) throughout which, between 15,000 and 30,000 people were the victims of forced disappearances. Only a few months later, the same institution denounced the acts which took place in Chile from September 11, 1973, the date on which Pinochet overthrew the constitutional president Salvador Allende, initiating one of the darkest periods in the history of Chile.

On November 1998, the very same day of the arrest of Pinochet in London thanks to an order issued from the Spanish judge Baltasar Garzón, the *Pleno de lo Penal de la AN* (a plenary within the Criminal Division of the National Criminal Court.) applying the principle of universal justice, unanimously issued two writs recognising the Spanish jurisdiction competence to try crimes of genocide and terrorism committed in both Chile and Argentina. These judicial rulings arouse a passionate international debate regarding the application of this principle by different domestic courts. In April 2000, the Spanish National Criminal Court opened proceedings for the genocide that took place in Guatemala. To allow the initiation of such proceedings, the Spanish National

Criminal Court relied upon international treaties ratified by Spain that had become substantive domestic law in Spain.

The differing opinions reached polemic proportions when the judgement of the Plenary session of the Criminal Cases Division of the Supreme Court (*Pleno de la Sala de lo Penal del Tribunal Supremo*) was reached. It agreed by a minimum and mere majority of eight votes to seven to reject the competence of Spanish courts to judge crimes of genocide admitted in April 2000, as seen above by the Spanish National Criminal Court, against the Mayan Indians in Guatemala, during the military dictatorships spanning from 1962 to 1996.

The Spanish National Criminal Court is authorised to investigate the assassinations of Spanish citizens in Guatemala, supposedly at the hands of the Guatemalan army. A charge by Rigoberta Menchu was brought for crimes of genocide, torture, terrorism, assassination and illegal arrest, against the General Efraín Ríos Montt, Head of the Guatemalan government in 1982 and 1983, general Oscar Humberto Mejías Victores, head of the government (1983-86), general Fernando Romeo Lucas García, president of the Republic of Guatemala (1978-1982) and another five members of the military occupying different positions during the dictatorship. This is a pyrrhic victory for the Nobel Peace Prize winner, Rigoberta Menchu.

The seven judges, against the majority decision, had cast a special vote in which they supported the Spanish competence to try the genocide in Guatemala. In this respect the principle of universal justice allows the extra-territorial criminal pursuit of such a crime. If their standpoint was admitted, it would give the plaintiffs “an opportunity to reverse the impunity of some clearly very serious acts”. It can be correctly assumed that national courts have not acted in an efficient manner, despite the elapsed time since the acts took place.

The dissenting vote which almost led to a draw vote between the judges of the Supreme Court who accept universal jurisdiction in the crime of genocide and those who do not can be described as fortunate. It signifies that in future, universal jurisdiction in the crime of genocide could be the subject of an appeal in other foras. Next step was the legal protection before the Spanish Constitutional Court to verify whether the current interpretation meets with the requirements set out in the Spanish *Magna Carta*.

In a similar interpretation to that outlined above by the courts in the Netherlands, it is established by virtue of the 1984 Convention against Torture that the Spanish justice system is competent to investigate and pass judgement on previous acts of a similar nature, for example “the acts committed against Spanish civilians” in the attack against the Spanish embassy in Guatemala by the Guatemalan army. As a result, during the attack which took place on January, 30 1980, three of the thirty seven killed were of Spanish nationality. The “carte blanche” granted to the Spanish justice system, included permission to investigate the assassinations in Guatemala of the following Spanish priests; Faustino Villanueva, Jose Maria Gran Cierva, Juan Alonso Fernandez and Carlos Perez Alonso.

Following some empty rhetoric of little consequence concerning moral repudiation directed at the actions of the Guatemalan armed forces against the Mayan Indians, it was decided that the Spanish courts were not competent to investigate genocide in Guatemala. This is due to a dubious interpretation, where the principle of universal jurisdiction can only be invoked to justify an

intervention over acts occurring on the territory of another state when it is in Spain's interests, allowing for exceptions to articles 6 and 8 of the Convention against Genocide. These articles establish the trial procedure for the respective territory where the acts were committed or the possibility of resorting to the United Nations in order to adopt the necessary measures to suppress the crime. In short, the necessary direct link cannot be found between the genocide which it claims to investigate and the national interests of Spain.

The Supreme Court interprets an international treaty that has become Spanish national legislation, but it does not interpret article 23 LOPJ. It is a highly significant law because it develops the most sensitive and important articles of the Spanish Constitution. As a result, the special vote signifies that the majority decision has applied the principle of universal jurisdiction in an excessively strict manner. It has also not respected the provisions under article 23.4 LOPJ, which allows for the extraterritorial criminal pursuit of the crime of genocide. It describes the authors of genocide as being common enemies of humanity as a whole, whereby in denying the right of the existence of a human 'group', they commit the most serious violation of human rights. These rigorous limits go against international law and Spanish domestic legislation which established the principle of universal pursuit for these crimes. Furthermore it can be safely assumed that Guatemalan jurisdiction has not been exercised in an effective manner.

Regarding genocide, the special vote indicates the Supreme Court has limited the application of Spanish jurisdiction exclusively to the event in which the victims are of Spanish nationality or where those responsible are found on Spanish territory. These are requirements that are not included in the norm. In practice, this derogates the principle of universal jurisdiction established in 1985 LOPJ, providing an exception to the rule. It utilises conclusive but lucid language which takes into account that the examining judge of the National Criminal Court should be allowed to admit the application for universal jurisdiction which, although "unable to bring the victims back to life or ensure the punishment of those responsible, contributes towards a just and safe world and helps to reinforce the use of international law, instead of violence, as a means of resolving conflicts."

In continuation of these clearly poor relations, on July 1, 2003, a date coincidental with the arrival of Cavallo to Spain, the Public Prosecution Office of the AN requested two actions, that are considered to be unfounded within the context of International Law of Human Rights. The first of these was to annul the order to open regulatory proceedings to admit oral hearings against the former military Argentinean ex naval Officer Adolfo Scilingo. This was due to a lack of defence for not having been given notification of the entirety of proceedings, only "incomplete photocopies". Furthermore, according to the Public Prosecutor, this summary cannot be judged in parts, but by examining "connected" acts that occurred during the dictatorship.

A constant tension exists between the Spanish Public Prosecution Office of the National Court, and the criminal division of the same entity, whereby the former put forward an article, previously mentioned, concerning the infringement of human rights and civil liberties, in which it requests either the dismissal or annulment of the actions. In this context, the Prosecution Office reaffirms the lack of competence of Spanish jurisdiction to recognise the acts and uses various resolutions as examples. Included amongst these is the judgement passed by the International Court of Justice in relation to the Foreign Minister of the Democratic Republic of the Congo,

Abdul aye Yerodia, (mentioned previously) as well as the ruling passed by the Supreme Court regarding the case in Guatemala.

In addition, the Public Prosecution Office seeks the final dismissal of the acts, their annulment and the filing of the procedure followed in respect of crimes of genocide, terrorism and tortures against numerous former high commanders of the Chilean and Argentinean dictatorship. The reasons for this are the lack of jurisdiction of the Spanish courts to try these acts, where “it would violate the principle under which a State cannot exercise its jurisdiction in the territory of another state”, as established by the doctrine of the Constitutional Spanish Tribunal. It alleges that immunity, in light of International Law, protects those former heads of state, without signifying that they remain exempt from being tried “in their own countries and where they would answer to their own people in respect of acts committed during their dictatorships.” Along the same lines, the Spanish National Court prosecution brief recalls how, in both Chile and Argentina, judicial proceedings have been initiated against those responsible for crimes committed during their respective dictatorships. It does not take into account, also respectively, the importance of the Amnesty of 1978 and the ‘Full Stop’ and ‘Due Obedience Laws’ (*leyes “punto final” and “obediencia debida”*).

Another argument put forward is the inability to retroactively apply this concept preventing the application of the principle of the universal pursuit of crimes committed before 1985. This is regulated in Spain with regard to genocide and terrorism, amongst others, from the 1st of July of that year, with the enactment of the LOPJ. It is appropriate to include that according to the prosecution, “an international convention does not exist that legitimises Spanish jurisdiction to investigate the crime of genocide committed by Argentina or Chile”. Furthermore, the acts carried out by military dictators of these nations have not been denounced before Spain, in order for them to be tried. With regard to this crime, there is no evidence that the Spanish victims were persecuted as a result of their nationality. The prosecution reaches similar conclusions in what it refers to as a crime of terrorism, which was not carried out against Spanish victims. Finally, it concludes by arguing that Spain can only remain competent when trying crimes of torture against Spanish Nationals between 1987 and 1990, although in this case immunity would prevail, still preventing proceedings from taking place.

The final judgement rendered by the Spanish constitutional court in September 2005²⁷ was crystal clear quashing the two previous rulings. The Spanish courts could try and investigate every crime committed in foreign soil with no Spanish connections such as criminal or victims being of Spanish nationality. An absolute universal principle is established.²⁸ “The Spanish law is not the only one to grant the universal jurisdiction principle without national links: Belgium article 7 Law 16th July 1993, amended by 1999 law; Denmark article 8.6 Penal Code; Sweden, 1964 Genocide Convention Law; Italy article 7.5 Penal Code and Germany²⁹”.

²⁷ STC 237/2005, September 26 2005. Recursos de amparo 1744-2003, 1755-2003 y 1773-2003 (acumulados). Vulneración del derecho a la tutela judicial efectiva (acceso a la justicia penal): jurisdicción universal de los Tribunales españoles en materia penal.

<http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html>

²⁸ Fundamental points of law. Paragraph 3.

<http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html>

²⁹ Fundamental points of law. Paragraph 6. Page 24

The Spanish courts now have just one way to see the universal jurisdiction principle. Some international scholars believe Spanish courts (as part of a state) are in breach of their obligations under general and customary international law, have violated and are violating the sovereignty of other countries or tribunals. Others regard the principle as a suitable tool to prosecute these serious crimes. We must keep in mind that crimes are committed by individuals not nationalities.

On the one hand, in early 2006, the AN granted to proceed an action brought by The Tibet House against seven Chinese civil servants. On the other hand, it ruled out the case against Cuban president Fidel Castro because of the Yerodia case of the International Court of Justice. A similar case is the seizure of the Spanish embassy in Guatemala. As stated in the newspaper *El País*, "*the occupiers, who had three or four pistols, were ready to leave the Spanish embassy and go to the University of San Carlos (the ambassador Cajal explained) accompanied by me, the president of the Red Cross and some journalists. Until the Guatemala authorities intervened and broke at the Spanish ambassador's office, the farmers had adopted a peaceful approach, expressing their demands by large banners.*"

The sole survivor of the assailants was killed even in a more despicable way, next day he was abducted from the hospital, tortured and extrajudicially executed and his body found, certainly as a threat, in the vicinity of the National Autonomous University of San Carlos, the more combative against the horror ?? military at the time.

A quarter century later, in 2005, the judge of the AN Fernando Grande-Marlaska, issued an international order of search and seizure to the Mexican authorities against who was then minister of the Interior in Guatemala, Donaldo Alvarez Ruiz, during the presidency of General Fernando Romeo Lucas Garcia (1978-1982), for their alleged involvement in the indigenous genocide.

Competency in the first instance would be up to the Guatemalan courts to hear the case of the Embassy of Spain as the state of nationality of the perpetrators and the majority of victims, and the place where the crime was committed. The Spanish courts could assert jurisdiction because of the Spanish nationality of three of the victims and the extent of territoriality Spanish embassies and consulates outside Spain. Lastly, Mexican courts could prosecute those responsible for the fire of the embassy and death of Guatemalan and Spanish if the culprits, as appears to be the case, were physically in Mexican territory.

The Spanish courts have another tool to claim a modern jurisdiction: the principle of universal jurisdiction. Since the eighties of the last century is opening passage this novel concept of the principle of universal jurisdiction that enables states to investigate and prosecute persons suspected of crimes classified as serious from the point of view of international law, without regard to the nationality of the perpetrator or victim, or where the offence was committed.

On June 10, 2003, the Supreme Court of Mexico accepts the extradition to Spain of alleged torturer Argentine Cavallo, who was arrested in Mexico three years earlier at the request of Judge Garzon. The legal opinion of the judge Luna Altamirano, on January 11, 2001, with continuous references to international treaties, accepted extradition for genocide and terrorism but not

torture. The universal justice involves just that: to overcome the old concept of territorial crimes prosecution by the state. The procedure is the same as was done then: the judge issued an international arrest warrant against him and sent an extradition request to the Mexican government. Soon the Spanish embassy in Mexico sent the original application to the Directorate of Legal Affairs of the Mexican Secretariat of Foreign Affairs, which in turn channelled to the Attorney General, sort of public prosecutor with broad investigative powers. This prompted a Mexican judge to issue an arrest warrant against Alvarez.

The request was processed through the Spanish Ministry of Foreign Affairs and the Attorney-General of the Mexican Embassy in Spain. We are positive that in a few more years, we will direct requests from judges, avoiding the complex path of the current system. Grande-Marlaska said in the arrest warrant issued against Alvarez that between January 1980 and September 1981 Fernando Romeo Lucas Garcia, president of Guatemala, created a government structure "aimed at minimizing the Maya ethnicity, causing forced displacement, making the violence generated within the state organization instrument suitable for such purposes (...) is not only physically attacked Maya ethnicity, but also to all people, mainly missionary priests, denouncing those facts and lend its assistance to farmers, trying to preserve their dignity and that the atrocities do not fall into oblivion."

In addition, in August 2003, the then conservative Spanish executive rejected the extradition requested by judge Garzon of forty former Argentine military linked to human rights violations, specifically citing his confidence that the Laws endpoint and Due Obedience were formally repealed by the Supreme Court of Argentina.

The Supreme Court issued in December 2004, a decision authorizing the AN to try the former Argentine official, Scilingo, for crimes of genocide, terrorism and torture." Finally, in February 2008, the Spanish socialist government agreed to re extradite Cavallo to Argentina with the green light of the Mexican government. At the end of the day, all is politics.

The Supreme Court believes Article 23.4 LOPJ is applicable, which establishes that Spanish jurisdiction covers acts committed by Spanish citizens or foreigners outside the national territory, subject to those classified under Spanish criminal law as terrorist crimes, genocide or any other that according to international treaties be prosecuted in Spain. It has been confined to apply the Guatemala doctrine discussed above where justified the Spanish jurisdiction with a connection to the national interest, as victims of Spanish nationality in the Argentine dictatorship and the murder of Spanish priests and the assault on the Spanish Embassy in Guatemala.

In the end, thanks to a broad and *pro homine* interpretation of the principle of universal jurisdiction, it seems that arguments such as "violates the principle that a State may not exercise its power in the territory of another State", immunity which protects former heads of state are being jettisoned, relying on highly controversial views that Chile and Argentina have opened legal proceedings against those responsible for crimes committed during their respective dictatorships and even the non-retroactivity, which would apply the principle of jurisdiction or universal persecution to crimes prior to its characterization, back in 1985.

This ruling strengthens the constitutional Spanish international instruments for prosecuting and sentencing the perpetrators of genocide. It also posits the Spanish Constitutional Court at the

forefront of international humanitarian law. On March 3, 2003, the dissenting vote of seven of the fifteen supreme court judges cleared the path which two years later the Spanish constitutional tribunal followed. One of those dissenting judges became, a year later with the arrival of socialist to power, the all-powerful prosecutor general of the nation, Conde-Pumpido, changing the criteria for the prosecution and saying yes to the appeal to the constitutional tribunal.

The habeas corpus before the Constitutional Court has determined that the interpretation upheld by the AN and the Supreme Court does not comply with the requirements of the Spanish Constitution and its development through organic laws. From now on, no one could question that the Spanish justice system has jurisdiction to investigate and prosecute crimes of genocide and crimes against humanity committed outside Spain, even in the absence of victims of Spanish nationality.

The Spanish constitutional court opted for full unrestricted universality of the prosecution of certain crimes against the need of connection points with the facts and territorial sovereignty. We do not agree with the latter assertion. You can act independently of a trial "value of the courts of a state about the ability to administer justice that have the relevant bodies of the same nature of another sovereign state" (Supreme Court judgement).

Accordingly, the rule concludes that Spanish courts have the legitimacy to investigate crimes of genocide, torture, murder and illegal detention committed in Guatemala between 1978 and 1986. It attacks and destroys each of the former required connection points so that competence can be attributed to a Spanish court. The alleged perpetrator of genocide should be in Spanish territory as an unavoidable prerequisite for the court because in Spain, unlike other countries, are not allowed trials in absentia but can initiate investigations along with the mandatory extradition requests, institution defined as "a cornerstone for effective achievement of the goal of universal jurisdiction: the persecution and punishment of crimes which, by their nature, affect the entire international community." Ruled out completely, the restriction of the application of the principle based on nationality "incorporates an added requirement not covered by the law, which also can not be theologically founded since, in particular with regard to genocide, contradicts the very nature of the crime and the shared aspiration of their universal persecution, which would be virtually cut by its base. "

Finally, the Spanish courts will have a single criterium, unequivocal and united to face the situations involving this important principle. Some will see it as unacceptable interference in judicial and government foreign sovereignties. Others as an instrument full of possibilities for prosecute hideous crimes.

The judicial Spanish landscape about this essential principle is everything but not clear.

In a strange tour of the wheel, the Spanish Constitutional Court judgement³⁰ of November 2007 considers the negation of the genocide as harmless and falls under the constitutional protection of

³⁰Spanish Constitucional Court in banc, STC 235/2007, November 7 2007 Cuestión de inconstitucionalidad 5152-2000. Planteada por la Sección Tercera de la Audiencia Provincial de Barcelona respecto al artículo 607.2 del Código penal. Vulneración del derecho a la libre expresión: sanción penal de la difusión de ideas o doctrinas que nieguen o justifiquen delitos de genocidio. Nulidad parcial e interpretación de precepto legal. Votos particulares

the freedom of expression right is *harmless, the conduct stands in a previous stage way before the need to intervene the criminal law arise. It is not even a potential danger to the goods the law has to protect. (es inane, conducta que permanece en un estadio previo al que justifica la intervención del derecho penal en cuanto no constituye, siquiera, un peligro potencial para los bienes jurídicos tutelados).*

Less than one month after the historic Constitutional Court resolution, AN on November 2005 “requires the inactivity of the country of origin or of the international community” in order to open an investigation by the Spanish courts, going clearly in opposite direction from the Spanish constitutional court. On the other hand, it gave leave of an action of genocide against seven highly ranked chinese civil servants brought by Casa del Tibet by a court order dated January 10, 2006. The Spanish constitutional court continues to apply its own fully universal jurisdiction in the Falun Gong³¹ case, allowing the investigation against the former Chinese president, Jiang Zemin and Luo Gan, deputy director of the Falun Gong unit inside the Chinese government. Actions against the then former president of Cuba, Fidel Castro, had been dismissed³² because the inapplicability of the full principle against an on going head of state.

On October 22, 2007, the Spanish constitutional tribunal ruled again³³ the full principle of universal jurisdiction alleging there is no need of previous condition. One new argument considered valid by the Court is that the Spanish universal jurisdiction is the only way left to prosecute high chinese civil servants. China did not ratify the International Criminal Court and could veto any proceedings against itself. The domestic law in contradiction of international law do not contemplate genocide in a non independent tribunals *vis a vis* the ruling comunist party. To subdue the competence to the existence of national interests goes against the universal jurisdiction principle which is based solely in the particular nature of the crime that affects the whole international community. Its prosecution and penalty is not only a compromise between nations. It is a common interest between them far away of a particular interest of one of them.

The Spanish Supreme Court issued two fundamental rulings. On October first, 2007, it said yes by an overwhelming majority 11 against 4 to the legality of the charges of killings and illegal detentions against³⁴ Adolfo Scilingo, Argentina former naval officer during the military

<http://www.tribunalconstitucional.es/jurisprudencia/Stc2007/STC2007-5152-2000.html>

³¹ Spanish Constitutional Court, second chamber, STC 227/2007, October 22, 2007

Recurso de amparo 3382-2005. Promovido por doña Zhi Zhen Dai y otros frente a la Sentencia de la Sala de lo Penal del Tribunal Supremo y los Autos de la Audiencia Nacional y de un Juzgado Central de Instrucción que no admitieron a trámite la querrela por delitos de genocidio y torturas en China.

Vulneración del derecho a la tutela judicial efectiva (acceso a la justicia penal): jurisdicción universal de los Tribunales españoles en materia penal (STC 237/2005).

<http://www.tribunalconstitucional.es/jurisprudencia/Stc2007/STC2007-227.html>

³² October 14, 2005

³³ [Sala Segunda. Sentencia 227/2007, de 22 de octubre de 2007](#)

<http://www.tribunalconstitucional.es/jurisprudencia/Stc2007/STC2007-227.html>

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³⁴ Spanish Supreme Court ruling setting the crimes committed by Adolfo Scilingo are crimes against humanity judgement 798/2007 01/10/2007

<http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html>

dictatorship. On July 17, 2007, it quashed³⁵ a previous December 2006 AN ruling that it has no jurisdiction over Cavallo an alleged Argentina torturer caught in Mexico and extradited to Spain. Eventually, he was re extradited to Argentina on March 2008, with the Mexican authorities green light, after the Spanish government³⁶ and the AN³⁷ decided so.

The well known Spanish judge, who made the bold move of sending an international detention order to Scotland Yard against the former Chilean dictator Pinochet and got him, Baltasar Garzón, issued on October 29, 2007 an order³⁸ giving leave to an investigation about genocide and tortures allegedly committed in the seventies and eighties of the last century in the Sahara by the marroquí government. It is not flawless. It is based in the European Court of Human Rights case log but without single out one of its rulings.

***SEGUNDO.-** De acuerdo con lo establecido en el artículo. 23.4 de la LOPJ, el principio de justicia penal universal, la Sentencia del Tribunal Constitucional de 26 de septiembre de 2005, el artículo 65 de la LOPJ, el artículo 14 y concordantes de la Ley de Enjuiciamiento Criminal, artículos 163,166, 173 y 607 del Código Penal y Tribunal Europeo de Derechos Humanos, procede admitir la competencia de este Juzgado, incoar el correspondiente procedimiento penal para iniciar la investigación y concreción de hechos, responsabilidades, y si existe o no procedimiento o causas abiertas en Marruecos contra las personas mencionadas, por los hechos objeto de querrela.*

Garzón also made a petition to the Chilean Supreme Court in order to have the background of former pinochet government members to indict them for genocide, terrorism and tortures in the killing of the Spanish diplomat Carmelo Soria.³⁹

Once again the Audiencia Nacional issued⁴⁰ warrant of international arrest for forty Rwanda army officers charged with genocide, crimes against humanity and terrorism, besides the murdered of nine Spanish citizens, priests and non governmental workers among them. If any of them, with the exception of the acting president Kagame, put a foot outside the Ruanda border, even for a medical treatment, would be in a high risk of being arrested, detained or even extradited.

Sometimes is the mission of strong minded judges as Santiago Pedraz at the Audiencia Nacional, who took evidence from a mass killing survivor group going openly against the Guatemala

³⁵ Sentencia anulando auto de la Sección Tercera de la Sala de lo Penal de la AN que cedía la competencia a favor de las autoridades penales argentinas en el caso Cavallo Sala de lo Penal judgement 705/2007 July 17, 2007

<http://www.derechos.org/nizkor/espana/juicioral/doc/guevara.html>

³⁶ Spanish Government Council february 29, 2008 http://www.la-moncloa.es/ConsejodeMinistros/Referencias/_2008/refc20080229.htm#Cavallo

³⁷ Audiencia nacional ruling march 13 2008 Stay and shelving of the Cavallo case <http://www.derechos.org/nizkor/espana/juicioral/doc/archivo1.html>

³⁸ http://www.elpais.com/elpaismedia/ultimahora/media/200710/30/internacional/20071030elpepuint_1_Pes_PDF.do

³⁹ http://www.elpais.com/articulo/internacional/Chile/acoge/peticion/Garzon/procesar/asesinos/Carmelo/Soria/elpepuint/20071123elpepuint_7/Tes

⁴⁰ 6 February 2008

http://www.elpais.com/elpaismedia/ultimahora/media/200802/06/espana/20080206elpepunac_1_Pes_PDF.pdf

constitucional court order which denied on December 12, 2007 the Spanish competence to investigate genocide, terrorism, tortures, murderers and illegal detentions.

We must never forget that crimes are not committed by nationalities but people, and like the protection of human rights knows no boundaries, the prosecution of those who violate them so massive and systematic can not depend on the nationality of the victims or the guilty party.

Conclusion

It is abidingly clear that the European judicial scene recognises the notion of universal jurisdiction, adopted in article 23.4 of the LOPJ, as an established norm for the crime of genocide and for crimes against humanity under international customary law. Consequently, one is reluctant to admit the fact that the exercise of universal jurisdiction in accordance with the terms provided under the cited article 23.4 is found to be contrary to other principles of international law, but rather that it is found to be in complete harmony.

The rain circle is the best way to explain the relationship between national justice and national law on one hand and international justice and international law on the other. The national justice and law is like a sea, the best part evaporate to the sky and become a sea of clouds being international justice and law. Afterwards an international rain fall into the national sea and they got mixed with each other.

Like *El Quijote*, the Spanish courts will fight against giants but the key is to look at them as merely windmills

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