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FUNDACIÓN INTERNACIONAL BALTASAR GARZÓN



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Legal pedagogy, The Rule of Law and Human Rights

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Este texto está dedicado a Jamin B. Raskin y Jorge E. Londoño Ulloa, por su compromiso en redimensionar las opciones de sus conciudadanos a través del fortalecimiento del Estado de derecho. "Las discusiones deben evitarse. Son siempre vulgares y frecuentemente hay que darle la razón al otro." Oscar Wilde

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Dedicated to Jamin B. Raskin and Jorge E. Londoño Ulloa for their commitment to the enlargement of other people's choices inspired by the strengthening of the Rule of Law. "Arguments are to be avoided. They are always vulgar and often convincing." Oscar Wilde

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Resumen

El proceso judicial del magistrado Baltasar Garzón por sus investigaciones relacionados con la comisión de crímenes de lesa humanidad durante la Dictadura Franquista ha causado controversia en lo que se ha percibido como un ataque al Estado de derecho por parte de la defensa del magistrado, así como de defensores de derechos humanos. Este texto proyecta un marco más amplio de comprensión de la situación, a través de la defensa del sistema judicial y el Estado de derecho en España a través de la interpretación de las obligaciones surgidas en el ámbito del derecho internacional de los derechos humanos, y al mismo pone en valor el desempeño de instituciones y jueces tales como Baltasar Garzón, cuya actuación ha permitido el restablecimiento de la dignidad y respeto por la víctimas. El principio de Jurisdicción Universal y el activismo en derechos humanos confrontan importantes desafíos, especialmente cómo ser eficaces en la búsqueda de la verdad y lograr el fin de la impunidad.

Abstract

The trial of the Judge Baltasar Garzon for his judicial investigation into the crimes against humanity committed under the Francoist regime has caused controversy, not least in legal circles, due to the apparent attack on the rule of law by defenders of the magistrate and advocates of human rights.

This article attempts to frame the debate in a more holistic way, defending the judicial system and the rule of law as central to the defence of human rights through a contemporary approach to International Law whilst also highlighting the important role these institutions and magistrates such as Baltasar Garzon have played in re-establishing the dignity and respect for victims of abuses throughout the World. The international jurisdiction principle and human rights activism are also introduced to the debate to help elucidate the challenges posed when confronting serious human rights and victims' rights violations and the challenges to seeking truth and ending impunity.

Palabras clave

Derechos Humanos, Jurisdicción Universal, Impunidad, Justicia Transicional en España, Procesos de Baltasar Garzón

Keywords

Human Rights, Universal Jurisdiction, Impunity, Transitional Justice in Spain, Judge Baltasar Garzón trial



Legal pedagogy, the rule of law and Human Rights. The Professor, The Magistrate's Robe and Miguel de Unamuno

Introduction

The history of the twentieth century, and to a large degree the century that we are currently paving, can well be explained by the role of the rule of law and popular aspirations all over the world for freedom, development, and democracy. Within this context, a thorough understanding of human rights in diverse countries is also illustrative, from totalitarianism, fascism, and communism, to the diverse pseudo-democratic regimes that have dismantled the rule of law and democracy and have systematically violated basic freedoms of people, to the democracies which, with varying degrees of success, have tried to strengthen democratic institutions by offering a framework of options and opportunities to their citizens and a basis for genuine public liberties.

From a legal perspective, it could be argued that our universities in democratic countries still fail to effectively transmit basic principles such as an aspiration for justice and the role of the rule of law, democracy, and human rights. What is lacking is an ability to generate a suitable didactic method similar to that found in the classic work by Paulo Freire, *Pedagogy of the Oppressed (Pedagogía del oprimido)*¹ in the sense that the rule of law is not only the essence of the legal order in a democratic state, but also a system of aspiration to civility and the reflection of ethical commitment to public life.

These introductory words symbolize an effort toward a better understanding of the rule of law and human rights, removed from fingerpointing interpretations and ideological prejudices. This approach has become necessary due to the unfolding

narrative of Baltasar Garzón and his investigation into crimes against humanity, which is the object of harsh criticism but is not the main purpose of this article. It could well be the case that these words are erroneous. This article is based on three premises. The first premise concerns doubt, which has always been a fundamental premise in research, writing, or debating in class. To debate, think, doubt, and deny or accept errors are indispensable parts of the intellectual process. Without these parts, dialogue is impossible, for dialogue is the meeting of different forms of reasoning.

The second premise is the idea of law, understood as an aspiration given impetus through a commitment to justice and the rejection of indifference through the maintenance of this commitment, especially when it is not only the citizen who is concerned, but rather the increased responsibility through participation in this system that we call law, which measures our vision of liberty and responsibility. It was British Judge Tom Bingham who expressed this sentiment in a definitive manner when he wrote, «So it seems to me that observance of the Rule of Law is the nearest we can get to a universal secular religion.»² Rule of law, justice, and commitment go hand in hand with our legal and moral obligations. The international rule of law has become a spiritual element of those democratic societies that aspire to be more just and inclusive.

The third premise is an understanding of the law as an encounter with “the other” in the sense that it speaks of a meeting with diversity—an encounter with otherness, as described by Ryszard Kapuscinski.³ This is par-

1. Paulo Freire, *Pedagogy of the oppressed* (Continuum eds., 2000). See also Celebrating the 40th Anniversary of Paulo Freire's Pedagogy of the Oppressed, www.pedagogyoftheoppressed.com

2. Tom Bingham, THE RULE OF LAW 174 (2010).

3. Ryszard Kapuscinski, THE OTHER (2008).

ticularly the case with those who are most vulnerable and those who have not had the possibility to choose and exercise their rights, among whom we find the victims. Professor Abdullahi Ahmed An-Na'Im⁴ has stated, as Alberto Moravia in his work *The Indifferent (Gli indifferenti)*⁵ had earlier affirmed, that in facing injustice, the only option is to say "No." Doing otherwise is to become an accomplice to injustice itself. According to this line of thought, Javier Cercas was right in the closing chapters of *Soldiers of Salamis* where he suggests that being decent may «mean[] learning to say no».⁶

These words may very well find their origin in Washington, D.C., October 2010, the month in which charges were accepted for consideration, presaging the disciplinary proceedings against Judge Baltasar Garzón for the investigation of the mass graves of the Francoist Era. On a fall afternoon on Massachusetts Avenue, Professor Claudio Grossman, with his habitual intelligent humor, stated, «It seems that you Spaniards throughout history haven't had the intention to address your own victims and assist them, and the proof of this lies in the actions of the judges of the [Spanish] Supreme Court». The author responded, trying to demonstrate a certain balance between deference to his teacher and his position as a human rights activist on the one hand, and his commitment to the rule of law on the other:

Without a doubt there may be non-legal intentions, but as a citizen I believe in the general integrity of the judicial system and, as such, I would like to assume the same capacity, dignity, and respect for the rule of law and of the magistrates of the highest jurisdiction in Spain. For that

reason I hope that the law speaks and the magistrate Baltasar Garzón enjoys the complete guarantee of due process.

At that moment the author did not have the words of his friend Professor Javier López de Goicoechea, when he gave voice to an important aspect of the situation:

The problem is most probably the virtual personality that surrounds the person of Garzón and which he himself has helped create and which he is also his own victim. It is possibly for this reason that Spanish readers, like those from Colombia, do not see in your article anything else but the defense of this virtual personality, and not a defense of the rule of law.⁷

The author would like to thank his beloved friend Professor Darío Villarroel, and also his academic colleagues and friends such as the professors and senators Jamin B. Raskin from Maryland, U.S.A., and Jorge Eduardo Londoño from Boyacá, Colombia. It was these people who obliged this article to be coherent and respectful in the defense of the rule of law through their own example, including entertaining the possibility of being misguided in writing this text, and without embellishing the desire to be right at all costs. It is hoped that these words will at least serve as a legalcivic exercise belonging to the humanist legacy, which Svetan Todorov, in his work, *The Imperfect Garden*, reminds us is an inherent part of the enlightenment tradition: «By confronting the past . . . we can gain access more easily and more directly to the world around us. To understand the thought of yesterday allows us to change the thought of today, which in turn influences future acts.»⁸

4. Joaquín González Ibáñez, Hisham Ramadan & Jamin B. Raskin *The Arab Garden and Ground Zero: The Right to Education, an Allegory of Democratic Citizenship and Islamic Fundamentalist Terrorism* (original version in English), in DERECHO A LA EDUCACIÓN Y CIUDADANÍA DEMOCRÁTICA., 660, n. 36 (2007).

5. Alberto Moravia, *GLI INDIFFERENTI* (Bompiani 2000).

6. Javier Cercas, *SOLDIERS OF SALAMIS* (Anne McLean trans., Bloomsbury 2003).

7. Personal conversation with Professor Javier López de Goicoechea, Co-Director, Berg Institute, in Washington, D.C. (Oct. 2011).

8. Tzvetan Todorov, *THE IMPERFECT GARDEN* 228 (2002)



Because rejecting the impunity of crimes committed in the past is part of the goal of current international law, it will be argued that Judge Baltasar Garzón initiated proceedings in Spain based on international obligations founded in international treaties. Furthermore, the principle of universal jurisdiction has been applied as the legal basis of indictment for other similar cases. The universal jurisdiction proceeding initiated by Judge Garzón was in accordance with the law and attempted to provide a legal and judicial response for victims of crimes committed outside Spain. There will also be an explanation for why Judge Garzón acted under the international rule of law despite accusations by the Supreme Court of his violation of the 1977 Amnesty Law triggered by his investigation into Franco-era crimes. Finally, the author will bear personal witness to the events of February 2012 during the Supreme Court hearing of this case.

Victims and international Human Rights Law

In his last collection of essays, titled *Arguably*,⁹ Christopher Hitchens reflects on the meaning of maturity. He writes that maturity arrives when we stop interpreting life as simply the principles we hold and instead see it as the experiences that make these principles vivid and meaningful in the world.¹⁰ For professors who research and teach in the field of international law and human rights, the constant balancing of principles and experiences is the essence of our working lives. However hard the lessons may be that we learn from

our experiences, we are always maturing and transforming our principles through experience. Much of this intellectual and existential growth takes place in Spain and in Latin American countries—places to which we travel frequently in order to work with magistrates, prosecutors, police, and the armed forces, and discuss in postgraduate courses with university professors. We go there to promote the consolidation of international standards of human rights and to preserve the rule of law.

The main instrument with which we work is an intellectual system—an *entelecheia*—that tries to protect spheres of liberty, dignity, and security for people. This instrument is the law—more specifically international human rights law. A particular procedural formula called universal jurisdiction has evolved during the last few decades as an effective method that, under the premise of allowing victims to find a last resort for vindication, demands justice and rejects impunity.

Universal Jurisdiction

The principle of universal jurisdiction is classically defined as «a legal principle allowing or requiring a state to bring criminal proceedings in respect to certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim».¹¹ Behind this is the principle *aut dedere aut judicare*.¹² «Jurisdiction is the means of making law functional»¹³—the means to obtain the goals and ends contained in the law. Whenever a crime is committed, a state has the obligation to exercise its jurisdiction in order to prosecute the res-

9. Christopher Hitchens, *ARGUABLY* (2011).

10. *Id.* at xvii-xviii (“For me, this was yet another round in a long historic dispute. Briefly stated, this ongoing polemic takes place between the anti-imperialist left and the anti-totalitarian left. . . . (This may not seem much of a claim, but some things need to be found out by experience and not merely derived from principle.)”).

11. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L.R. EV.* 785, 788 (1988).

12. The Latin motto *aut dedere aut judicare* means “extradite or prosecute” and is used to designate the alternative obligation concerning the treatment of an alleged offender “which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct.” M. Cherif Bassiouni & Edward M. Wise, *A UT DEDERE A UT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3 (1995).

13. Christopher Blakesley, *Extraterritorial Jurisdiction*, in *INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS (VOL. II)* 85, 89 (M. Cherif Bassiouni ed., 3d ed., 2008).

possible person before a court of law. That legitimate process is performed by states on the principles of territoriality or nationality, and sometimes on passive personality, the victim's nationality, or the protective principle, when national interests are affected.¹⁴ Through the principle of universal jurisdiction, national and international courts have prosecuted defendants without any of the traditional jurisdictional links being present. This is an evolution of international law that permits any state to apply its laws to certain offenses even in the absence of territorial, nationality, or other links with the offender or the victims. The principle of universality implies that certain crimes are of such an atrocious and appalling nature that all states have a responsibility or a legitimate interest in taking action and preventing impunity. However, such judicial exercise is certainly controversial because jurisdiction itself is a manifestation of state sovereignty.¹⁵

The principle of universal jurisdiction is said to deviate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator, or the victim. In the words of Mary Robinson, «It is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim».¹⁶ Universal jurisdiction allows for the

trial of international crimes committed by any individual, regardless of his or her private or public authority held at the time the crime was committed and regardless of its location anywhere in the world.

Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius, and to the prosecution and punishment of the crime of piracy. The first actions of states under the principle of universal jurisdiction date back to acts of piracy in the seventeenth century. There are also some occasional precedents in the slave trade cases on the high seas during the nineteenth century. Pirates were universally reviled and recognized as *hostis humani generis*, or «punishable in the tribunals of all nations».¹⁷ Because all states were affected by piracy, states were eager to prosecute pirates, and universal jurisdiction was a neat compromise to settle «potentially innumerable... conflicts of jurisdiction».¹⁸ Any state that apprehended a pirate could try him in its courts. This has been recognized as customary international law and has furthermore been codified by subsequent conventions, including the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea.¹⁹

However, the trials at Nuremberg are widely acknowledged as the birth of the modern form of universal jurisdiction. The

14. See Yana Shy Kraytman, *Universal Jurisdiction – Historical Roots and Modern Implications*, 2 BSIS. J. INT' L S TUD. 94 (2005), <http://www.kent.ac.uk/brussels/journal.html>.

15. M. Cherif Bassiouni expresses the notion that universal jurisdiction implicitly transcends national sovereignty and imposes an active obligation on States: «The obligation to extradite or prosecute is 'alternative' in the sense a state subject to this obligation is bound to adopt one of two possible courses of action: it must extradite if it does not prosecute, and prosecute if it does not extradite.» Bassiouni & Wise, *supra* note 12, at n 2.

16. See Mary Robinson, *Foreword* to THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 15 (2001) [hereinafter PRINCETON PRINCIPLES], http://lapa.princeton.edu/hosteddocs/unive_jur.pdf

17. *United States v. Smith*, 18 U.S. 153, 156 (1820). This is the case in which the United States Supreme Court upheld the exercise of universal jurisdiction by U.S. courts over piracy, which was declared to be «an offence against the universal law of society.» *Id.* at 161. The notion of pirates being *hostis humani generis* is often credited to Cicero. M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 293 (1999); Kraytman, *supra* note 14 (quoting Bassiouni).

18. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 83 (2001). See, e.g. Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304–305 (4th ed., 1990).

19. Convention on the High Seas, art. 19, adopted 29 Apr. 1958, 13 U.S.T 2312, 450 U.N.T.S. 11; United Nations Convention on the Law of the Sea art. 105, adopted 10 Dec. 1982, 1833 U.N.T.S. 396, http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.



legal outcome after the Second World War was the London Conference, where, a month after the defeat of Nazi Germany, the victors set up the Nuremberg Principles and drafted the Geneva Conventions, to be followed by the development of multilateral human rights instruments and the Eichmann Trial in 1966. This has become the standard formula for explaining the extension of universal jurisdiction from the days of piracy to its modern application in jus cogens crimes, in particular since the crimes committed during the II World War by the Nazi regime and the other Axis' members:

The Axis' offenses, like piracy, thus became crimes of international concern. Moreover, war crimes and crimes against humanity are analogous to piracy in that they are typically committed in locations where they will not be prevented or punished easily; this parallel suggests the necessity of extending universal jurisdiction to the Axis' crimes.²⁰

The first precedent of universal jurisdiction in the twentieth century in an international treaty was the prompting of states to enact judicial cooperation. This appears in the abovementioned *London Agreement* of 1945, which provided for the jurisdiction of the Tribunal for crimes having no precise geographical location and for the jurisdiction of national courts over other war criminals.²¹ Similarly, the International Humanita-

rian Law that entered into force after World War II through the Geneva Conventions of 1949 stands as a clear example of universal jurisdiction over grave breaches of those Conventions. Some landmark cases and historical chapters like the kidnapping by Mossad agents in Argentina of Adolf Eichmann, the high-ranking officer of the Third Reich's SS organization, showed in practice that rules of customary law enlarged the principle's scope of application. The Eichmann case of 1961 confirmed that international crimes were no longer to remain unpunished. In practice, this meant that in certain circumstances, sovereignty could be limited in the case of heinous crimes and that this was accepted as a general principle in a limited number of cases.²²

Former U.S. Secretary of State Henry Kissinger noted that the Eichmann case should be considered as the first precedent of the application of universal jurisdiction but then affirmed that the drafters of the Helsinki Accords (the basic human rights principles initiated by Willy Brandt and his *Ostpolitik*,²³ adopted in 1975 by the Conference on Security and Cooperation in Europe) and the United Nation's 1948 Universal Declaration of Human Rights never intended to authorize universal jurisdiction. The improper application of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents or for aims extraneous to criminal justice.

20. Randall, supra note 11, at 788.

21. See Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution of the Major War Criminals of the European Axis, 8 Aug. 1945, 82 U.N.T.S. 280 [hereinafter *London Agreement*], <http://avalon.law.yale.edu/imt/imtchart.asp>. See *id.* art. 1: "There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities." See also *London Agreement* art. 6: "Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals."

22. We may refer to the Eichmann case in 1961 as the first case. See *Israel v. Eichmann*, 36 I.L.R. 277, 298-300 (Isr. Sup. Ct. 1962); *R. v. Finta*, 104 I.L.R. 285, 305, n. 12 (Can. Sup. Ct. 24 March 1994); *Demanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986); *R. v. Bartle and the Comm'r of Police for the Metropolis and Others Ex parte Pinochet*, [1999] 2 W.L.R. 827 (H.L.); *The Four from Butare Case*, Cour d'Assises de Bruxelles, 7-8 June 2001 (Belg.).

23. See Gordon A. Craig, *Did Ostpolitik Work?*, 73 FOREIGN AFF. 1625 (1994), <http://www.foreignaffairs.com/articles/49450/gordon-a-craig/did-ostpolitik-work>.

Moreover, the imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and national reconciliation in nations struggling to recover from violent conflict or political oppression. Prudence and good judgment are required here, as elsewhere in politics and law.²⁴ As Kenneth Roth points out,²⁵ Henry Kissinger is a former Secretary of State and an individual potentially affected by the principle of universal jurisdiction should he travel to some European countries.²⁶ In this sense, Kissinger exemplifies one of the real controversies that the application of universal jurisdiction might cause.

To overturn the compromise negotiated by South Africa's Nelson Mandela, widely recognized at the time as the legitimate representative of the victims of apartheid. Mandela agreed to grant abusers immunity from prosecution if they gave detailed testimony about their crimes. In an appropriate exercise of prosecutorial discretion, no prosecutor has challenged this arrangement, and no government would likely countenance such a challenge.²⁷

Many Spaniards might make a similar assumption, with an important difference being that in Spain, there was not a leader like Mandela. Neither the victims, both those exiled abroad and those "exiled" within Spain, nor those who suffered retaliation after the Spanish Civil War, were given a voice or heard in court as was the case in South Africa.

Universal Jurisdiction and the Principle of Complementarity

Universal jurisdiction only operates when the principle of complementarity, also called the principle of subsidiarity, has been met. The principle of complementarity refers to an operative principle aimed at granting jurisdiction to a third country's court or to an international court, provided that domestic institutions have failed to exercise their primacy of jurisdiction. This means that other courts, different from the national courts with jurisdiction over the national territory, will intervene in a subsidiary manner in order to deal with infringements of international law. When the domestic system fails, others intervene and ensure that the perpetrators do not go unpunished.

The Eichmann case of 1961 confirmed that international crimes were no longer to remain unpunished. In practice, this meant that in certain circumstances, sovereignty could be limited in the case of heinous crimes and that this was accepted as a general principle in a limited number of cases

24. See PRINCETON PRINCIPLES, *supra* note 16, at 25.

25. Kenneth Roth, Executive Director of Human Rights Watch, wrote a response to the article by Henry Kissinger. See Kenneth Roth, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFFAIRS 86-96 (2001) [hereinafter Roth, Pitfalls]. See also Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFFAIRS 150-154 (2001) [hereinafter Roth, Case], www.foreignaffairs.com/articles/57245/kenneth-roth/the-case-for-universal-jurisdiction.

26. See Christopher Hitchens, *THE TRIAL OF HENRY KISSINGER* (2002). Christopher Hitchens gathered part of the legal background and the development of the principle of international jurisdiction thanks to professors at Washington College of Law-American University, Michel Tigar and Jamin B. Raskin.

27. Roth, *Pitfalls*, *supra* note 25. See also Roth, *Case*, *supra* note 25.

28. Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L. 870 (2002).

29. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L. 386 (1998).



Mohamed M. El Zeidy has emphasized the idea that this principle of complementarity takes for granted a complex system in international criminal law requiring the existence of both functioning national and international criminal justice systems.²⁸ The principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction. The lack of a genuine national investigation and prosecution should be regarded as the core criterion for the exercise of universal jurisdiction. The lack of a genuine national investigation means that national courts are not willing or are not capable of conducting proper investigations that bring alleged perpetrators before national courts.²⁹

Universal jurisdiction is based on the idea that some crimes are so terrible and harmful to the international community—crimes against humanity, genocide, war crimes, torture, and forced disappearance, among others—that states are authorized and even obliged to investigate and judge the presumed perpetrators, regardless of where the crime was committed, the nationality of the victims, or indeed whether the offense or crime has directly affected the state's interests. Universal jurisdiction is a complementary instrument in the fight against impunity—in other words, a means to achieve accountability and prevent perpetrators from remaining unpunished by international law. It reflects the obligation of states that are party to international human rights treaties to prosecute or extradite those responsible to face a national or international court.

Since the Nuremberg and Tokyo trials, international law has conceived the legal structures for the exercise of universal justice. Examples can be found in the ad hoc Crimi-

nal Tribunals for the Former Yugoslavia and Rwanda, the Special Courts for Sierra Leone, East Timor, and Cambodia, and the International Criminal Court. As Olga Martin-Ortega and Jordi Palou-Loverdos have stated, «Each of these mechanisms, acting in tandem with domestic courts, serve as instruments for the enforcement of human rights and international humanitarian law. Universal jurisdiction is only one of the tools available in the fight against impunity for severe human rights violations».³⁰

Spanish Law, Universal Jurisdiction and judge Baltasar Garzón

In Spain, the rules regarding international jurisdiction competence are regulated by the 1985 Judiciary Act called *La Ley Orgánica del Poder Judicial* (LOPJ) in which the main rules dealing with national and international courts' jurisdiction in criminal matters are set out. Article 23.4 of the LOPJ indicates that under the principle of universal justice, Spanish courts have jurisdiction to try certain very serious offenses, listed as genocide, terrorism, slavery, piracy, child prostitution and abuse, currency forgery, and drug trafficking. This article also includes any other crime that should be prosecuted by Spain in accordance with international treaties, even in those cases in which the offense has been perpetrated outside Spanish territory and regardless of the nationality of the offender. The only court competent to exercise universal jurisdiction according to the LOPJ is the National Court (*Audiencia Nacional*).³¹

Spanish courts have been exercising universal jurisdiction for more than two decades now and have made an extraordinary contribution to the development of international criminal law and the fight against impunity. The Spanish courts originally

30. Olga Martin-Ortega et al., *Preserving Spain's Universal Jurisdiction Law in the Common Interest*, JURIST, 29 June 2009, <http://jurist.org/forum/2009/06/protecting-spains-universal.php>.

31. See B. Bachmaier et al., CRIMINAL LAW IN SPAIN 409 (2010).

started to exercise universal jurisdiction in the late 1980s in relation to crimes associated with the forgery of Spanish pesetas bank notes and drug trafficking. But in 1998, the application of universal jurisdiction by the *Audiencia Nacional* had an international impact when Judge Garzón indicted several Argentinean and Chilean officials for their alleged roles in abuses committed as part of *Plan Condor*.

The Spanish Supreme Court (*Tribunal Supremo*) ruled in the Guatemala case that in order to avoid the abuse of jurisdiction and an excessive extension of extraterritorial jurisdiction, Article 23.4 of the LOPJ should be applied within the framework of the current stage of international law and the principle of the real effectiveness of the sentence.³² This decision was in line with the 2001 Princeton Principles on Universal Jurisdiction, established two years after the Augusto Pinochet detention in London by a group of jurists led by Professor Stephen Macedo in a document titled *The Princeton Principles on Universal Jurisdiction*.³³ These principles help clarify and bring order to an increasingly important area of international criminal law: prosecutions for serious crimes under international law in national courts based on universal jurisdiction, absent traditional jurisdictional links to the victims or perpetrators of crimes. The main

goal, according to Stephen Macedo, was to elaborate a document containing a set of principles that might clarify what universal jurisdiction is and how its reasonable and responsible exercise by national courts can promote greater justice for victims of serious crimes under international law.

The Supreme Court's ruling in the *Guatemala* case meant that Spanish courts would only be entitled to prosecute a crime if there was a link to Spanish territory, citizens, or "interests," and also that it could cause international political conflict; in practice, it would be ineffective and impossible to implement the sentence. Nevertheless, in a very progressive sentence two years later, the Spanish Constitutional Court reversed the Supreme Court's judgment in 2005, labeling it as a restrictive interpretation of Article 23.4, inconsistent with the fundamental right of access to courts. They held that the law did not require any specific connection to Spanish territory or any limitation to the application of the principle of international jurisdiction.³⁴ The Spanish Constitution, in Article 96.1, establishes that international treaties validly signed, ratified, and officially published, form part of the country's domestic order. As a consequence, the doctrine of the Constitutional Court, after the 2005 *Guatemala* case, has asserted that the reach of universal jurisdiction is absolute and

32. See Spanish Supreme Court (STC), 26 Sept. 2005 (237/2005), <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5497>.

33. See PRINCETON PRINCIPLES, *supra* note 16: These are The Princeton Principles on Universal Jurisdiction, which were signed by the participants in the Princeton Project on Universal Jurisdiction for the purposes of advancing the continued evolution of international law and the application of international law in national legal systems. We can summarize the principles as follows: (1) state courts should be able to exercise jurisdiction over grave human rights violations and abuses and violations of international humanitarian law; (2) no immunity for persons in private nor official capacity; (3) no immunity for past crimes; (4) no statutes of limitation; (5) superior orders, duress, and necessity should not be permissible defences; (6) national laws and decisions designed to shield persons from prosecution cannot bind courts in other countries; (7) no political interference; (8) grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest; (9) internationally recognized guarantees for fair trials; (10) public trials in the presence of international supervisors; (11) the interests of victims, witnesses, and their families must be taken into account; (12) no death penalty or other cruel, inhuman, or degrading punishment; (13) international co-operation in investigation and prosecution; (14) effective training of judges, prosecutors, investigators, and defence lawyers. See Amnesty International, UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION (1999), www.amnesty.org/fr/library/asset/IOR53/001/1999/fr/dd42b888-e130-11dd-b6eb-9175286ccde2/ior530011999en.pdf.

34. See STC, *supra* note 32.



super-sedes the existence or non-existence of national interests. Moreover, the Scilingo case—the only judgment so far produced by the *Audiencia Nacional*—recognizes the prosecution of some international crimes as being obligatory and effective against third parties (*jus cogens* and *erga omnes*). Spain, in a way, became the national pioneer in the exercise of universal jurisdiction and still provides the last resort for victims of crimes under international law that seek to address impunity, truth, justice, and reparation in those cases in which there is no possibility of obtaining national remedy.

The final limitation on the exercise of the principle of universal jurisdiction by judges at the *Audiencia Nacional* came not from the Court's rulings, but from the Spanish Parliament in 2009, which enacted an amendment to the 1985 Judiciary Act and limited the Jurisdiction of the Spanish court to cases with "national connection."³⁵ In practice, this means that beginning in December 2009, it would only be possible to pursue international criminals if they are physically in Spain, if the victims of their crimes were Spaniards, if they have some "relevant connection" to Spain (although such connection is not yet defined in the law), and if no international court or "competent court" has opened an investigation into the issue. This amendment has meant a dramatic change in the conception of universal jurisdiction, whose main goal was to end impunity and eliminate safe havens for the perpetrators of the worst crimes.

In May 2009, as a Spanish citizen and international law professor, the author signed the *Manifesto Against Impunity - In Favour of Uni-*

versal Jurisdiction.³⁶ The goal was to prompt public opinion and politicians not to support a new act of Parliament that would reduce and restrict the competencies of Spanish national courts to initiate criminal proceedings under the universal jurisdiction principle.

Judge Baltasar Garzón and the Universal Jurisdiction

Beginning in the 1990s, Judge Baltasar Garzón, a Spanish Magistrate born in 1955 in Andalusia, initiated an investigation into Argentina's Dirty War in which a number of Spaniards and other citizens had been killed. Garzón was acting under Spain's principle of universal jurisdiction and the initial Argentine investigation led him to Pinochet's role in the so-called Operation Condor, a program under which various South American security services, including those of Chile and Argentina, cooperated to eliminate left wing opponents. One victim of Operation Condor was Orlando Letelier, the former Chilean ambassador to the United States who was murdered in Washington, D.C., in 1976.

Judge Garzón later came to worldwide attention in the late 1990s when former Chilean military ruler and noted Human Rights criminal Augusto Pinochet was arrested in London on Garzón's initiative while there seeking medical treatment

35. See Ley Orgánica 1/2009, 3 Nov. 2009.

36. Manifesto Against Impunity - In Favour of Universal Jurisdiction, NODO 50. ORG, www.nodo50.org/csca/agenda09/palestina/pdf/MANIFESTOUNIVERSALJURISDICTION.pdf.

37. See Profile: Judge Baltasar Garzón, BBC NEWS (9 Feb. 2012), <http://www.bbc.co.uk/news/world-europe-16591284>.

38. See Statement of Secretary of State for the Home Department to the House of Commons, 345 P ARL. DEB. H.C. (6th ser.) 571, 574 (2000), <http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/debtext/00302-10.htm> - 00302-10_spmi0

Judge Garzón later came to worldwide attention in the late 1990s when former Chilean military ruler and noted human rights criminal Augusto Pinochet was arrested in London on Garzón's initiative while there seeking medical treatment.³⁷ Garzón took this opportunity and issued an international arrest warrant and a request for extradition. This led to an eighteen monthlong drama during which Pinochet was held under house arrest in Britain while his ultimate fate was debated in the courts. In the end, his case was heard by the House of Lords, which ruled that he could in fact be extradited to Spain because there existed an obligation to extradite consistent with international law. Nevertheless, as in any extradition case, the British government had the last word: Minister for Home Affairs Jack Straw acknowledged his own belief that "universal jurisdiction against persons charged with international crimes should be effective," although he concluded Pinochet was medically unfit to stand trial and released Pinochet.³⁸ Some authors like Lee A. Casey and David B. Rivkin did not recognize the application of universal jurisdiction in the proceedings against Augusto Pinochet.³⁹

Judge Garzón was also the investigative judge (*Juez instructor*) in the Spanish trial of Argentine exnaval officer Adolfo Scilingo, who was convicted of crimes against humanity and sentenced to 640 years in jail in April 2005. Other cases have since followed, including a case initiated by the Nobel Peace Prize laureate Rigoberta Menchú concerning the genocide, torture, terrorism, assassinations, and illegal detention in Guatemala.

It has not only been Baltasar Garzón, but many other magistrates at the *Audiencia Nacional* who have continued to address serious violations in different corners of the globe for which no alternative jurisdiction or efficient court has been found. Such efforts include a case against officials of the Rwandan Patriotic Army (RPA) and the Rwandan Patriotic Front (RPF) for crimes allegedly committed against Hutu Rwandans, Congolese, and nine Spanish victims surrounding the Rwandan genocide (1990-2002). As part of this effort, Spanish courts have issued several international arrest warrants for alleged genocide, crimes against humanity, and war crimes by senior political and military officials in Rwanda. The *Audiencia Nacional*, consistent with these criteria, has also addressed such human rights issues as Chinese abuses in Tibet and the United States torture of Guantanamo detainees.⁴⁰

Paradoxically, although Garzón's investigation relating to crimes against humanity during the Francoist regime was inspired by the same obligations under international law and the principle of universal jurisdiction, it was not grounded in this principle due to the fact that Baltasar Garzón as a Spanish judge was exercising jurisdiction over Spanish territory and crimes that took place in the 1930s and 1940s, not in a third country, but in his own. Judge Garzón, for the first time, interpreted that the 1977 Amnesty Law was contrary to international obligations, and he had the duty to reject impunity for the crimes against humanity committed during this period and start judicial enquiries.

39. Lee A. Casey and David B. Rivkin Jr., *The Dangerous Myth of Universal Jurisdiction*, in A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES 156 (Robert H. Bork ed., 2005), http://media.hoover.org/sites/default/files/documents/0817946020_135.pdf.

40. See Javier Chinchón Álvarez & Joaquín González Ibáñez, *El principio de Jurisdicción Universal en el Ordenamiento Jurídico Español: Una Conquista Bajo Amenaza*, in PROTECCIÓN INTERNACIONAL DE DERECHOS HUMANOS Y ESTADO DE DERECHO: STUDIA IN HONOREM NELSON MANDELA 889 (Joaquín González Ibáñez ed., 2009)



The United Nations Human Rights Committee on several occasions has asked Spain to derogate the 1977 Amnesty Law due to the fact that it is contrary to the obligations contained in the International Covenant on Civil and Political Rights (ICCPR), of which Spain is a signatory member state. In an October 2008 Report, the United Nations Human Rights Committee addressed Spain explicitly by stating as follows:

While taking note of the recent decision of the National High Court [(*Audiencia Nacional*)] to consider the question of the disappeared, the Committee is concerned at the continuing applicability of the 1977 Amnesty Law. It recalls that crimes against humanity are not subject to a statute of limitations and draws the State party's attention to its general comment No. 20 (1992), on article 7, according to which amnesties for serious violations of human rights are incompatible with the Covenant, and its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant.

While noting with satisfaction the State party's assurance that the Historical Memory Act [(*Ley de Memoria Histórica*)] provides for light to be shed on the fate of the disappeared, the Committee takes note with concern of the reports on the obstacles encountered by families in the judicial and administrative formalities they must undertake to obtain the ex-

humation of the remains and the identification of the disappeared persons. The State party should: (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate.⁴¹

This paragraph was an exceptional ground for legitimation of Judge Baltasar Garzón's legal reasoning when he decided to initiate investigations and criminal proceedings for the crimes against humanity committed during the Franco regime. Based on the principle of good faith, the *pacta sunt servanda* principle, and Article 40 of the ICCPR, Spain should have implemented the considerations and observations listed in the Report.

As the former Spanish Supreme Court Justice Martín Pallín put it, the model of the contemporary judge has to be 'aware that the Rule of Law is not just the principle of legality,' because the essence of the Rule of Law is, certainly, the statutes 'plus the values and principles enshrined in the Constitution, and it says roundly that we must interpret it through a human rights vision.'⁴²

41. United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 9, U.N. Doc. CCPR/C/ESP/CO/5 (5 Jan. 2009).

42. Lydia Vicente Márquez & Alicia Moreno, *Derechos Humanos e Independencia Judicial*, EL PAÍS, 1 Feb. 2012, http://elpais.com/diario/2011/02/01/opinion/1296514812_850215.html. The original text in Spanish reads as follows: El modelo de juez contemporáneo, como aboga Martín Pallín, tiene que ser 'consciente de que el Estado de derecho no es el Estado de las leyes,' pues aquel consiste efectivamente en la ley 'más los valores y los principios que contiene la Constitución y, además, nos dice claramente que tenemos que interpretarla a través de los derechos humanos.' Id

Democratic Maturity and Human Rights: Judge Garzón's Fading Light

Judge Garzón was charged with violating the Franco-era amnesty law in May 2009 for his actions initiated in October 2008 in which he launched an unprecedented inquiry into “crimes against humanity” during the Franco era, promising to investigate the disappearance of tens of thousands of people and ordering the excavation of mass graves. A right wing civil servants’ union accused him of over-reaching his judicial powers by breaching the official amnesty that drew a line under the Franco era in 1977. The Supreme Court’s final ruling on February 27, 2012 acquitted Judge Garzón of an alleged breach of the amnesty related to the investigation of Franco-era crimes, including the disappearances of antigovernment dissidents. Nevertheless, he was suspended from the bench for eleven years after being found guilty in another criminal proceeding.⁴³

With melancholic reservations, Spanish citizens must resume with a reinvigorated character the task of weaving a fabric of tolerance with regard to some aspects of the *res publica* and institutions. Some will criticize these words, either for their lukewarm defense of Garzón, or by others for lacking a profound respect for the decisions of the Supreme Court and for being legally inconsistent. However, they are words that are simply attempting to sanction that which makes us more civil, impartial and competent as a democratic country—that which is otherwise known as the rule of law. The argument sustained here is an attempt to vindicate the actions of a civil servant in the prosecution of the alleged crimes against

humanity during the Francoist dictatorship. It is an argument that upholds the belief that Judge Garzón’s investigation demonstrated a coherent, truthful, and legally defensible interpretation of the rule of law under the existing legal system.

There are some general problems in the understanding and perception of human rights, specifically the polarization of the general public caused by the case against Baltasar Garzón. On the one hand stands the ideology of human rights, while on the other is the use of these rights for the purpose of demagoguery. With regard to the first, the adoption by and identification of human rights with a particular ideological sensibility and the creation of ideological assumptions about human rights is one of the chief errors to have harmed the commitment to the cause of justice. In the same way that art, sensibility, and other manifestations of the human condition are not strictly the domain of either the Left or the Right, it is a fallacy to think that human rights lie exclusively in the ambit of the traditional Left, with people who identify themselves as liberal or progressive, and not in the domain of the Right, with conservatives and traditionalists. Human rights, in fact, belong to all who affirm the validity and respect for democratic and dignitary principles.

Another issue is the question of the diverse way in which each of these ideological sensibilities understands the implementation, recognition, and transcendence of the public policies that grant citizens access to different human rights. Without a doubt, the examining magistrate in one of the cases against Baltasar Garzón has been poorly treated by the media, largely owing to the fact that his public profile as a progressive magistrate

43. Nevertheless, on the same day, 27 February 2012, the Spanish Supreme Court cleared Baltasar Garzón of violating a 1977 amnesty law with his investigation of Franco-era crimes. He was suspended from the bench for 11 years after being found guilty of illegal phone-tapping in the investigation of a political corruption scandal—the *Gurtel* Case. See Spain Judge Baltasar Garzón Cleared on Franco Probe, BBC NEWS (27 Feb. 2012), <http://www.bbc.co.uk/news/world-europe-17176638>



seems at odds with the particulars of his examination procedure; it is as if the law and the judge could not simultaneously be the protectors of human rights and the rule of law.

Second, the demagogic use of human rights has led to a deterioration of their legitimacy and the effectiveness of the protection of fundamental rights and liberties. This demagogy is based to a large extent on frightening and ignorant prejudices, elements that are always a catalyst for injustice and, moreover, do not allow for a critical and balanced analysis of any human rights abuse. Human rights, together with the rule of law and democracy, form what has been called a “magical triangle” that permits the generation of a vision of the dignity of humankind, the *imago ominis* of our time. To think that human rights are a blank check, or to speculate that their just cause allows for the recreation of a trial-by-ordeal of human rights, does not do any service to the cause of our democracy or the rule of law.

Spain and Transitional Justice

In the same way, it is of interest to understand that the judicial actions of Baltasar Garzón in the prosecution of crimes against humanity are related to well-studied processes in judicial systems and ideologically based upon democratic principles that follow from processes of political transition from dictatorships or authoritarian regimes to democracies.⁴⁴ In certain circumstances, and with the objective of guaranteeing the observation of constitutional principles in a democratic state governed by the rule of law (that which the Greeks called *isonomia*), higher courts often produce jurisprudential hyperactivity that springs from a need to compensate for a lack of public policies or legislation when circumstances dictate the

crystallization of legal-political objectives in a democratic regime. The case of Colombia fits this paradigm given its proclamation of a “Welfare Social State” governed by the rule of law in the constitution of 1991. The lack of appropriate budget resources and public policy measures to implement the social state have meant that the Constitutional Court of Colombia, through the system of constitutional tutelage, has begun constructing with imagination, intellectual resources, and judicial sophistication part of the scaffolding of a social state and with it the respect and admiration of judicial systems throughout the American continent.

In the case of Spain, the writer Javier Cercas, in a balanced article titled *The Left and the Transition (La izquierda y la transición)*, argued that the political transition, although successful in many aspects, has suffered from the lack of an honest format of transitional justice. Cercas states as follows: And so it is that [in 2012] instead of doing what should have been done to resolve the scandal that is the existence of ditches filled with the bodies of the dead—instead of paying with funds from the public treasury so that the dead could be exhumed, identified and buried with honour—we have painted over the situation with a law (*Ley de Memoria Histórica*, 2007) . . . It is unreasonable because it never has been; in 1978 maybe it wasn’t practical—or simply it wasn’t possible—to exhume the dead; in 2012 it is appalling that they continue to be buried where they have been left.⁴⁵

Probably in the distant future it will be the Constitutional Court that will have to decide what truth, justice, and reparation mean, as well as establishing the task of judicial bodies

44. See Ruti G. Teitel, *TRANSITIONAL JUSTICE* (2000).

45. Javier Cercas, *La Izquierda y la Transición*, *EL PAÍS*, 4 Mar. 2012

in light of our international obligations, as well as those of conventional law or those derived from other sources. The recent legal and judicial history of Spain has shown us on other occasions that the law is interpretation and contextualization in time and space, holding as much regard for norms, uses, and principles as it has for international obligations.

As a professor, a part of the pedagogical effort required to teach law students resides in the understanding of the principal characteristics of the democratic legal system. It is for this reason that professors continually remind students that a person who looks at statutes alone will not understand the entirety of the law. Examples of this abound in the sentences of the Supreme Court concerning the competence of the Spanish jurisdiction (universal jurisdiction) in Chile, Argentina, and Guatemala, and whose sentence concerning the latter was annulled by the Constitutional Court in 2005, confirming the competency of Spanish jurisdiction in the prosecution of crimes of genocide, terrorism, and torture committed in Guatemala.

The recent legal and judicial history of Spain has shown us that the law is interpretation in time and space, holding as much regards for norms, uses, and principles as it has for international obligations

Epilogue

Victims at the Spanish Supreme Court

In February of 2012, and not in a rhetorical fashion nor as part of an intellectual exercise, the author tried to give meaning to the title of this article by attending a hearing at the Supreme Court of Spain. The aspiration for justice, the rule of law, and the legal and civic fight against impunity prompted the author to sit beside Judge Baltasar Garzón during his final hearing at the Supreme Court. Judge Garzón sat on the bench, accused of not respecting the 1977 Spanish Amnesty Law and subsequently erring in his interpretation of the international obligations or imperative mandates to investigate crimes against humanity perpetrated on Spanish soil during the Francoist regime.

On a cold and clear winter day in Madrid, February 7, 2012, the criminal trial began against Garzón and his investigation of crimes against humanity committed by the Franco dictatorship. After 17 years as a university professor, the author decided for the first time to put on his attorney's robe and sit beside Garzón in the dock at the Supreme Court. The author decided to attend the court proceedings and sit beside professor and lawyer Manuel Ollé Sesé because the author had come to know Baltasar Garzón through our collaboration on a book that this author had edited concerning the protection of human rights.⁴⁶

46. See Álvarez & Ibáñez, *supra* note 40.

47. See Reyes Mate, MEDIANOCHE EN LA HISTORIA: COMENTARIOS A LAS TESIS DE WALTER BENJAMIN "SOBRE EL CONCEPTO DE HISTORIA" 124, 143 (2006) ("Para las víctimas el estado de excepción es permanente."). The original quote is in German ("Für die Unterdrückten und die Opfer ist der Ausnahmezustand dauerhaft.") and belongs to Walter Benjamin's work. Walter Benjamin, DAS PASSAGEN-WERK (Rolf Tiedemann ed., Suhrkamp Verlag 1982); Walter Benjamin, THE ARCADES PROJECT (Rolf Tiedemann, ed., Howard Eiland & Kevin McLaughlin, trans., Harvard University Press 2002). Walter Benjamin was a German Jewish philosopher friend of Adorno, who went into exile in Paris when Hitler came to power in 1933. This work is part of a diary that he passed to the writer George Bataille before Benjamin committed suicide in September 1940 in Porbou, Spain, after the Francoist police threatened to send Benjamin back to France and into the hands of the Gestapo.



The author believes that the launching of legal proceedings and the subsequent writs ordered by Magistrate Garzón relating to the crimes against humanity committed by the Francoist regime during the civil war and postwar period are in accordance with the law. The proceedings stem from crimes against humanity and the obligation to recognize and compensate the victims regardless of how much time has passed, who committed the crimes, or where the crimes took place. International human rights law after 1993 is unequivocal in its jurisprudence and the resolutions of Human Rights bodies such as the United Nations Human Rights Committee, and the Spanish courts have exercised jurisdiction in cases of crimes against humanity and genocide that have occurred in Chile, Guatemala, and Argentina, among other places.

A state governed by the Rule of Law, such as the Spanish legal system, presupposes the existence of grounds for justice, ethics, and civility. That Tuesday, during the testimony of the four witnesses, the magistrate presiding over the proceedings required, without any limitations, that the witnesses respond in depth to the questions posed by the lawyers for the defense and prosecution. And when the witnesses began to speak, the author realized that this was not Case A, B, C, or one by any other name, but instead simply the case of victims, each and every one of them, and the author noted obstinately in a notebook a quote by Walter Benjamin that came to mind: “For the victims, the state of emergency is permanent.”⁴⁷

The author noted phrases and expressions from previous hearings of mass violations of human rights in Chile, Argentina, Columbia, Perú, Guatemala, and El Salvador. The syntax was indistinguishable and the subject and the action seemingly identical; the only

variation was in the names of the places and people involved. To hear, in the flesh, the testimony of a woman from Navarra, a man from Cordoba, a Catalan, and a man from Valladolid, the author understood that while the accents of the people and scenes of the crimes changed, the narrative remained constant—the same terrifying narrative and sequence of criminal events that have taken place on both sides of the Atlantic.

This author remembers the demands for civic and human spaces that had lain dormant within his memory, above all when one of the witnesses, a man his father’s age and born during the Civil War, stated with an unwa- vering voice, «I am the son of a missing person and all my life I have been conditioned by this fact». It seemed that Spain, curiously, had become an international reference point for the demands for the recognition and commemoration of victims of human rights abuses through the international jurisdiction exercised by the Spanish High Court—a reference point for the victims in Chile, Argentina, Guatemala, and other countries. For example, throughout this author’s work in the field in Colombia, with professors, magistrates, and judges, there is a continuous “legal mantra” about democracy and human rights—and in particular the rule of law—that has become a spiritual element of the democratic societies that aspire to be more just and inclusive—an essential element to reaching goals of development, or, in other words, a space where there exist the options of rights and opportunities. Tom Bingham insisted that not to incorporate human rights as a basic element of the rule of law would be based on an impoverished or “thin” definition, as compared to his own preference for what he calls a “thick” definition, and that is way the rule of law is «the nearest we are likely to approach to a universal secular religion».⁴⁸

48. Bingham, *supra* note 2, at 174

International rule of law, specifically international human rights law, represents an attempt on the part of the international community to realize an ethical and moral aspiration reaffirming that the advancement and exercise of human rights symbolizes one of the most important forms of progress in the human condition. This is especially true because the progress of the human condition means access to the exercise of rights by vulnerable and excluded groups, normally women, children, indigenous peoples, poor and marginalized people, minorities, and above all, victims. Human rights are the rights of the other and a commitment to the cause of justice.

The author thought, along similar lines to Isaac Newton, that to have his vision of human rights and victims meant that professors, jurists, and citizens must stand upon the shoulders of giants who have allowed us to see and understand these new horizons. This author stands on the shoulders of people such as Baltasar Garzón, on his commitments and deeds, and also on the shoulders of the men and women of the High courts, the Supreme Court, and the Constitutional Court of Spain, for not only are they men and women of law, but in their work and through their rulings, resolutions, and sentences, they are also the men and women of justice who have incorporated a new opportunity for victims within a new legal framework.

John Ruskin understood human action as an eventual generator of a legacy called civilization. This legacy is measurable in its words, in its deeds, and in its arts, and the law that we apply today, a law that contains the three elements mentioned by the above writer, will also be our legacy of civility or inequality. What is happening in our time, in our legal system in 2012, is definitive for our

ability to interpret and assess our civilization. We can see in our daily routine that human rights and democracy are similar to religion: they must be renewed daily; to believe in them is to strengthen them; and by doing the opposite, their intensity and their effect are reduced.

It is for this reason that Miguel de Unamuno and his novel *San Manuel Bueno Martir* comes to mind.⁴⁹

It is the story of a priest who lost his faith and became agnostic but could not be sincere with his parishioners because his deeds had provided relief, hope, and Christian faith for all the community members. The professor who writes these lines expects that his country should be up to the task of maintaining a vision of dignity and support for the victims who are defended by international law and human rights, which is itself Spanish domestic law, and not what occurs to Unamuno's eponymous hero. For him, the obstinacy of the situation and the injustice that surrounded him led him to lose faith in what it was that he represented and in the values that he defended. Instead, it should be expected that this country be committed, for responsibility's sake, to enact the humanity of the rule of law, whose maximum aspiration is to accede to that magical and very human threshold of justice.

International rule of law, specifically international Human Rights law, represents an attempt on the part of the international community to realize an ethical and moral aspiration

49. Miguel de Unamuno, *SAN MANUEL BUENO MARTIR* (2009)



The Copernican Turn in Favor of Victims

As an avid reader of literature, this author has learned to try not to dwell on the biography of the writer, but instead on the quality and transcendence of their work. It would be of the utmost importance that in Spain, a generous and caring country, but also a country where fraternal hatred can prevail, a country where some are happily toasting in the public domain and where others feel humiliated and violently wronged by the resolution of the Supreme Court, it should be understood that what really matters is the anonymous and silent effort made by civil servants who, through their work, give legitimacy and practical meaning to our legal system. From the Trial Courts (*Juzgados de Instrucción*) to the Supreme Court, these civil servants still have unfinished work, which includes the task of guaranteeing due

process and access to justice for all and not merely the right to a process in which the expectations of citizens are diluted and the meaning of events obscured.

Real justice requires serious attention, and this is especially the case for those citizens who are victims. Primo Levi claimed the necessity of a public space for the commemoration of victims, since the contempt they experience is multiple: first when they are murdered, and once again when they are forgotten. It is a sad paradox that the case against Judge Baltasar Garzón has been the only opportunity provided by our democracy in which the victims have had a voice in a judicial setting. We cannot forget that the aforementioned Copernican revolution has arrived in legal culture precisely because the victims, those who are most vulnerable and obscure, have become the epicenter of the legal universe.

Referencias

- ▶ Alberto Moravia, *GLI INDIFFERENTI*, (Bompiani, 2000)
- ▶ Amnesty International, *UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION* (Amnesty International, 1999)
- ▶ Bartram S. Brown, *Primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals*, 23 *YALE J. INT'L L.* 386 (1998)
- ▶ Christopher Hitchens, *THE CASE AGAINST HENRY KISSINGER* (Verso, 2002)
- ▶ Christopher L. Blakesley, "Extraterritorial Jurisdiction" in M. Cherif Bassiouni (ed.), 2 *INTERNATIONAL CRIMINAL LAW*, 36 (Transnational Publishers Inc, 1999).
- ▶ Gordon A. Craig, *Did Ostpolitik Work?*, 73 *FOREIGN AFFAIRS* 1625 (1994) Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 *FOREIGN AFFAIRS* 86-96
- ▶ (2001) Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304–305 (4th ed. 1990) Javier Cercas, *SOLDIERS OF SALAMIS* (Bloomsbury, 2003)
- ▶ Javier Chinchón Álvarez et al., *El principio de jurisdicción universal en el ordenamiento jurídico español. Una conquista bajo amenaza* in Joaquín González Ibáñez, *PROTECCIÓN INTERNACIONAL DE DERECHOS HUMANOS Y ESTADO DE DERECHO (OBRA HOMENAJE A NELSON MANDELA)*, 889 (Gustavo Ibáñez Ediciones Jurídicas, 2009)
- ▶ Kenneth C. Randall, *Universal jurisdiction under international law*, 66 *TEX. L. REV.* 785, 788 (1988).
- ▶ Kenneth Roth, *The Case For Universal Jurisdiction*, 80 *FOREIGN AFFAIRS* 150-154 (2001)
- ▶ Lee A. Casey et al., *The Dangerous Myth of Universal Jurisdiction in*, Robert H. Bork, *THE LEGAL ASSAULT ON AMERICAN VALUES. A COUNTRY I DO NOT RECOGNIZE* 156 (Hoover Press)
- ▶ Lorena Bachmaier et al., *CRIMINAL LAW IN SPAIN* 409 (Kluwer Law International, 2010)
- ▶ Lydia Vicente, Alicia Moreno, "Derechos Humanos E Independencia Judicial", published February 1, 2012, available at http://elpais.com/diario/2011/02/01/opinion/1296514812_850215.html
- ▶ Mary Robinson (Forword), *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 15 (Princeton University, 2001)
- ▶ Miguel de Unamuno, *SAN MANUEL BUENO MARTIR* (European Masterpieces, 2009)
- ▶ M. Cherif Bassiouni, *UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION* 89-90, 96 (2001, AI Index: IOR 53/002/2001).
- ▶ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice* 42 *VA. J. INT'L L.* 81, 83 (2001)



- ▶ M. Cherif Bassiouni et al., *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3* (Martinus Nijhoff Publishers, 1995).
- ▶ Mohamed M. El Zeidy, *The principle of complementarity: A new machinery to implement international criminal law*, 23 MICH. J. INT'L L. 870 (2002)
- ▶ See Ruti G. Teitel, *TRANSITIONAL JUSTICE*, Oxford UP, 2000.
- ▶ Tzvetan Todorov, *THE IMPERFECT GARDEN* 228 (Princeton University Press, 2002)
- ▶ Yana Shy Kraytman, *Universal Jurisdiction – Historical Roots and Modern Implications*, 2 BSIS Journal of International Studies (2005)
- ▶ Martin-Ortega, Palou-Loverdos, "Preserving Spain's Universal Jurisdiction Law in the Common Interest" published at Jurist Law(<http://jurist.org>, 29 June 2009.
- ▶ UNITED NATIONS, 1958 Geneva Convention on the High Seas, Article 19 and 1982 United Nations Law of the Sea Convention, Article 105. available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

Accessed Web sites

- ▶ <http://avalon.law.yale.edu/imt/imtchart.asp>
- ▶ <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5497>
- ▶ <http://jurist.law.pitt.edu/forumy/2009/06/protecting-spains-universal.php>
- ▶ http://lapa.princeton.edu/hosteddocs/unive_jur.pdf
- ▶ http://media.hoover.org/sites/default/files/documents/0817946020_135.pdf
- ▶ <http://www.asf.be/AssisesRwanda'/fr/frVE>
- ▶ <http://www.amnesty.org/fr/library/asset/IOR53/001/1999/fr/dd42b888-e130-11dd-b6eb-9175286ccde2/ior530011999en.pdf>
- ▶ <http://www.bbc.co.uk/news/world-europe-16591284>
- ▶ <http://www.bbc.co.uk/news/world-europe-16591284>
- ▶ <http://www.bbc.co.uk/news/world-europe-17176638>
- ▶ [http://www.derechoshumanos.net/jurisprudencia/2003-02-25-STG-\(Guatemala\)-\(Competencia\)-Sentencia-falta-competencia-\(Anulada\).htm](http://www.derechoshumanos.net/jurisprudencia/2003-02-25-STG-(Guatemala)-(Competencia)-Sentencia-falta-competencia-(Anulada).htm)
- ▶ <http://www.foreignaffairs.com/articles/49450/gordon-a-craig/did-ostpolitik-work>
- ▶ <http://www.foreignaffairs.com/articles/57245/kenneth-roth/the-case-for-universal-jurisdiction>
- ▶ <http://www.kent.ac.uk/brussels/journal/documents/2005/Kraytman%20-%20Universal%20Jurisdiction.pdf>
- ▶ <http://www.nodo50.org/csa/agenda09/palestina/pdf/MANIFESTOUNIVERSALJURISDICTION.pdf>
- ▶ <http://www.pedagogyoftheoppressed.com>
- ▶ <http://www.publications.parliament.uk/pa/>
- ▶ <http://www.uax.es/publicaciones/saberes.htm>