

SPAIN'S EXPANDED UNIVERSAL JURISDICTION TO PROSECUTE HUMAN RIGHTS ABUSES IN LATIN AMERICA, CHINA, AND BEYOND

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I. INTRODUCTION

In the post World War II era, an estimated 170 million civilians, not including soldiers, have been victims¹ of “atrocities crimes” such as genocide, crimes against humanity, grave war crimes, and other gross human rights violations.² But the culprits have nearly always escaped punishment, as their atrocities have generally been tolerated by national authorities in their respective countries, as well as by the international community. For instance, in Argentina, between 1975 and 1981, a military junta purged an estimated 30,000 “leftists” during its “Dirty War Against Subversion.”³ Many were tortured in secret prisons or killed by being thrown out of airplanes over the sea. The purges and intimidation tactics targeted anyone suspected of dissent.⁴ In private conversations, top military officers argued that the purges would be justified if only 5% of all victims were actual rebels.⁵ Luiz Urquiza is a survivor of the Dirty War.⁶ He was jailed, tortured, and even taken before a hoax firing squad. However, he was not killed and knew the identities of several of his repressors. After exiling himself in Europe, he returned to Argentina in 1994 when he discovered that his repressors had become senior commanders in the Argentine police. His return was greeted with a volley of death threats.⁷ In 1997, he gave his first testimony about his persecution to a judge, although it was not in an Argentine courtroom. Rather, he was in Madrid addressing Judge Baltasar Garzón of the National Audience, a Spanish high court.⁸

Spain has recognized its universal jurisdiction to prosecute entirely foreign atrocity crimes as a step toward ending impunity for gross human rights abuses. Spanish officials led several major prosecutions, notably against former Chilean dictator, Augusto Pinochet, for genocide, torture, and other

¹ Jamison G. White, Note, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 128 (1999) (citing R.J. RUMMEL, *DEATH BY GOVERNMENT* (1994)).

² David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389, 395–96 (2002).

³ DANIEL K. LEWIS, *THE HISTORY OF ARGENTINA* 134, 143–46 (2001); *Spain's Uncharted Foray into World Justice*, EL PAÍS (English version) (Spain), Dec. 22, 2005, at 4.

⁴ LEWIS, *supra* note 3, at 143–46; CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 54, 56 (1996).

⁵ NINO, *supra* note 4, at 56.

⁶ See *Spain's Uncharted Foray into World Justice*, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

atrocities;⁹ against Guatemalan generals for genocide, torture, and state-sponsored terrorism against the Mayan people between 1978 and 1986;¹⁰ and against several repressors of Argentina's Dirty War.¹¹

However, the appropriate scope of universal jurisdiction law is a matter of ongoing debate. Spain's high courts clashed on whether international law permits states to unilaterally prosecute atrocities allegedly committed by foreigners against other foreigners in a foreign country, devoid of any link to the prosecuting state. In November 2004, the Spanish Supreme Court tried to narrow Spain's universal jurisdiction by essentially requiring a link to national interests, in an effort to rein in prosecutions that it felt had gone too far.¹² In September 2005, the Spanish Constitutional Tribunal overruled this decision, holding that no such link was necessary, blasting the Supreme Court's reasoning and authorizing Spanish courts to exercise broad universal jurisdiction.¹³ This decision had the immediate practical consequence of encouraging alleged victims to introduce a criminal complaint against former Chinese president, Jiang Zemin, and other officials for genocide in Tibet.¹⁴ In a separate case, several exiled Chinese citizens filed a complaint against different officials alleging genocide and torture of Falun Gong members.¹⁵

This Article focuses on universal jurisdiction in Spain in the aftermath of the Constitutional Tribunal's decision. First, I examine the doctrine of universal jurisdiction, its origins, and its modern application. Second, after a brief overview of the Spanish legal system, I respectively analyze the Supreme Court and Constitutional Tribunal opinions. Third, I identify several procedural restraints, thereby underlining that Spain does not authorize pure universal jurisdiction. Fourth, I assess whether Spain's still relatively broad jurisdiction violates international law. Fifth, I argue that the expansion of

⁹ White, *supra* note 1, at 144–47.

¹⁰ Hervé Ascensio, *The Spanish Constitutional Tribunal's Decision in Guatemalan Generals: Unconditional Universality is Back*, 4 J. INT'L CRIM. JUST. 586 (2006); STC, Sept. 26, 2005 (S.T.C., No. 237) § I, available at <http://www.derechos.org/nizkor/guatemala/doc/tcgtm1.html>.

¹¹ *Spain's Uncharted Foray into World Justice*, *supra* note 3; Luis Méndez, *Reclaman para Cavallo 30 Mil Años de Prisión*, REFORMA (Mex.), Feb. 26, 2006.

¹² STS, Nov. 15, 2004 (J.T.S., No. 1362), available at <http://www.derechos.org/nizkor/espana/juicial/doc/stscilingo.html>.

¹³ STC, Sept. 26, 2005.

¹⁴ José Yoldi, *La Audiencia Perseguirá al Ex Presidente Chino por Genocidio en el Tibet*, EL PAÍS (Spain), Jan. 11, 2006; *Pekín Convoca al Embajador Español para Quejarse de las Imputaciones de Genocidio*, EL PAÍS (Spain), June 9, 2006, at 31 [hereinafter *Pekín*].

¹⁵ Natalia Junquera, *Se Presenta en Madrid un Informe sobre Tráfico de Órganos en China*, EL PAÍS (Spain), Nov. 29, 2006.

universal jurisdiction in Spain and other countries could justify the creation of a procedural mechanism to resolve competing jurisdictional claims over the same defendants. Finally, I suggest that legislators may eventually abrogate or narrow Spain's universal jurisdiction law due to diplomatic problems in spite of its deterrent value and intrinsic worth as a means of defending human rights.

II. UNIVERSAL JURISDICTION IN NATIONAL COURTS

Jurisdiction empowers a court to hear a case.¹⁶ But defining *universal* jurisdiction is an intricate task considering that there is neither a consensus on what universal jurisdiction is or should be, nor a consensus regarding the crimes covered by the doctrine.¹⁷ One perspective defines it as broad jurisdiction based solely on the substantive nature of the crime, regardless of its location, the nationality of the accused or the victims, or any other connection to the prosecuting state.¹⁸ Another view favors narrower jurisdiction with procedural requirements in the form of links between the prosecuting state and the offense, such as a combination of "territorial jurisdiction, personal jurisdiction, passive jurisdiction, and protective jurisdiction."¹⁹ As we shall see, the Spanish Constitutional Tribunal and Supreme Court differed sharply on whether such procedural requirements are needed.

In practice, countries exercising universal jurisdiction differ on whether custody of the accused is procedurally required before initiating proceedings. Under *conditional universal jurisdiction*, a state may prosecute a defendant only if he is in custody, as under the laws of Austria, France, and Switzerland.²⁰ Moreover, customary law has historically required states to exercise universal jurisdiction to prosecute pirates in their custody.²¹ Further, at the treaty level, states are required to prosecute the accused through universal jurisdiction or extradite him to a concerned state when he is suspected of "grave breaches" of the 1949 Geneva Conventions and the First

¹⁶ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 277 (2003).

¹⁷ Scheffer, *supra* note 2, at 423.

¹⁸ PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), available at <http://www.umn.edu/humanrts/instree/princeton.html> [hereinafter PRINCETON PRINCIPLES].

¹⁹ Scheffer, *supra* note 2, at 429.

²⁰ CASSESE, *supra* note 16, at 285–86.

²¹ *Id.* at 284.

Additional Protocol of 1977, torture under Article 7 of the 1984 Torture Convention, and terrorism under various United Nations (U.N.) treaties.²²

Conversely, under *absolute universal jurisdiction*, a state may prosecute a defendant regardless of whether he is in custody.²³ This view of jurisdiction is recognized by certain Western European countries, including Belgium and Spain.²⁴ While Spain and many other states prohibit trials *in absentia*, absolute universal jurisdiction enables them to initiate criminal proceedings even when an accused has never set foot in their territory,²⁵ and an extradition may be sought to force him into the country to attend trial. Belgium went even further in permitting trials *in absentia* until political pressure forced it to amend its universal jurisdiction law, as discussed below.²⁶ Accordingly, the main difference between conditional and absolute universal jurisdiction is that, under the latter, judicial authorities are not constrained to wait for the accused to come onto their territory to prosecute him, thereby resulting in much broader jurisdictional power to prosecute, what I term, *foreign atrocity crimes*: atrocities committed by foreigners against other foreigners in a foreign country.

While I will later examine whether a broad exercise of universal jurisdiction is permitted by international law, I must first emphasize that the recent drive to prosecute foreign atrocity crimes in national courts based on universal jurisdiction is virtually unprecedented. Unquestionably, universal jurisdiction is not nearly as well established as the fundamental principles of territorial jurisdiction and active or passive nationality jurisdiction.²⁷ Some form of universal jurisdiction has nonetheless existed for centuries. In the Middle Ages, “[j]urists . . . assumed that certain dangerous criminals posed a threat to the societies in which they were found [Hence], these jurisdictions were entitled to investigate and prosecute crimes committed by

²² *Id.* at 285–86.

²³ *Id.* at 286.

²⁴ *Id.* at 287.

²⁵ *Id.* at 286–87.

²⁶ See *infra* notes 53–54 and accompanying text.

²⁷ A state has territorial jurisdiction when a crime or one of its elements is committed on its territory or when its effects are felt therein. CASSESE, *supra* note 16, at 277–78. Active nationality jurisdiction typically enables a state to prosecute its citizens for foreign crimes so they do not escape justice altogether when extradition to the territorial state is impossible or would result in an unfair proceeding. *Id.* at 281–82. Passive nationality jurisdiction allows a state to prosecute foreign crimes committed against its citizens in order to protect its citizens when they are abroad and when there is “substantial mistrust” in the territorial state’s capacity to bring justice. *Id.* at 282.

these actors in other jurisdictions.”²⁸ But universal jurisdiction was not based on the substantive heinousness of the offense per se, as procedure required the accused’s presence in the jurisdiction.²⁹ Moreover, “[f]or as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century), any nation could try any pirates it caught, regardless of the pirates’ nationality or where on the high seas they were apprehended.”³⁰ However, most jurists today falsely assume that piracy was universally cognizable due to the heinousness of preying on civilian ships: “To the contrary, the law of every nation and the law of nations countenanced such behavior when carried out by state-licensed sea-robbers called privateers.”³¹ Neither the Middle Ages nor piracy cases provide a tenable precedent to support the extension of universal jurisdiction to crimes chosen precisely because of their heinousness, including genocide, crimes against humanity, and torture.³²

Universal jurisdiction for atrocity crimes only emerged in the post World War II era. While the Nuremberg Trials rested on another doctrine,³³ some military and civilian courts claimed universal jurisdiction to prosecute the Nazis’ crimes.³⁴ Notably, the Israeli Supreme Court held that it had universal

²⁸ Ryan Rabinovitch, *Universal Jurisdiction in Absentia*, 28 FORDHAM INT’L L.J. 500, 517 (2005) (citing AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION* (2001), available at <http://web.amnesty.org/library/index/engior530042001> (last visited Nov. 14, 2004)); see also Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 3, 36 (Feb. 14) (separate opinion of President Guillaume).

²⁹ Rabinovitch, *supra* note 28, at 518.

³⁰ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 190 (2004).

³¹ *Id.* at 210. Novels and movies have given pirates a “reputation for torturing and murdering captives.” *Id.* at 215. But these atrocities were hardly inherent to the international crime of piracy, which was simply considered robbery on the high seas. *Id.* at 191, 223. No universal jurisdiction over torture and murder existed per se, whether committed on the high seas or not. *Id.* at 215. But even pirates who never mistreated their victims were fully subjected to universal jurisdiction. *Id.* Besides, courts were well aware that “privateers often committed the same atrocities as pirates. . . .” *Id.* In fact, “[p]irates were often laid-off privateers.” *Id.* at 216. Thus, seizing ships and cargos at sea by force was not considered extraordinarily heinous conduct. *Id.* at 210.

³² *Id.* at 210–11. The piracy analogy is also flawed because pirate acts were for private gain, while atrocity crimes are frequently perpetrated under public authority. Madeline H. Morris, *Universal Jurisdiction in a Divided World*, 35 NEW ENG. L. REV. 337, 345 (2001).

³³ The Nuremberg Tribunal stressed that the German Reich had unconditionally surrendered, thereby giving the Allies sovereign powers to prosecute Germans. Morris, *supra* note 32, at 344.

³⁴ See Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1116 (2004). For example, one case held: “An

jurisdiction to try Adolf Eichmann for crimes against humanity and other atrocities.³⁵ However, the expansion of prosecutions in national courts did not occur before the 1990s, during which time

criminal complaints or investigations have been instituted before courts in Austria, Canada, Denmark, France, Germany, the Netherlands, Senegal, Spain, Switzerland, and the United Kingdom for atrocities in Europe, Africa and South America. . . . More controversially, criminal complaints have been filed in Belgium -- until recently, the world capital of universal jurisdiction -- against current or former leaders of Chad, Cuba, Iraq, Iran, the Democratic Republic of Congo, the Ivory Coast, the Palestinian Authority, Israel, the United States, and other countries.³⁶

Alongside Belgium, Spain has been at the forefront of the universal jurisdiction agenda. In 1996, Spanish investigative "magistrate Baltazar [sic] Garzón and Spanish prosecutors in Valencia began a crusade to vindicate gross human rights violations" in Spanish courts.³⁷ They charged current and former Argentine officials with atrocities committed during the Dirty War.³⁸ In 1998, Judge Garzón became famous for demanding the extradition of former Chilean dictator, General Augusto Pinochet, from the United Kingdom where he had traveled for medical surgery.³⁹ Pinochet had been untouchable until then despite his dreadful legacy. On September 11, 1973, General Pinochet led a bloody coup overthrowing then-president Salvador Allende, a democratically elected socialist.⁴⁰ Pinochet subsequently banned all political parties,

international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances." United States v. List (The Hostages Trial) (U.S. Mil. Trib. Nuremberg 1948), in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (U.N. War Crimes Comm'n ed., 1949).

³⁵ CASSESE, *supra* note 16, at 293.

³⁶ Orentlicher, *supra* note 34, at 1059–60 (footnotes omitted).

³⁷ Julia K. Boyle, Note, *The International Obligation to Prosecute Human Rights Violators: Spain's Jurisdiction Over Argentine Dirty War Participants*, 22 HASTINGS INT'L & COMP. L. REV. 187, 189 (1998).

³⁸ *Id.*

³⁹ White, *supra* note 1, at 144.

⁴⁰ Jonathan Kandell, *Augusto Pinochet, 91, Dictator Who Ruled by Terror in Chile, Dies*, N.Y. TIMES, Dec. 11, 2006, at 1.

dissolved Congress, and abandoned the constitution. By the time his seventeen-year rule ended in 1990, his dictatorship was responsible for the execution or disappearance of more than 3,200 people.⁴¹ Thousands more were detained and tortured or forced into exile.⁴² The vast majority of all victims were nonviolent.⁴³ Pinochet also embezzled at least \$28 million that he kept in more than 100 secret bank accounts, most of them in the United States.⁴⁴

Judge Garzón invoked universal jurisdiction to prosecute Pinochet for genocide, torture, and other atrocities against scores of political opponents.⁴⁵ But Pinochet and the Chilean government objected that extradition would violate Chilean sovereignty since Pinochet was immune from prosecution.⁴⁶ Nevertheless, a judicial panel of Law Lords held that under the British codification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), extraterritorial torture was an extraditable offense and that Pinochet did not enjoy absolute immunity from prosecution.⁴⁷ While the British executive ultimately allowed Pinochet to return to Chile due to his failing health, his arrest, sixteen undignified months in detention, and an unsuccessful immunity claim marked a shift in international practice toward ending impunity for brutal dictators.⁴⁸ Until *Pinochet*, judicial authorities had generally declined to judge the acts of foreign officials.⁴⁹

Despite *Pinochet's* relative success, Spain's endeavor to prosecute foreign atrocity crimes was controversial. Human rights groups generally supported the effort.⁵⁰ Spain's attempt to prosecute Pinochet was also backed with "similar extradition requests . . . from at least seven countries."⁵¹ Yet,

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Editorial, *The Dextrous Dictator*, N.Y. TIMES, Dec. 11, 2006, at 26.

⁴⁵ White, *supra* note 1, at 144.

⁴⁶ *Id.* at 147. As a condition for stepping down, Pinochet obtained a lifetime senatorship that made him immune from prosecution. Orentlicher, *supra* note 34, at 1071. But this arrangement was far from democratic, as Pinochet had threatened a coup if his de facto self-amnesty was challenged. *Id.* at 1123.

⁴⁷ Orentlicher, *supra* note 34, at 1080.

⁴⁸ Warren Hoge, *After 16 Months of House Arrest, Pinochet Quits England*, N.Y. TIMES, Mar. 3, 2000, at 6.

⁴⁹ See Orentlicher, *supra* note 34, at 1059.

⁵⁰ See, e.g., White, *supra* note 1, at 146.

⁵¹ *Id.* at 147.

pragmatists warned that Spain should not espouse a radical form of universal jurisdiction devoid of strong procedural footing that could violate international customary law and harm diplomatic relations.⁵² Most important, the states whose citizens were prosecuted vehemently protested what they perceived as a violation of their sovereignty over national criminal justice matters.⁵³ Facing the same challenge, Belgium finally caved in to intense political pressure, especially from the United States,⁵⁴ and significantly narrowed its own universal jurisdiction law in 2003.⁵⁵ Around the same time, the Spanish Supreme Court also decided to narrow Spain's universal jurisdiction to rein in prosecutions that it felt had gone too far,⁵⁶ however, the Constitutional Tribunal overruled this decision.⁵⁷

⁵² See, e.g., Kontorovich, *supra* note 30, at 183–84.

⁵³ See Marlise Simons, *Pinochet's Spanish Pursuer: Magistrate of Explosive Cases*, N.Y. TIMES, Oct. 19, 1998, at 1.

⁵⁴ After American officials were charged with various crimes by Belgian courts, "Secretary of Defense Donald H. Rumsfeld warned that the United States would withhold further funding for a new NATO headquarters building in Brussels and that senior U.S. officials may stop visiting Belgium unless it repealed its already diminished law on universal jurisdiction." Orentlicher, *supra* note 34, at 1062 (citing Vernon Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, WASH. POST, June 13, 2003, at A24); see also Craig S. Smith, *NATO Agrees to U.S. Proposals to Revamp Alliance*, N.Y. TIMES, June 13, 2003, at 3.

⁵⁵ Steven R. Ratner, Editorial Comment, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888 (2003). Belgium now

(1) limits jurisdiction of Belgian courts to cases in which (a) the accused is a national of Belgium or has his primary residence in Belgium, or (b) the victim is a national of Belgium or has resided in Belgium for at least 3 years; and (2) provides that criminal actions under this law may only be initiated by the federal prosecutor, who will evaluate individual complaints, and that the decision of the federal prosecutor is not subject to review. The amendment also specifically provides for immunity for heads of State and other government officials, and bars criminal action against certain persons officially invited by Belgian authorities or international organizations based in Belgium.

Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?*, 25 CARDOZO L. REV. 247, 264 (2003) (footnotes omitted).

⁵⁶ Prior to its decision of November 15, 2004, the Spanish Supreme Court had narrowed universal jurisdiction in a separate case regarding Guatemala on February 25, 2003. See STS, Feb. 25, 2003 (J.T.S., No. 327), available at <http://www.derechos.org/nizkor/guatemala/doc/gtmsnt.html>. Because the holdings are remarkably similar, I focus only on the 2004 case for brevity's sake.

⁵⁷ STC, Sept. 26, 2005 (S.T.C., No. 237).

III. SPAIN'S HIGH COURTS CLASH ON UNIVERSAL JURISDICTION

Spain is a parliamentary and constitutional monarchy with a democratic political system. The *Tribunal Constitucional* (Constitutional Tribunal) is the highest court. It must uphold and interpret the constitution, which provides significant rights for the accused in conformance with international due process standards.⁵⁸ Like the U.S. Supreme Court, the Constitutional Tribunal has judicial review power over the actions of other state organs.⁵⁹ The *Tribunal Supremo* (Supreme Court) is the highest court for all non-constitutional matters. It must abide by the Tribunal's constitutional rulings.⁶⁰ The *Audiencia Nacional* (National Audience) is a lower court responsible for matters of international and national interest, including international crimes, terrorism, drug trafficking, money laundering, political corruption, and extradition proceedings.⁶¹ Depending on the crime, the court has either original or appellate jurisdiction.⁶² Appeals of the National Audience's decisions are first heard by the Supreme Court, whose decisions may also be appealed to the Constitutional Tribunal if they entail constitutional issues.

Spain is party to numerous international humanitarian and criminal law treaties, including the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and Torture Convention.⁶³ Spain also recognizes its universal jurisdiction to try foreign atrocity crimes. Article 23.4 of Spain's Law on Judicial Power posits that "Spanish jurisdiction is competent to try acts committed by Spaniards or foreigners outside the national territory" for crimes recognized "under Spanish law" as, *inter alia*, "genocide," "terrorism," and crimes that, "under international treaties and agreements, must

⁵⁸ See Dennis P. Riordan, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373, 382–84 (1999).

⁵⁹ CHARLOTTE VILLIERS, *THE SPANISH LEGAL TRADITION: AN INTRODUCTION TO THE SPANISH LAW AND LEGAL SYSTEM* 43–44 (1999).

⁶⁰ *Id.*

⁶¹ *Id.* at 128.

⁶² *Id.* at 128–29.

⁶³ Boyle, *supra* note 37, at 188–89. Spain's international treaties are self-executing and automatically incorporated into domestic law once signed and ratified, unless they conflict with the constitution. VILLIERS, *supra* note 59, at 50. It is worth mentioning that the Spanish Supreme Court strongly criticized the detention of "enemy combatants" by the United States at Guantánamo, Cuba as violating human rights. See José Yoldi, *El Supremo Absuelve al Taliban Español y Dice que Guantánamo No Tiene Justificación*, EL PAÍS (Spain), July 25, 2006, at 21.

be prosecuted in Spain.”⁶⁴ The Supreme Court and Constitutional Tribunal have sharply disagreed on the scope of Spain’s universal jurisdiction under treaty law and Article 23.4.

*A. The Supreme Court Decision*⁶⁵

In 1995, Adolfo Scilingo, an Argentine navy officer, confessed to “murdering dozens of detainees by dumping their drugged bodies from a helicopter into the sea” during Argentina’s Dirty War.⁶⁶ In 1997, Scilingo voluntarily traveled to Spain to appear in a television show and was summoned to court to testify about his crimes.⁶⁷ He was arrested after reiterating his confession.⁶⁸ In 2004, after a series of appeals, the Supreme Court eventually held that Spain had jurisdiction to try Scilingo for genocide, terrorism, and torture.⁶⁹ In his defense, Scilingo argued that Spain lacked jurisdiction to try him, partly because he is an Argentine citizen and the crimes occurred in Argentina; however, the Constitutional Tribunal denied Scilingo’s appeal and remanded the case to a lower criminal court.⁷⁰

The Supreme Court ruled on two narrow jurisdictional bases. First, some of Scilingo’s alleged victims were Spanish citizens. The court succinctly listed several international criminal law treaties as creating “jurisdictional criteria that are generally based on territory or active or passive personality.”⁷¹ While

⁶⁴ Ley Orgánica del Poder Judicial [L.O.P.J.] [Law on Judicial Power], art. 23.4 (Spain).

⁶⁵ Quotations from Spanish court decisions have been translated by the author.

⁶⁶ Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1855 n.485 (2005); see also LEWIS, *supra* note 3, at 143–46.

⁶⁷ *Argentine Arrested in Spanish ‘Dirty War’ Inquiry*, N.Y. TIMES, Oct. 8, 1997, at 4.

⁶⁸ *Id.*

⁶⁹ STS, Nov. 15, 2004 (J.T.S., No. 1362); see also Julio M. Lazaro, *El Supremo Deja Via Libre para que la Audiencia Juzgue a Scilingo*, EL PAÍS (Spain), Nov. 17, 2004, at 22.

⁷⁰ STS, Nov. 15, 2004, § II. First, Scilingo argued that he should be tried in Argentina, but the court noted that he had not been charged in Argentina for the crimes for which he was charged in Spain. *Id.* Second, he contended that Argentina did not recognize Spanish courts’ jurisdiction, yet, the court underlined that Argentine authorities had previously arrested and extradited suspects wanted by Spain. *Id.* Third, he claimed that he was protected by amnesty laws shielding military officers from prosecution. The Tribunal countered that this amnesty had “no value” outside Argentina. *Id.*

⁷¹ The Genocide Convention, Torture Convention, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention on the Suppression of Unlawful Seizure of Aircraft, Convention against the Taking of Hostages, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Convention for the Suppression

the court technically held that the existence of Spanish victims gave Spain a “national interest” to exercise universal jurisdiction, its decision effectively amounted to ruling on the basis of passive personality jurisdiction and *not* on the basis of universal jurisdiction. Second, the court held that Scilingo’s presence on Spanish territory provided an alternative basis for jurisdiction. It held that international criminal law treaties⁷² create “an obligation to try the alleged culprits when they are present on one’s territory and extradition has been denied.”⁷³ Under these circumstances, states must “prosecute the crimes, whatever their place of commission . . . thereby preventing an organized response against impunity by suppressing the possibility that some states would be used as safe havens.”⁷⁴ By allowing the prosecution of alleged culprits apprehended on Spanish territory, the court endorsed the aforesaid principle of conditional universal jurisdiction.⁷⁵ Hence, the court provided two relatively narrow bases for Spanish jurisdiction, which it limited to the small proportion of cases involving either Spanish citizens or foreign defendants who rather foolhardily venture into Spanish territory and are apprehended therein like Scilingo.

Aside from situations where Spain is obliged by treaty to prosecute or extradite alleged culprits on its territory, the Supreme Court emphasized that the exercise of national jurisdiction requires a procedural link to national interests, which it reduced to the protection of citizens through active or personality jurisdiction and the defense or protection of other interests, implying the prosecution of defendants threatening national security or economic interests.⁷⁶ Its rationale was that “jurisdiction is a manifestation of state sovereignty.”⁷⁷ A state’s jurisdiction reaches only as far as its national interests, as going farther would interfere with the sovereignty of other states. Accordingly, the court held that universal jurisdiction is only justified by the union of “the common interest in avoiding impunity for atrocity crimes with the concrete interest of a state in protecting [its national interests].”⁷⁸

of the Financing of Terrorism, and European Convention on the Suppression of Terrorism. *Id.* § II.6, ¶ 5.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See CASSESE, *supra* note 16, at 284–86.

⁷⁶ STS, Nov. 15, 2004, § II.6, ¶ 6.

⁷⁷ *Id.*

⁷⁸ *Id.*

The court found that broader universal jurisdiction would violate “criteria of reasonableness” and the “principle of non-intervention” in another state’s affairs.⁷⁹ No treaty “has expressly authorized a state to prosecute, without limitation whatsoever and relying only on domestic law, acts that occurred in the territory of another state.”⁸⁰

The court identified the principle of non-intervention into the affairs of other countries under Article 27 of the U.N. Charter as a bar to broad universal jurisdiction.⁸¹ It conceded that Article 27 admits limitations relating to human rights abuses, but only in the form of an intervention decided between states or by the international community, such as prosecution at the International Criminal Court.⁸² The court added that under Article 8 of the Genocide Convention, each party-state can refer genocide matters to U.N. institutions so that they may take necessary steps to prevent or punish them, as was done with the creation of ad hoc tribunals for Rwanda and the former Yugoslavia.⁸³ The international community has the responsibility to collectively decide whether to prosecute foreign atrocity crimes because “today there is important doctrinal support for the idea that no state should unilaterally devote itself to establishing order through the application of international criminal law, against everyone and in all the world, without there being a link that legitimizes the extraterritorial extension of its jurisdiction.”⁸⁴ Hence, the court stressed that Spain had no prerogative to unilaterally prosecute entirely foreign atrocity crimes.

While acknowledging the vagueness and generality of Article 23.4 of the Law on Judicial Power,⁸⁵ the court declined to interpret it as allowing prosecution of an international crime “regardless of the location of its commission and the nationality of its perpetrator or victim.”⁸⁶ In particular, it conceded that the Genocide Convention and its codification in Article 23.4 do *not* prohibit universal jurisdiction, although it declined to interpret them as providing Spanish courts with this power since they do not “expressly” establish universal jurisdiction.⁸⁷ In sum, the court ruled that Scilingo could

⁷⁹ *Id.*

⁸⁰ *Id.* § II.6, ¶ 5.

⁸¹ *Id.* § II.6, ¶ 6.

⁸² STS, Nov. 15, 2004, § II.6, ¶ 6.

⁸³ *Id.*

⁸⁴ *Id.* § II.6, ¶ 5.

⁸⁵ Ley Orgánica del Poder Judicial [L.O.P.J.] [Law on Judicial Power], art. 23.4 (Spain).

⁸⁶ STS, Nov. 15, 2004, § II.6, ¶ 6.

⁸⁷ *Id.*

be tried in Spain, although it clarified that Spanish courts could only exert a narrow form of universal jurisdiction. Scilingo was eventually convicted of crimes against humanity and was expected to serve thirty years in prison.⁸⁸

The Supreme Court based its opinion on one of its own recent precedents. In 1999, Nobel Peace Prize laureate, Rigoberta Menchú, filed a criminal complaint in the National Audience alleging acts of genocide, torture, terrorism, assassination, and illegal detention perpetrated by civilian and military authorities in Guatemala between 1978 and 1986 as part of a repression campaign against the Maya Indians.⁸⁹ The allegations included a 1980 assault on the Spanish embassy where thirty-seven people were killed, as well as the murder of four Spanish priests in a separate incident.⁹⁰ The National Audience rejected the criminal complaint except for the crimes involving Spanish victims.⁹¹ On appeal, the Supreme Court affirmed and narrowed the scope of Spanish universal jurisdiction, thereby providing the precedent which it closely followed in *Scilingo*. However, on September 26, 2005, the Constitutional Tribunal overruled the Supreme Court's decision in the Guatemalan case,⁹² thereby effectively departing from the standard set in *Scilingo*.

B. The Constitutional Tribunal Decision

In strong language, the Constitutional Tribunal's decision in the Guatemalan case overruled the Supreme Court's reasoning, which it found to have wholly emasculated the principle of universal jurisdiction. The Tribunal exercised judicial review under Article 24.1 of the Spanish Constitution, which grants all persons, including foreigners,⁹³ the right to access the courts to assert "their legitimate rights and interests."⁹⁴ Under Spanish constitutional law, "an excessively strict consideration of the applicable norm"⁹⁵ and "mere formalities or unreasonable understandings of procedural norms [should not

⁸⁸ Renwick McLean, *Argentine Officer Convicted*, N.Y. TIMES, Apr. 20, 2005, at 8.

⁸⁹ STC, Sept. 26, 2005 (S.T.C., No. 237) § I.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*; see also Ascensio, *supra* note 10.

⁹³ Constitución (C.E.) art. 24.1 (Spain). Foreigners have equal standing rights in Spanish courts. See FRANCISCO RUBIO LLORENTE, DERECHOS FUNDAMENTALES Y PRINCIPIOS CONSTITUCIONALES: DOCTRINA JURISPRUDENCIAL 267 (1995).

⁹⁴ STC, Sept. 26, 2005, § I(E)(5)(3)(a); C.E. art. 24.1.

⁹⁵ STC, Sept. 26, 2005, § II.8, ¶ 3 (citing STC, Sept. 14, 1999 (S.T.C., No. 157)).

preclude] a judgment on the merits.”⁹⁶ Consequently, the Tribunal found that the Supreme Court’s ruling had unconstitutionally prevented the Guatemalan complainants from accessing Spanish courts. The court’s narrow holding had “practically *de facto* abrogated [Article 23.4 of the Law on Judicial Power]”⁹⁷ by relying on criteria that “may not even be implicitly considered present in the law” and that are contrary to the purpose of universal jurisdiction.⁹⁸

The Constitutional Tribunal thoroughly criticized the Supreme Court’s contradictory reasoning. While the Supreme Court noted that the Genocide Convention does not prohibit universal jurisdiction, it effectively found such a bar by ruling that Article 8 only authorizes recourse to U.N. institutions and bars a state from unilaterally prosecuting genocide.⁹⁹ The Tribunal countered that the Convention only mentions the U.N. as a “possible” mechanism for punishing genocide and does not imply a prohibition on party-states exercising universal jurisdiction to punish the crime.¹⁰⁰ The Tribunal also found that the requirement of Article 6, that party-states punish alleged culprits entering Spanish territory, is only a “minimum requirement” that does not preclude states from exercising broader jurisdiction.¹⁰¹ Accordingly, the Tribunal found that universal jurisdiction is permissible even when the Convention does not expressly authorize it. It would be absurd to posit that entering the treaty would limit states’ ability to prosecute genocide at the national level while non-party-states would face no such restriction.¹⁰² Thus, the Tribunal asserted that the Supreme Court’s restrictive interpretation of the Genocide Convention is incompatible with its goal of universally prosecuting genocide in order to avoid impunity.¹⁰³ Further, since universal jurisdiction is not barred by the Genocide Convention or any other treaty, it cannot violate Article 27 of the Vienna Convention on the Law of Treaties, as illogically argued by the Supreme Court.¹⁰⁴

⁹⁶ *Id.* (citing STC, Dec. 15, 2003 (S.T.C. No. 220)).

⁹⁷ *Id.* § II.9, ¶ 3.

⁹⁸ *Id.* § II.8, ¶ 2.

⁹⁹ STC, Nov. 15, 2004 (J.T.S., No. 1362), § II.5.

¹⁰⁰ STC, Sept. 26, 2005, § II.5, ¶ 3.

¹⁰¹ *Id.*

¹⁰² STC, Sept. 26, 2005, § II.5, ¶¶ 3–4.

¹⁰³ *Id.*

¹⁰⁴ *Id.* § II.5, ¶ 2, § 7, ¶ 3. “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

Most important, the Tribunal rejected the Supreme Court's reasoning that universal jurisdiction requires links to national interests. It found "highly debatable" the presumption that international customary law requires such a link and criticized the "pretended value of the precedents cited for theoretical support" by the Supreme Court, which had misstated their holdings.¹⁰⁵ The cited German cases had been supplanted by more recent decisions not requiring a link to national interests, including a case affirming the conviction of Serbian citizens for genocide against Bosnian citizens in Bosnia.¹⁰⁶ The International Court of Justice's (I.C.J.) opinion in *Arrest Warrant of 11 April 2000* had restricted its holding to immunity considerations without ruling on universal jurisdiction.¹⁰⁷ Finally, the Belgian Cassation Court held that universal jurisdiction still existed under Belgian law after the aforementioned amendment.¹⁰⁸ Moreover, the Tribunal added that the Supreme Court had selectively omitted to mention a "multitude of precedents" contrary to its position, such as statutes or cases from Denmark, Germany, Italy, and Sweden not requiring links to national interests.¹⁰⁹

The Tribunal held that a link to national interests is not required because universal jurisdiction is exclusively based on the substantive nature of grave crimes affecting the entire international community. More specifically, it ruled that neither Spanish nor international law restricts universal jurisdiction based on the citizenship of alleged victims or defendants.¹¹⁰ In particular, requiring that victims of genocide be Spanish citizens contradicts the nature of the crime and the aspiration to prosecute it universally. Under Article 607 of the Spanish Penal Code, a genocide conviction requires acts seeking the eradication of a national, ethnic, racial, or religious group.¹¹¹ Accordingly, the Supreme Court's rule would only permit jurisdiction in cases involving Spanish victims and criminal acts motivated by the goal of exterminating all Spaniards. Rather, Article 23.4 of the Law on Judicial Power was logically intended to punish genocide around the world.¹¹²

After the Tribunal's decision, a Spanish magistrate issued international arrest warrants against former Guatemalan military rulers Efraín Ríos Montt

¹⁰⁵ STC, Sept. 26, 2005, § II.6, ¶ 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 3, 36 (Feb. 14)).

¹⁰⁸ *Id.*; see also *supra* note 55 and accompanying text.

¹⁰⁹ See STC, Sept. 26, 2005, § II.6, ¶ 4.

¹¹⁰ *Id.* § II.9.

¹¹¹ Código Penal [C.P.] art. 607 (Spain).

¹¹² STC, Sept. 26, 2005, § II.9.

and Oscar Humberto Mejía, as well as five generals for alleged genocide, torture, and terrorism.¹¹³ The European Parliament voted to support these extradition efforts, the outcome of which remains unforeseeable so far.¹¹⁴ The Spanish magistrate also promulgated an order to freeze the defendants' assets.¹¹⁵ Meanwhile, Amnesty International reported that witnesses to these alleged crimes were threatened in an effort to prevent them from cooperating with Spain's investigation.¹¹⁶

IV. PROCEDURAL RESTRAINTS ON SPANISH UNIVERSAL JURISDICTION

Despite the Constitutional Tribunal's broad holding, Spain has significantly limited the scope of its universal jurisdiction by adopting a moderate stance on four key procedural problems. First, the National Audience has held that incumbent heads of state are immune from prosecution,¹¹⁷ thereby conforming with the I.C.J.'s *Arrest Warrant of 11 April 2000* decision.¹¹⁸ Obviously, prosecuting incumbent heads of state and senior officials can drastically damage diplomatic relations. Spain, nonetheless, does not recognize the immunity of former heads of state and senior officials, as evidenced by its attempt to prosecute Pinochet.¹¹⁹ While prosecuting former officials can still

¹¹³ M. Delfin, *Judge Orders Arrests of Former Guatemalan Military Leaders*, EL PAÍS (English version) (Spain), July 8, 2006, at 3.

¹¹⁴ *EU Supports Ríos Montt's Extradition*, EL PAÍS (English version) (Spain), Nov. 1, 2006, at 4.

¹¹⁵ *¿Como Pinochet?*, EL PAÍS (Spain), July 10, 2006, at 12.

¹¹⁶ José Yoldi, *Amnistía Denuncia las Amenazas Contra Testigos del Genocidio en Guatemala*, EL PAÍS (Spain), July 11, 2006, at 17.

¹¹⁷ Audiencia Nacional, Mar. 4, 1999 (No. 2723) (holding that neither Fidel Castro nor any incumbent head of state can be prosecuted in Spain); see also CASSESE, *supra* note 16, at 292. Spanish courts also declined to prosecute Silvio Berlusconi while he was serving as prime minister of Italy between 2001 and 2006. Berlusconi is accused of tax evasion and fraud between 1991 and 1993 as an owner of the Spanish television channel Telecinco. Even though Berlusconi is no longer prime minister, Italy is unlikely to accede to any future Spanish requests to extradite him, especially since he still enjoys immunity due to his nomination to a parliamentary committee in the Council of Europe. M. Delfin, *Garzón Moves to Lift Immunity from Trial for Berlusconi in Wake of Election Defeat*, EL PAÍS (English version) (Spain), Sept. 7, 2006, at 3. Berlusconi's case is nonetheless distinguishable from Castro's because he is accused of crimes having occurred in Spain. See José Yoldi, *El Constitucional Da Luz Verde para que Continúe el Proceso Contra Berlusconi*, EL PAÍS (Spain), July 29, 2006, at 23.

¹¹⁸ The I.C.J. held that incumbent heads of state, ministers, and other senior officials are immune from jurisdiction while in office. *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 3 (Feb. 14).

¹¹⁹ The I.C.J. ruled that former senior officials can be prosecuted for acts allegedly committed

create diplomatic problems, granting them immunity could drastically curtail the prosecution of atrocity crimes, which are generally committed with the complicity of government authorities. Immunizing former officials may violate both international treaty¹²⁰ and customary law.¹²¹ Officials should not be able to use their position as a sword to perpetrate atrocities and as a shield to permanently protect them from prosecution.¹²² There are nonetheless diplomatic issues to consider, which I explore below.

Second, Spanish law bars defendants from being tried *in absentia*.¹²³ Such trials may violate international customary law and due process standards by precluding absent defendants from presenting a cogent defense.¹²⁴ Yet, Spain can initiate an investigation *in absentia* and does not have to wait for an alleged culprit to enter its territory to have jurisdiction, as had been suggested by the Supreme Court.¹²⁵ Instead, extradition is permitted to force a culprit into Spain.¹²⁶

prior or subsequent to taking office, as well as those committed in a private capacity while in office. *Id.* at 36. But the I.C.J. seemed disinclined to follow *Pinochet*'s logic that atrocity crimes are "private" acts to which no immunity attaches, thereby suggesting that the I.C.J. may eventually bar the prosecution of former senior officials for atrocity crimes. See Sarah C. Rispin, *Implications of Democratic Republic of Congo v. Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?*, 3 CHI. J. INT'L L. 527 (2002).

¹²⁰ For instance, the Torture Convention's text is silent about the immunity of heads of state. United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. However, the court in *Pinochet* held that the Convention would be emasculated if former officials could claim immunity from prosecution outside their state of nationality. Orentlicher, *supra* note 34, at 1086. "Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity." *Id.* (citing *Pinochet III*, [2000] 1 A.C. 147, 205 (H.L. 1999) (opinion of Lord Browne-Wilkinson)). Immunity would therefore apply to all culprits. Unless Chile waived its officials' immunity, the international crime of torture could not be prosecuted outside Chile, an outcome that would defeat the Convention's purpose of establishing universal jurisdiction to avoid impunity for torturers. *Id.*

¹²¹ See Jonathan H. Marks, *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council*, 42 COLUM. J. TRANSNAT'L L. 445, 455–59 (2004).

¹²² *Id.* at 475.

¹²³ STC, Sept. 26, 2005 (S.T.C., No. 237) § II.7, ¶ 4.

¹²⁴ It is unclear whether international customary law either permits or prohibits universal jurisdiction *in absentia*. However, recent practices suggest that states may do so if they desire. Rabinovitch, *supra* note 28, at 510–11. However, former I.C.J. Judge Guillaume has argued that *in absentia* trials violate international customary law. See Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. 3, 12 (Feb. 14) (separate opinion of President Guillaume).

¹²⁵ STS, Nov. 15, 2004 (J.T.S., No. 1362) § II.6, ¶ 5.

¹²⁶ STC, Sept. 26, 2005, § II.7, ¶ 4.

Third, the Supreme Court and Constitutional Tribunal's decisions suggest that Spain will defer to international courts asserting their jurisdiction. The Rome Treaty requires Spain and other International Criminal Court (I.C.C.) member states to give preference to the I.C.C.¹²⁷ But the I.C.C.'s jurisdiction is limited and countries with universal jurisdiction may be able to lawfully prosecute individuals when the I.C.C. cannot.¹²⁸ Accordingly, trials in Spanish courts may help end impunity for atrocities.

Fourth, the Constitutional Tribunal held that Spanish jurisdiction was only complementary. Spain must give priority to the territorial state when proceedings have already been or will soon be initiated therein.¹²⁹ But Spain need not defer to these courts when "serious and reasonable proofs of judicial inactivity [demonstrate] a fault, whether of will or of capacity, to effectively prosecute the crimes."¹³⁰ The Tribunal rejected the National Audience's requirement that complainants prove that the territorial state had decidedly and permanently rejected their complaint—an "impossible" burden of proof or "*probatio diabolica*" that would bar complainants from accessing Spanish courts.¹³¹ Through its judicial inactivity, the territorial state could bar another state from exercising jurisdiction, thereby allowing impunity for atrocities.¹³² While the Tribunal underlined that Spain should appropriately defer to territorial states, it also emphasized that states have "concurrent" jurisdiction over atrocity crimes.¹³³ Further, Spain's Law on Judicial Power gives "broad reach to the principle of universal justice, given that the only limit expressed in this respect is that . . . the criminal has not been acquitted, pardoned, or punished in a foreign country."¹³⁴ If these criteria are met, Spanish prosecutors

¹²⁷ David Scheffer, Opening Address, *Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 233, 238 (2001).

¹²⁸ *Id.*

¹²⁹ STC, Sept. 26, 2005, § II.4, ¶ 5.

¹³⁰ *Id.*

¹³¹ *Id.* § II.4, ¶ 6.

¹³² *Id.* § II.4, ¶¶ 5–6. "[I]f the prosecution and punishment occur on the [territory where the crime was perpetrated, it is more likely for the cathartic process of criminal trials to have effect. . . ." CASSESE, *supra* note 16, at 279. Prosecution in the state having territorial jurisdiction *locus delicti* may be hard to achieve, however, because atrocity crimes "are often committed by State officials or with their complicity or acquiescence. . . . [Hence] judicial authorities may be reluctant to prosecute State agents or to institute proceedings against private individuals that might eventually involve State organs." *Id.* Further, whenever prosecution occurs, there is a clear risk that judicial authorities will be under pressure to absolve state officials of any wrongdoing.

¹³³ STC, Sept. 26, 2005, § II.3, ¶ 3.

¹³⁴ *Id.* § II.3, ¶ 4.

do not necessarily have to defer to a territorial state because both a "literal" interpretation of the statute and legislative intent require "absolute universal jurisdiction."¹³⁵ However, the Tribunal acknowledged that other interpretations of the statute are possible, and that its application may subsequently be restricted by certain regulating criteria.¹³⁶

Therefore, Spain does not have pure universal jurisdiction based solely on a crime's substantive nature, as it precludes prosecuting incumbent government officials, trying defendants *in absentia*, circumventing international courts' jurisdiction, and infringing on the territorial state's proceedings. Despite these procedural requirements, universal jurisdiction in Spanish courts still presents complex problems regarding evidentiary considerations,¹³⁷ forum-shopping by alleged victims,¹³⁸ and due process standards, including notice requirements and the bar on *ex post facto* prosecutions.¹³⁹ These and other complex issues relating to universal jurisdiction cannot be addressed in detail within the ambit of this Article. Instead, I examine whether Spain's universal jurisdiction violates international customary law.

V. INTERNATIONAL CUSTOMARY LAW AND NATIONAL UNIVERSAL JURISDICTION

It is debatable whether Spain's rather expansive universal jurisdiction violates international law. No treaty expressly bars universal jurisdiction. However, the Spanish Supreme Court posited that broad universal jurisdiction violates the long established customary rule of state sovereignty. Indeed, even without prosecuting incumbent government officials, Spain might unlawfully interfere in other countries' affairs by asserting jurisdiction over their citizens. This conclusion would be supported by the maxim of *par in parem non habet*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ A prosecution should not go forward unless there is compelling evidence against the accused. CASSESE, *supra* note 16, at 290. But evidence may be difficult to collect insofar as it is remotely located in the territorial state where authorities may not cooperate with attempts to try their nationals, especially if the authorities played a role in the crimes. *Id.* at 291.

¹³⁸ *Id.* at 289-90.

¹³⁹ See generally Eric S. Kobrick, Note, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1515 (1987) (examining the *ex post facto* clause).

imperium or “the acts of one state should not be justiciable before the courts of another state.”¹⁴⁰

On the other hand, under customary law, states do not have exclusive jurisdiction over their nationals. “[W]hen another State seeks to prosecute a State’s nationals, the latter may seek to intercede diplomatically on behalf of its citizen on the basis of comity, but it has no legal right under international law to insist that it be the exclusive fora for such prosecution.”¹⁴¹ Moreover, the principle of state sovereignty has undoubtedly decreased in importance in the post-World War II era. After witnessing the atrocities of Nazi Germany and many other oppressive regimes, the international community has progressively recognized that a government’s power ends where people’s basic human rights begin. Judge Antonio Cassese has used this premise to argue that the dispute over sovereignty marks the confrontation of two different conceptions of the international community: “The first is an archaic conception, under which non-interference in the internal affairs of other States constitutes an essential pillar of international relations. The second is a modern view, based on the need to further universal values [against human rights abuses].”¹⁴² In other words, it is increasingly accepted that human rights can trump sovereign national interests.

Whereas this general evolutionary principle enjoys some support in recent practice,¹⁴³ it does not necessarily justify broad assertions of universal jurisdiction by states acting unilaterally at the national level. Certainly, the international community is authorized, under certain circumstances, to interfere with state sovereignty in order to protect human rights. For instance, it legitimately created ad hoc tribunals to prosecute abuses perpetrated in

¹⁴⁰ Marks, *supra* note 121, at 471.

¹⁴¹ Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 377 (2001).

¹⁴² CASSESE, *supra* note 16, at 292.

¹⁴³ For instance, the International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) emphatically held:

Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights. . . . It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.

Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 55, 58 (Oct. 2, 1995).

Rwanda and the former Yugoslavia, and it used military force to confront situations presenting a threat to peace and security, as in Haiti in 1994.¹⁴⁴ However, these measures were taken under a U.N. mandate and with the Security Council's approval.¹⁴⁵

Besides, it may be a *non sequitur* to premise the right to exercise broad universal jurisdiction on a general evolutionary principle that may not constitute an established rule of customary international law. "Proof of customary international law is found in collective state practice supplemented in some instances by widespread codification at the national or international level";¹⁴⁶ however, as noted above, universal jurisdiction for atrocities has only existed since the post-World War II era, and especially since the 1990s. Moreover, broad universal jurisdiction laws have essentially only been adopted by some, not all, European states. It is therefore doubtful that an international custom has emerged, unless we adopt a rather pretentious, Eurocentric view that a handful of countries embody the state of international law.

Instead of extrapolating from a general evolutionary principle valorizing human rights over state sovereignty, there are two other rationales permitting Spain and other states to lawfully exercise broad universal jurisdiction. The first is the *Lotus* principle. The second is consent by treaty.

A. *The Lotus Principle*

In *Arrest Warrant of 11 April 2002*, the I.C.J. focused on immunity matters and declined to rule on the lawfulness of Belgium's universal jurisdiction law per se as neither country had formally raised the issue.¹⁴⁷ However, two separate groups of judges issued concurring opinions commenting on Belgium's universal jurisdiction law. Judge Guillaume's group found Belgium's international arrest warrant for Abdulaye Yerodia Ndongbasi, a Congolese minister accused of gross human rights violations, to be illegal absent a positive rule of international law authorizing it.¹⁴⁸ Conversely, Judge

¹⁴⁴ See Statute of the International Criminal Tribunal for Rwanda, S.C. Res 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), pmbl.; United Nations Stabilization Mission in Haiti, <http://www.un.org/Depts/dpko/missions/minustah/background.html> (last visited June 28, 2007).

¹⁴⁵ *Id.*

¹⁴⁶ Scheffer, *supra* note 2, at 428.

¹⁴⁷ Rabinovitch, *supra* note 28, at 503 (citing *Arrest Warrant of 11 April 2002 (Congo v. Belg.)*, 2002 I.C.J. 3, 18 (Feb. 14)).

¹⁴⁸ Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has it Affected the Development of a Principle of Universal Jurisdiction that Would*

“Higgins['] group saw it as a voluntary act unrestricted by international law.”¹⁴⁹

The disagreement between these I.C.J. concurring opinions largely mirrored the disagreement between the previously discussed Spanish opinions. The Guillaume group and the Spanish Supreme Court defended the principle of conditional universal jurisdiction, which bars any proceedings unless the accused is in the prosecuting state's custody. Moreover, they generally reasoned that broad universal jurisdiction is *prohibited unless expressly authorized* by treaty or customary law. Conversely, the Higgins group and the Constitutional Tribunal licensed absolute universal jurisdiction, which permits proceedings to begin without the accused, who can be forced into custody through extradition in order to stand trial.¹⁵⁰ Further, they reasoned that broad universal jurisdiction is *permissible unless expressly barred* by treaty or customary law.

We must therefore consider whether a voluntary assertion of broad universal jurisdiction is compatible with international customary law. At the outset, it is necessary to clarify that neither the Higgins group nor Spain's Constitutional Tribunal opinions advocated for purely unbridled universal jurisdiction. Judge Higgins' concurrence stressed that states must not transgress established international legal rules,¹⁵¹ and Spanish jurisdiction is narrowed by the previously stated procedural restraints.¹⁵² Thus, both opinions recognized that international customary law occasionally trumps universal jurisdiction. Yet, they generally reasoned that a broad assertion of universal jurisdiction does not necessarily violate the principle of state sovereignty under customary law. Judge Higgins opined that states are virtually prohibited from exercising criminal jurisdiction without permission in another state's territory, although the acts alleged in Belgium's arrest warrant constituted crimes against humanity and fit within the narrow exceptions under which universal jurisdiction is not precluded under international law.¹⁵³ Similarly, the Constitutional Tribunal rejected the Supreme Court's reasoning that broad universal jurisdiction would violate the principle of state sovereignty.¹⁵⁴

Obligate All States to Prosecute War Criminals?, 21 B.U. INT'L L.J. 63, 92–93 (2003).

¹⁴⁹ *Id.* at 93.

¹⁵⁰ The Higgins opinion suggested that even trials *in absentia* are permissible under customary law, *id.* at 92–96, which is distinguishable from Spanish law.

¹⁵¹ *Id.* at 95.

¹⁵² *See supra* Part IV.

¹⁵³ Summers, *supra* note 148, at 92, 95.

¹⁵⁴ STC, Sept. 26, 2005 (S.T.C., No. 237).

The position of the Higgins group and the Spanish Constitutional Tribunal appears to be supported by the longstanding principle set in the *Lotus* shipwreck case, which posits that, “in applying their criminal laws extraterritorially states have a ‘wide measure of discretion only limited in certain cases by *prohibitive rules*. . . .’”¹⁵⁵ First, there is no “prohibitive rule” under treaty law against relatively broad universal jurisdiction. Judge Higgins duly noted that the post-World War II international criminal treaties *oblige* states to either extradite or prosecute the accused who enter their territory, although the treaties do not bar states from *voluntarily prosecuting* the accused outside their territory.¹⁵⁶ The Constitutional Tribunal reasoned alike in asserting that Spain could voluntarily assert broad jurisdictional power to prosecute international genocide, which is not expressly prohibited by the Genocide Convention.¹⁵⁷ Second, there is no “prohibitive rule” under customary law. The Spanish Supreme Court was mistaken in holding that a link to national interests is *required* by customary law, as this position is directly contradicted by precedent. For instance, a U.S. Military Tribunal in Germany after World War II suggested that defendants charged with crimes against humanity may be called to answer to “humanity itself, humanity which has no political boundaries and no geographical limitations.”¹⁵⁸ In practice, *Eichmann* may be the first case where a person accused of atrocity crimes was tried in a state to which he had no formal ties (although Eichmann technically had ties to Israeli holocaust survivors).¹⁵⁹ The Israeli Supreme Court held that it could try Eichmann on behalf of the world community because his unspeakably heinous crimes had an “international character” and offended all mankind.¹⁶⁰ Similarly, the Spanish Constitutional Tribunal mentioned several European statutes and cases authorizing universal jurisdiction without links to national interests.¹⁶¹ Hence, a link to national interests is not *required* by

¹⁵⁵ Summers, *supra* note 148, at 95 (quoting S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7)) (emphasis added).

¹⁵⁶ *Id.* *Pinochet* held alike. [2000] 1 A.C. 147, 205 (H.L. 1999) (opinion of Lord Browne-Wilkinson).

¹⁵⁷ STC, Sept. 26, 2005, § II.7.

¹⁵⁸ Orentlicher, *supra* note 34, at 1116 (quoting United States v. Otto Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 411, 497 (1950)).

¹⁵⁹ CASSESE, *supra* note 16, at 293.

¹⁶⁰ *Id.* at 294.

¹⁶¹ STC, Sept. 26, 2005, § II.6, ¶ 4.

custom. Broad universal jurisdiction is therefore permitted under the *Lotus* principle.

B. Consent Under Treaty Law

Enforcing an international criminal law treaty against a foreigner does not necessarily violate the sovereignty of the accused's country. Under customary law, states do not have exclusive jurisdiction to prosecute their nationals.¹⁶² Further, in the previously discussed cases, Spain's high courts held that they could prosecute an Argentine citizen and several Guatemalan citizens for torture, genocide, and other crimes.¹⁶³ Argentina, Guatemala, and Spain are all parties to the Torture Convention¹⁶⁴ and Genocide Convention.¹⁶⁵

The Torture Convention specifically provides for universal jurisdiction.¹⁶⁶ As a multilateral treaty, it is an instrument of international law, but its provisions also comprise domestic law of a legislative and judicial nature. States entering the treaty "are required to 'take effective legislative, administrative, judicial or other measures' to prevent torture."¹⁶⁷ These key terms are left to be clarified by national courts, which embroider their own interpretive meanings to the treaty's language. The law of the Torture Convention is therefore made at both the international and national level.¹⁶⁸

Thus, Spanish courts were not enforcing purely foreign law against Argentine and Guatemalan citizens by prosecuting them under the Torture Convention—these countries had made this treaty their law through ratification. But Spain became a co-author of this law through its own ratification, thereby enabling Spanish courts to legitimately prosecute international crimes of torture.¹⁶⁹ By adhering to the Convention, Argentina

¹⁶² Scharf, *supra* note 141, at 377.

¹⁶³ See *supra* Part III.

¹⁶⁴ Torture Convention, *supra* note 120, available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

¹⁶⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

¹⁶⁶ Orentlicher, *supra* note 34, at 1088. Some commentators have construed the 1949 Geneva Conventions as binding parties to prosecute "grave breaches" under universal jurisdiction, although no court has apparently directly considered the issue. Summers, *supra* note 148, at 76–77.

¹⁶⁷ Orentlicher, *supra* note 34, at 1067 (quoting Torture Convention, *supra* note 120, art. 2(1)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1100.

and Guatemala accepted the possibility that the courts of other parties, including Spain, could assert universal jurisdiction to prosecute acts of torture committed in their territory. Hence, prosecuting defendants under the Torture Convention in Spanish courts is “a model of democratically legitimate reliance on universal jurisdiction.”¹⁷⁰

Conversely, the Genocide Convention does not explicitly provide for universal jurisdiction.¹⁷¹ Argentina and Guatemala could therefore argue that they did not foresee that another nation could use this treaty to assert universal jurisdiction against their citizens. Yet, the Constitutional Tribunal never pretended that the treaty required Spain to exercise universal jurisdiction to prosecute genocide. Instead, it held that this particular universal jurisdiction is required by *Spanish law*, which is permissible since it is not expressly prohibited by the Genocide Convention,¹⁷² as under the *Lotus* principle.

There is nothing incongruous about prosecuting gross human rights violators when the states having territorial or personality jurisdiction refuse to abide by their treaty duty to do so. Since Argentina and Guatemala are parties to the Conventions, they cannot logically refute their goals of ending impunity for torture and genocide. Numerous governments, including authoritarian regimes, hypocritically ratify treaties without any intent to enforce them and merely to “induc[e] a feel-good factor and a good human rights rating to waive in front of aid donors.”¹⁷³ But the Conventions mean what they say.¹⁷⁴ As argued by the Tribunal, the Genocide and Torture Conventions envisage that states will exercise “concurrent” jurisdiction over atrocity crimes to end impunity.¹⁷⁵

Citizens of non-party states may argue that enforcing the Conventions against them would violate the *nullem crimen sine lege*, or notice principle, because their countries do not recognize the treaty as their law at all.¹⁷⁶ Nonetheless, based on Nuremberg, Spain could also prosecute citizens of non-party states without violating this principle, as no one can feign ignorance of the fact that genocide and other atrocities are punishable.¹⁷⁷ In addition,

¹⁷⁰ *Id.* at 1104.

¹⁷¹ *Id.* at 1088.

¹⁷² STC, Sept. 26, 2005 (S.T.C., No. 237) § II.

¹⁷³ Orentlicher, *supra* note 34, at 1089 (quoting GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 370 (1999)).

¹⁷⁴ *Id.*

¹⁷⁵ STC, Sept. 26, 2005, § II.3, ¶ 3.

¹⁷⁶ Scharf, *supra* note 141, at 375.

¹⁷⁷ The Nuremberg Tribunal held that it was not unjust to punish the Nazis for crimes

“[s]ince terrorist acts and other international crimes are most often committed by nationals of rogue states that encourage or condone such activity, limiting the application of the treaties to nationals of State parties would significantly undermine their effectiveness.”¹⁷⁸ Accordingly, while consent by treaty may authorize Spanish universal jurisdiction, such procedural consent may not be required given the substantive nature of atrocity crimes.

VI. IMPLICATIONS FOR THE INTERNATIONAL LEGAL SYSTEM

More states will likely expand their own universal jurisdiction powers, especially if Spain and other countries' laws survive any legal challenges at the I.C.J. Therefore, there could theoretically be a chaotic situation due to a host of competing claims over the right to prosecute the same defendants. For example, alongside Spain, at least seven countries sought Pinochet's extradition from the United Kingdom.¹⁷⁹ A reasonable procedure may be needed to resolve such claims.

A quagmire could be avoided insofar as the discordant U.N. Security Council could agree to exercise its prerogative to refer cases to the I.C.C.,¹⁸⁰ a decision that Spain and other I.C.C. members would have to respect. Even when the I.C.C. lacks prosecutorial jurisdiction, it could technically be empowered to serve as a clearinghouse to decide which country has the priority to prosecute. The I.C.J. could also resolve disputes between states, as in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*. A new international advisory group could be created to help adjudicate competing claims, perhaps under the U.N. International Law Commission or International Court of Arbitration.¹⁸¹

While such procedures may become indispensable, it is unlikely that the expansion of universal jurisdiction will be wholly unmanageable. Past practice suggests that states will not prosecute atrocity crimes *ad nauseam*. First, given the high number of atrocity crimes recurrently perpetrated around the world, prosecutors and magistrates will not overburden themselves with investigating

prescribed in the Nuremberg Charter because they must have known that their atrocities were wrong, regardless of whether they were permitted by the state having territorial or personality jurisdiction. *Id.* Professor Scharf cites several U.S. precedents where courts enforced treaties against citizens of non-party states. *Id.* at 379–82.

¹⁷⁸ *Id.* at 382.

¹⁷⁹ See White, *supra* note 1, at 146–47.

¹⁸⁰ See Scheffer, *supra* note 2, at 429–31.

¹⁸¹ *Id.* at 430.

more than a mere fraction of all cases. Second, foreign policy constraints will lead them to avoid many delicate cases. For example, several European countries resisted American encouragements to prosecute Pol Pot, the now-deceased Cambodian Khmer Rouge leader, and Abdullah Ocalan, the Kurdish rebel of Turkey, even though they easily could have done so under domestic universal jurisdiction laws.¹⁸²

Aside from competing jurisdictional claims, the expansion of universal jurisdiction may lead to other problems, such as inconsistent rulings by different countries' courts,¹⁸³ including diverging interpretations of identical treaty provisions and conflicting evaluations of the state of international customary law, forum-shopping by victims,¹⁸⁴ and abuses by rogue states.¹⁸⁵ Be that as it may, universal jurisdiction and its benefits should not be abandoned altogether due to the fear of a worst case scenario. We might be witnessing the beginning of the end of outright impunity for atrocities, as universal jurisdiction "contributes to a conception of international criminal justice that, in combination with the ICC, might at least aspire to become systematic."¹⁸⁶ Some degree of procedural rigor is nonetheless warranted given universal jurisdiction's potential pitfalls. The need to end impunity "should not lead to incaution in determining exactly what it is that should be done."¹⁸⁷

VII. THE UNCERTAIN FUTURE OF SPANISH UNIVERSAL JURISDICTION

Whereas Spain's universal jurisdiction might not be barred by the I.C.J., it may not survive political pressure in spite of its deterrent value. Belgium already succumbed to international pressure to drastically amend its own law.¹⁸⁸ Many complaints had been filed in Belgian courts for essentially political reasons, as evidenced by their timing.¹⁸⁹ Certainly, Spain's universal

¹⁸² Scheffer, *supra* note 127, at 235.

¹⁸³ CASSESE, *supra* note 16, at 290.

¹⁸⁴ *Id.* at 289.

¹⁸⁵ States antipathetic to Western powers could use universal jurisdiction in bad faith to stage baseless show trials against political enemies. See PRINCETON PRINCIPLES, *supra* note 18.

¹⁸⁶ Marks, *supra* note 121, at 470.

¹⁸⁷ Morris, *supra* note 32, at 361.

¹⁸⁸ See Halberstam, *supra* note 55.

¹⁸⁹ Notably, after Ariel Sharon became the Israeli prime minister in 2001, he was charged with alleged genocide and war crimes dating back to 1982. *Id.* at 248. After America invaded Iraq in 2003, former President George H.W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell, and other U.S. officials were charged with alleged war crimes in the 1991

jurisdiction is much narrower than Belgium's former law, which authorized incumbent head-of-state prosecutions and *in absentia* trials. But Spain's law is expansive enough to cause many diplomatic headaches. Political pressure has already led senior Spanish executive officials to protest that Spain should not prosecute crimes in Argentina and Chile, including crimes against Spanish victims.¹⁹⁰

While Scilingo has been the only person tried and convicted thus far, at least five other Argentine repressors are in Spanish custody. Juan Carlos Fotea Dimieri should soon be tried in Spain.¹⁹¹ However, the others are facing extradition requests to Argentina, which seeks to try them for various crimes. Notably, María Estela de Perón, known as Isabel, who became Argentina's president between July 1974 and March 1976 as the widow of authoritarian president Juan Domingo Perón, was arrested in Spain after Argentina demanded her extradition so that she could be tried for crimes related to her role in leading a bloody repression campaign against dissidents.¹⁹² Perhaps in a deliberate effort to avoid prosecution for these and other crimes, Isabel Perón had fled to Spain, where she lived since 1981.¹⁹³ The fact that she ultimately

Gulf War. *Id.* at 250–51. General Tommy Franks was also charged with war crimes allegedly committed during the 2003 Iraqi invasion. *Id.* at 252.

¹⁹⁰ Boyle, *supra* note 37, at 191.

¹⁹¹ Fotea, a former police official in Argentina, was arrested in Madrid on November 24, 2006. José Yoldi, *Detenido en Madrid un Policía Argentino Acusado del Asesinato del Escritor Walsh*, EL PAÍS (Spain), Nov. 25, 2005. Since 1977, Fotea had exiled himself in Madrid, where he did profitable business in the real estate and security services industries. Benjamín Prado, *El Lobo*, EL PAÍS (Spain), Dec. 1, 2005. Spain will try him for the kidnapping of Alicia Milia de Pirlas, an Argentine woman now residing in Spain. It is also expected that Fotea will eventually be extradited to Argentina, which seeks to try him for the murder of Rodolfo Walsh, a famous Argentine novelist and journalist who also engaged in armed resistance with the Montoneros, a Peronist group. These alleged crimes were apparently part of a systematic repression campaign during the Argentine junta's Dirty War. José Yoldi, *España Juzgará al Represor Argentino Fotea Antes de Extraditarlo*, EL PAÍS (Spain), Nov. 23, 2006, at 12; Ernesto Ekaizer, *Who Killed Rodolfo Walsh?*, EL PAÍS (Spain) (English Version), Nov. 30, 2005, at 5.

¹⁹² Oriol Güell & Jorge Marirrodiga, *Isabelita Perón Convalece en la UCI de un Hospital de Madrid*, EL PAÍS (Spain), Feb. 14, 2007, at 9; see also Larry Rohter, *Argentine Ex-President Charged With Rights Abuses*, N.Y. TIMES, Jan. 13, 2007, at 3. Isabel Perón is accused of, *inter alia*, ordering various political assassinations and of arming the Argentine Anticommunist Alliance, known as the "Triple A." Güell & Marirrodiga, *supra* note 192. The Triple A was a paramilitary fascist group that was supported by the Argentine government, notably between 1974 and 1975. LEWIS, *supra* note 3, at 140–41. Its mission was to kill and repress leftists, not only communist guerrillas, but also peaceful dissidents, including union activists, academics, and journalists. *Id.*

¹⁹³ Jorge A. Rodríguez, *Isabelita Perón Queda en Libertad Provisional Tras Ser Detenida*

obtained Spanish citizenship might enable her to avoid being extradited to Argentina,¹⁹⁴ although she could still be tried in Spain on the basis of universal jurisdiction.

On the other hand, it is expected that Spain will extradite Ricardo Taddei¹⁹⁵ and Rodolfo Eduardo Almirón Sena to Argentina.¹⁹⁶ Similarly, a Spanish court has halted its prosecution of Ricardo Cavallo¹⁹⁷ because Argentine courts have started proceedings against him, which may lead to an extradition request.¹⁹⁸

The Argentine cases suggest that Spanish courts can be moderate in asserting their universal jurisdiction. First, the courts have declined to prosecute most defendants whose extradition was sought by Argentina, which is the state having territorial jurisdiction and obviously the greatest link to the cases concerned. Second, insofar as Spain has sought to prosecute Argentine repressors, this has not posed a major diplomatic problem since these repressors are vilified as gross human rights violators in Argentina, where they would also likely face prosecution if not tried in Spain.

en Madrid, EL PAÍS (Spain), Jan. 13, 2007, at 2.

¹⁹⁴ *Id.*; see also *Slaking a Thirst for Justice*, ECONOMIST, Apr. 14, 2007, at 40.

¹⁹⁵ Jorge A. Rodríguez, *Detenido en Madrid un Ex Militar Argentino Acusado de 161 Casos de Secuestro o de Tortura*, EL PAÍS (Spain), Feb. 10, 2006, at 24. Taddei was arrested in Madrid on February 8, 2006. Spain will likely extradite him to Argentina, which seeks to try him for 161 cases of torture and kidnapping. *Id.* Taddei entered Spain legally in 1985 and maintained a lawful immigration status. He kept a low profile as the owner of a modest shoe repair and key duplication shop in Madrid. Jorge A. Rodríguez, *El Pasado Cruel del Buen Zapatero*, EL PAÍS (Spain), Feb. 12, 2006, at 26. According to one of his alleged victims who was sequentially detained in five separate concentration camps during Argentina's Dirty War, Taddei was the "toughest" when it came to ordering torture and confessed his admiration for Adolf Hitler. Natalia Junquera, *Era el Torturador Más Duro, El Que Daba Órdenes*, EL PAÍS (Spain), Feb. 10, 2006, at 24; see also A. Eatwell, *Argentine Former Police Officer Arrested in Madrid to Face Kidnap and Torture Charges*, EL PAÍS (English version) (Spain), Feb. 10, 2006, at 3.

¹⁹⁶ J.A. Rodríguez & J. Marirrodiga, *La Policía Detiene En Valencia a un Jefe de la Ultraderechista Triple A de Argentina*, EL PAÍS (Spain), Dec. 29, 2006, at 26. Almirón, who had lived in Spain since 1983, was presumably the military chief of the Argentine Anticommunist Alliance. *Id.*; see *supra* note 192.

¹⁹⁷ Spanish prosecutors had charged Cavallo, a former Argentine military official, with one count of genocide, seven murders, 152 assaults, and 407 terrorism charges. Manuel Marraco, *La Fiscalía Acusa de Genocidio al Ex Militar Argentino Cavallo*, EL MUNDO (Spain), Jan. 12, 2006, at 27. In June 2003, Spain obtained Cavallo's extradition from Mexico. Cavallo had assumed a false identity in Mexico, where he managed to obtain a prominent post as the director of the National Center for Vehicle Registration. Méndez, *supra* note 11.

¹⁹⁸ Julio M. Lázaro, *La Audiencia Renuncia a Juzgar al Represor Argentino Serpico*, EL PAÍS (Spain), Dec. 21, 2006, at 28.

Conversely, Spanish courts may be perceived as quite immoderate, if not radical, and certainly far less diplomatic in asserting their universal jurisdiction against defendants who are not facing prosecution in their respective countries because they are considered innocent of any wrongdoing by their national governments and courts. Spanish courts have already thrust themselves in this difficult situation by accepting cases against defendants from China and the United States, which have both steadfastly opposed these defendants' prosecutions in Spain or even in their own national courts.

In the case of China, an alleged victim, a Spanish national of Tibetan origin named Thubten Wangchen, as well as two non-profit organizations filed a complaint against former high-profile Chinese officials for genocide in Tibet.¹⁹⁹ The defendants include former president Jiang Zemin, former prime minister Li Peng, and five other former officials.²⁰⁰ Wangchen was enthused after making his first declaration in court, arguing that this was a "historic day" because it was the "first time" that a Tibetan could tell a judge about the alleged genocide.²⁰¹ He nonetheless was pragmatic in stating that he did not expect that China would extradite the former officials to Spain,²⁰² which is a prerequisite for a trial to go forth since Spanish law would not authorize an *in absentia* trial.²⁰³ But he expressed hope that the case would increase international discussion about Tibet so that "the Chinese government recognizes its errors and starts respecting human rights."²⁰⁴ In a separate case, several exiled Chinese citizens and Falun Gong members filed a complaint against other officials alleging genocide and torture, including trafficking of organs forcibly harvested from Falun Gong members.²⁰⁵ Hundreds, if not thousands, of Falun Gong members have been killed or detained due to the Chinese government's repression of this opposition group and its "spiritual" movement.²⁰⁶

In protest, China reiterated its longstanding position that it has absolute sovereignty over its citizens and rejects any foreign interference in its domestic

¹⁹⁹ *Pekin*, *supra* note 14.

²⁰⁰ *Id.*; Yoldi, *supra* note 14; Christine A.E. Bakker, *Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work?*, 4 J. INT'L CRIM. JUST. 595 (2006).

²⁰¹ *See Pekin*, *supra* note 14.

²⁰² *Id.*

²⁰³ STC, Sept. 26, 2005 (S.T.C., No. 237) § II.7, ¶ 4.

²⁰⁴ *Pekin*, *supra* note 14.

²⁰⁵ Junquera, *supra* note 195.

²⁰⁶ *Pekin*, *supra* note 14.

affairs “under the pretext of human rights.”²⁰⁷ Statements by the Chinese government decried the accusations in the Tibet and Falun Gong cases, stating that they were “complete defamation, an absolute lie”²⁰⁸ as well as “‘calumnies’ . . . motivated by political reasons [in order to] damage the international image of China and bilateral relations between Spain and China.”²⁰⁹ Regarding the Falun Gong case, a spokesman for the Chinese Embassy in Spain stated that Falun Gong is “an illegal sect, which causes illnesses and makes people crazy. . . . The complaint is exaggerated and false.”²¹⁰ In the eyes of the Chinese regime, Spain added insult to injury when it also granted asylum to several Falun Gong members.²¹¹ The Chinese government also summoned Spain’s ambassador in Beijing in order to give him an earful about Spain meddling in Chinese affairs.²¹²

The Spanish executive seemed fairly receptive to these complaints, as it undoubtedly seeks to preserve its profitable relations with China, the new economic behemoth. A Spanish prosecutor, who apparently spoke in the name of the executive branch, said he opposed these proceedings by arguing that Spanish courts cannot be “universal pursuers of justice,”²¹³ thereby disagreeing with the Constitutional Tribunal. The prosecutor distinguished the Guatemalan genocide case tried in Spain from the Chinese cases by arguing that Spain has “historical, language, and even moral links” with Guatemala, unlike the “exotic and distant” China.²¹⁴ He also challenged the validity of the genocide charge in the Falun Gong case, specifically questioning whether Falun Gong is a religious group covered by the definition of genocide.²¹⁵ Nevertheless, the Spanish executive is essentially powerless to stop the proceedings because the investigations are conducted by judges empowered to accept cases and act as pseudo prosecutors in Spain’s inquisitorial system. The Spanish Foreign Ministry actually stated that the executive branch

²⁰⁷ José Reinoso, *China Acusa a España de Injerencia por Dar Asilo a Miembros de Falun Gong*, EL PAÍS (Spain), June 14, 2006, at 19.

²⁰⁸ *Pekin*, *supra* note 14.

²⁰⁹ Reinoso, *supra* note 207.

²¹⁰ Junquera, *supra* note 195.

²¹¹ Reinoso, *supra* note 207.

²¹² *El Gobierno Chino Cita al Embajador Español por las Causas Judiciales del Tibet y Falun Gong*, EL PAÍS (Spain), June 9, 2006, at 1.

²¹³ *La Represión China, Ante la Audiencia Nacional*, EL PAÍS (Spain), June 12, 2006; *see also Peking*, *supra* note 14.

²¹⁴ J.M. Lázaro, *El Supremo Ordena Investigar el Presunto Genocidio de Falun Gong*, EL PAÍS (Spain), June 7, 2006.

²¹⁵ *Id.*

“maintains a scrupulous respect for judicial decisions.”²¹⁶ However, this justification is unlikely to satisfy the Chinese government, which does not recognize a meaningful separation of powers in its own political system.²¹⁷

In addition to drawing the ire of the Chinese government, Spain's expanded universal jurisdiction has already led to tensions with the United States, an even closer strategic ally. In a controversial judicial decision, Spain indicted three American soldiers for the death of a Spanish journalist who was killed when their tank fired at the Hotel Palestine in Baghdad on April 8, 2003.²¹⁸ Based on the Constitutional Tribunal's decision to expand universal jurisdiction, Spanish courts were deemed competent to try the American soldiers for what was deemed a “crime against the international community” and a crime against civilians protected by the Fourth Geneva Convention.²¹⁹ Santiago Pedraz, the Spanish magistrate handling the case, asserted that the soldiers must have known that the hotel was situated in a civilian area and was only occupied by journalists.²²⁰ Because the magistrate deemed that no evidence demonstrated that the soldiers were under attack, he contended that the soldiers' use of force was an act of reprisal or intimidation against journalists who were critical of the war.²²¹ This allegation was disputed by the U.S. government, whose investigation concluded that the soldiers had abided by the applicable combat rules and not committed any crime,²²² and that the soldiers were targeting a sniper located on the hotel's roof.²²³ The U.S. government has also refused to cooperate with Spain's investigation.²²⁴ Spain, nonetheless, issued an international arrest warrant against the three soldiers, much like the warrant formerly issued against Pinochet.²²⁵ It is highly unlikely

²¹⁶ *Pekin*, *supra* note 14.

²¹⁷ See generally Joseph Kahn, *Deep Flaws, and Little Justice, in China's Court System*, N.Y. TIMES, Sept. 21, 2005, at 1.

²¹⁸ *Soldiers Indicted in Killing*, N.Y. TIMES, Apr. 28, 2007, at 5; José Antonio Hernández, *Procesados Tres Militares De EE UU Por La Muerte Del Cámara José Couso*, EL PAÍS (Spain), Apr. 28, 2007, at 21; see also John F. Burns, *3 Journalists Die in U.S. Strikes on 2 Baghdad Buildings*, N.Y. TIMES, Apr. 9, 2003, at 2.

²¹⁹ J.M. Lázaro, *El Supremo Ordena Reabrir El 'Caso Couso' En Contra De La Audiencia*, EL PAÍS (Spain), Dec. 6, 2006, at 19.

²²⁰ Hernández, *supra* note 218.

²²¹ *Id.*

²²² José Antonio Hernández, *EE UU Rechaza Facilitar Al Juez Datos De Quienes Mataron A Couso*, EL PAÍS (Spain), Feb. 5, 2007, at 23.

²²³ Thom Shanker, *U.S. Says Shot Fired at Hotel Was Justified*, N.Y. TIMES, Aug. 13, 2003, at 14.

²²⁴ Hernández, *supra* note 222.

²²⁵ Hernández, *supra* note 218.

that the soldiers will ever be brought into Spanish custody, as a U.S. State Department spokesman stated that it will be a "very cold day in hell" before American soldiers have to answer to Spanish courts.²²⁶

Moreover, Ismael Moreno, a Spanish magistrate, is currently investigating whether any legal violations were committed by American or Spanish officials when Spain allowed numerous U.S. government planes to transit in Spain on their way to the U.S. military base in Guantánamo, Cuba.²²⁷ The origin and final destination of the planes remain unknown, although the investigation determined that at least one plane originated from Afghanistan.²²⁸ This judicial investigation was spurred by a criminal complaint filed by several Spanish human rights non-governmental organizations (NGOs).²²⁹ Judge Moreno has also accepted to investigate accusations of torture against agents from the Central Intelligence Agency (CIA) whose flights transited through Spain as part of the practice of "extraordinary rendition,"²³⁰ the transfer of terrorism suspects to countries where they allegedly face torture or other harsh interrogation methods.²³¹

The U.S. government will predictably construe the three aforesaid cases against American defendants, not only as an assault on American sovereignty, but also as an unjustified challenge to the lawfulness of America's "War on Terror" by foreign magistrates who sit atop an ivory tower and indulge in anti-American biases. Indeed, while the U.S. government has insisted that "aggressive" methods are necessary to defend America against dangerous terrorists, it has flatly denied that it tortures terrorism suspects.²³² The judicial proceedings against Americans in Spain could consequently lead to considerable diplomatic frictions. But this may only be the beginning. Faced with eventual complaints from purported victims, Spain will likely have to

²²⁶ José Yoldi, *El Juez Reactiva La Orden De Detener A Los Militares De EE UU Que Mataron A Couso*, EL PAÍS (Spain), Jan. 17, 2007, at 21.

²²⁷ M.G., *La Acusación Pide al Juez que Indague los Vuelos Desde Bases Españolas a Guantánamo*, EL PAÍS (Spain), Mar. 5, 2007, at 30; Miguel González, *EE UU Utilizó las Bases de Rota, Morón y Torrejón Para Sus Vuelos a Guantánamo*, EL PAÍS (Spain), Feb. 12, 2007, at 22.

²²⁸ González, *EE UU Utilizó*, *supra* note 227.

²²⁹ M.G., *La Acusación*, *supra* note 227.

²³⁰ Miguel González, *La Acusación Pide al Juez que Impute a lost 13 Agentes de la CIA que Hicieron Escala en Palma*, EL PAÍS (Spain), Dec. 20, 2006, at 22.

²³¹ *EU Countries Ignored CIA Terror Suspect Flights, Report Says*, GUARDIAN (London), Feb. 14, 2007, available at <http://www.guardian.co.uk/usa/story/0,,2012966,00.html>.

²³² Michael A. Fletcher, *Bush Defends CIA's Clandestine Prisons; 'We Do Not Torture,' President Says*, WASH. POST, Nov. 8, 2005, at A15.

decide whether to prosecute former officials in even more controversial cases. For instance, the German Supreme Court has received complaints from human rights groups asking that Donald Rumsfeld be tried for war crimes after he lost diplomatic immunity pursuant to his resignation as the U.S. secretary of defense.²³³

In the end, Spanish judicial and prosecutorial authorities may not allow these cases to go forward due to political and economic costs. Time will tell whether Spain is prepared to confront other countries, especially strategic allies, if they remove their ambassadors and threaten diplomatic retaliation in defense of their sovereignty against Spanish universal jurisdiction.

Conceivably, Spain may ignore allegations against former officials of certain “untouchable” countries while targeting relatively powerless defendants. This approach may be predicted by the Belgian precedent, where the prosecutions of high-profile political and military figures, incumbent or not, had not advanced to the merits before Belgium dismissed many cases under its new law.²³⁴ Conversely, Belgium tried and convicted four Rwandan civilians who were sentenced to prison terms ranging from twelve to twenty years for genocide.²³⁵

[T]he [Rwanda] case proceeded to trial because of a unique combination of historical conditioning factors: (1) the presence of the accused in Belgium during the investigation; (2) the severity of the atrocities of which they were accused; (3) the strength of the evidence against them; (4) the sense that the prosecution was apolitical and not tantamount to taking sides in a distant political conflict; (5) the absence of an effective judiciary in the state where the atrocities took place and the presence of one in Belgium; (6) the special links between the state of the crime and Belgium; (7) the political powerlessness of the defendants; and (8) the lack of opposition from any state, in particular Rwanda, to their prosecution.²³⁶

²³³ *El Destituido Jefe del Pentágono, Demandado por Crímenes de Guerra*, EL PAÍS (Spain), Nov. 25, 2006, at 5; Mark Landler, *12 Detainees Sue Rumsfeld In Germany, Citing Abuse*, N.Y. TIMES, Nov. 15, 2006, at 17.

²³⁴ Ratner, *supra* note 55, at 893.

²³⁵ *Id.* at 889.

²³⁶ *Id.* at 892.

Since cases involving dictators and other officials have stalled largely due to diplomatic considerations, the conviction of vulnerable Rwandan civilians may have been an example of hypocritical and paternalistic neocolonialism by Belgium against one of its former colonies in Africa,²³⁷ especially since only a Western country is likely to have the time and money to investigate and prosecute entirely foreign atrocity crimes. Though the neocolonialist critique may be exaggerated,²³⁸ the Rwandan case exemplified how universal jurisdiction laws will necessarily be enforced unequally if some defendants are considered untouchable.

Regardless of any neocolonialist biases,²³⁹ the law will inevitably be enforced discriminatorily. Atrocity crimes are typically perpetrated on a wide scale, which means that prosecutors can only prosecute a fraction of all perpetrators, generally focusing on those most responsible. Prosecuting top officials attracts extensive public attention, thereby setting an example to deter atrocities worldwide. Yet, singling out political leaders might offend democratic egalitarian values and the Kantian principle of not using a person as a means to an end.

The worst discrimination would occur if Spain refuses altogether to prosecute certain untouchable characters. But Spain might conceivably be justified in doing so if prosecuting them would create diplomatic problems damaging Spanish political and economic interests. Perhaps "it is unrealistic to see universal jurisdiction as charity work for forum states."²⁴⁰ Aside from human rights benefits, a state should also be entitled to "consider its own interests in deciding whether to prosecute."²⁴¹

There may be good reason to require only the attorney general to pursue any such charges so that lower level prosecutors and magistrates who wish to act independently of the national

²³⁷ *Id.* at 894.

²³⁸ Persons from developing countries are likely to be disproportionately charged with atrocity crimes. Rabinovitch, *supra* note 28, at 519. But this does not necessarily evince discrimination insofar as these crimes have disproportionately occurred in developing countries like Cambodia, East Timor, Rwanda, and Sudan.

²³⁹ A neocolonialist critique of universal jurisdiction may also question whether a country has the moral authority to act as the conscience of the world by judging other countries' abuses despite its own record of abuses. For instance, in Spain's case, some may question under what pretense Spanish courts may act as universal guarantors of human rights given Spain's own history of colonialism, slavery, and fascism.

²⁴⁰ Ratner, *supra* note 55, at 893.

²⁴¹ *Id.*

government cannot trigger an international witch-hunt that may or may not be politically motivated or lack merit. There is no guarantee against politically motivated charges at the highest national level either, but the chances of that happening may be fewer if the political realities of interstate relations and the need to prevent judicial chaos in the international system influence national authorities.²⁴²

Instead, in Spain, magistrates like Baltasar Garzón have played an important role in driving proceedings.²⁴³ It is unclear whether this arrangement will remain manageable if Spain's caseload grows to include more cases tied to complex political situations.

Complications will arise if defendants only on one side of a political conflict are charged, such as Palestinians and not Israelis or vice versa. Atrocity crimes frequently occur during military or political conflicts where all sides tend to commit gross human rights violations. Spain might therefore be tempted to be "fair" and prosecute perpetrators on all sides. But this may fail to bring a "fair" result if each case does not have the same outcome, which would lead critics to protest that Spain is taking sides in a political conflict. At the same time, any attempt to ensure that defendants on all sides receive the same verdict and sentence would compromise judicial independence and the integrity of the truth-finding process. Spain may therefore be thrust into an intractable situation provoking negative political repercussions. Additionally, if complaints are only or mostly brought by victims on one side of a conflict, Spanish magistrates or prosecutors might be tempted to intervene and bring complaints against the other side to even the balance, which could prove very awkward. Of course, one might counter that such considerations are irrelevant

²⁴² Scheffer, *supra* note 2, at 429.

²⁴³ See generally Simons, *supra* note 53. Judge Garzón has become a celebrity in Spain for pursuing international human rights violators and many other high-profile defendants. He has reopened proceedings against Silvio Berlusconi, the former Italian prime minister, for tax evasion and fraud. Yoldi, *supra* note 191. He has led proceedings against corrupt Spanish officials, drug dealers, and terrorists from Euskadi Ta Askatasuna (ETA), the Basque separatist group. See, e.g., Ana Portalo, *Baltasar Garzón*, EPOCA (Spain), July 7, 2006, at 44. Judge Garzón is also investigating Spanish officials accused of falsifying intelligence reports to pretend that ETA was linked to the Madrid terrorist attacks of March 11, 2004. José Yoldi, *Garzón Impute a Tres Peritos que Reconocen Haber Falseado el Informe que Vincula a ETA con el 11-M*, EL PAÍS (Spain), Sept. 30, 2006, at 18. Further, Judge Garzón is investigating Hassan El Haski, who is suspected of being one of the actual culprits in the attacks. José Yoldi, *Garzón Seguirá Investigando el Caso en Relación con El Haski*, EL PAÍS (Spain), Oct. 5, 2006, at 19.

since the purpose of penal law is to punish the guilty in a particular case, even if other culprits are uncharged.

Universal jurisdiction might also violate the separation of powers. Because many cases will have diplomatic implications, the judiciary may become entangled in foreign policy decisions generally handled by the executive.²⁴⁴ For example, judges will have to weigh whether protecting human rights justifies offsetting national political or economic interests. This separation of powers critique could go further into accusing the Spanish Constitutional Tribunal of usurping the elected legislature's power with judicial activism. Statutory law was essentially silent on the issue of links to national interests and conditional or absolute jurisdiction.²⁴⁵ The Spanish Supreme Court read this as an implicit bar on broad jurisdiction. The Tribunal saw it as an implicit authorization. Regardless of which interpretation was correct, judges can interpret statutes broadly or narrowly, and this largely depends on their subjective beliefs.

Nevertheless, all of these problems are unlikely to convince human rights purists that Spain's universal jurisdiction is too broad. In particular, while purists might concededly accept unequal selective enforcement of the law insofar as it can deter human rights violations, they will not make compromises in their quest to ensure that no violators are considered untouchable. Purists believe that "[n]either a legislature preparing a statute, nor a public prosecutor determining whether to take a case, nor an investigating judge preparing it for trial should be influenced by [political pressure]."²⁴⁶ To purists' credit, there is little merit to the claim that prosecuting top officials automatically entails an abuse of universal jurisdiction for "political" reasons. Atrocity crimes are generally committed or sponsored by government officials for political motives. So it is essentially a truism to argue that there is a "political" dimension to a prosecution. Further, a prosecution is not necessarily "abusive" if based on reasonable probable cause or another appropriate legal standard assessed by judicial and prosecutorial authorities.

By expanding universal jurisdiction over all culprits regardless of political pressure or national interests, the purist approach increases deterrence and contributes to reducing impunity for atrocities. International treaties cannot deter atrocities without a "credible threat of enforcement."²⁴⁷ This may be

²⁴⁴ CASSESE, *supra* note 16, at 290.

²⁴⁵ See *Ley Orgánica del Poder Judicial* [L.O.P.J.] [Law on Judicial Power], art. 23.4 (Spain).

²⁴⁶ Ratner, *supra* note 55, at 893.

²⁴⁷ Orentlicher, *supra* note 34, at 1064.

what the Spanish Constitutional Tribunal had in mind when it held that links to national interests were not required. The narrow conditional universal jurisdiction proposed by the Spanish Supreme Court was little more than a travel ban. Few human rights abusers venture into countries where they can be prosecuted and face years in prison, leaving Spain powerless to prosecute those responsible for all but a minute fraction of atrocities. Conversely, under the Tribunal's holding, Spain will be able to initiate investigations *in absentia* and use extradition processes to force the accused into Spain to stand trial.²⁴⁸ This will have much greater deterrence potential than a mere travel ban. Of course, many culprits may never be punished, especially if extradition requests are commonly rejected. Authorities may end up investigating numerous complaints that will not result in prosecution.²⁴⁹ Still, "the stigma associated with investigations and prosecutions, even in *absentia*, will in some measure punish criminals" and help deter atrocities.²⁵⁰ Moreover, deterrence depends largely on notifying political and military officials that human rights abuses will not be tolerated. Spain's foray into international criminal justice helped provide such notice by raising public consciousness about the importance of human rights and the need to hold abusers accountable.

It is nonetheless noteworthy that, far from deterring human rights abuses, universal jurisdiction might actually reinforce the status quo by enticing despots to cling onto power rather than step down and face prosecution for their crimes.²⁵¹ In Spain's case, this is especially likely to occur when the prospective defendant is an incumbent head of state. Indeed, because Spain grants immunity to incumbent heads of state, all they have to do to avoid being

²⁴⁸ See STC, Sept. 26, 2005 (S.T.C., No. 237).

²⁴⁹ CASSESE, *supra* note 16, at 290.

²⁵⁰ Rabinovitch, *supra* note 28, at 520.

²⁵¹ Enrique de Diego, *El Juez Veleta*, EPOCA (Spain), Mar. 23, 2007, at 16–17. This criticism of Spanish universal jurisdiction is part of a broader position that argues against international justice, including prosecution in international courts, insofar as it has the potential to hamper democratic transition. For instance, the International Criminal Court has issued warrants seeking the apprehension of five leaders of the Lord's Resistance Army, a Ugandan militia allegedly responsible for killing tens of thousands of victims and other atrocities. Emily Wax, *Net Tightens Around Northern Uganda's Brutal Rebel Militia; Lord's Resistance Army Unchecked for 20 Years*, WASH. POST, Oct. 8, 2005; Press Release, International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), available at http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html. The case has stalled partly due to an ongoing controversy over whether the Ugandan government should grant the men amnesty in exchange for a peace deal. See generally *Will Kony Come Out of the Bush?*, ECONOMIST, Oct. 21, 2006, at 56; *Heeding Truce, Rebel Leader From Uganda Waits in Sudan*, N.Y. TIMES, Sept. 18, 2006, at 18.

prosecuted in Spain is remain in power.²⁵² Rather than dissuade human rights abuses, Spanish universal jurisdiction might actually dissuade abusers from stepping down, thereby paradoxically enabling them to commit more abuses.²⁵³

While Spanish universal jurisdiction may reinforce the status quo under these circumstances, it can have a positive impact by spurring domestic prosecutions in countries that are amenable to change. Spain's highly publicized effort to prosecute Pinochet and Argentine repressors probably contributed to putting domestic prosecutions for past abuses back on the agenda in Chile and Argentina. When Judge Garzón started Spain's investigations in 1996, Pinochet was still the Chilean army's commander-in-chief.²⁵⁴ However, by the time Pinochet died following a heart attack on December 10, 2006, he had become increasingly recognized by Chileans and others as the tyrant and mass human rights violator that he was.²⁵⁵ Pinochet was stripped of his untouchability after distinguished Spanish and British judges held that he was not immune from prosecution for atrocities. This may have emboldened and inspired Chilean judges and prosecutors in their subsequent efforts to try and hold Pinochet accountable.²⁵⁶ After the British executive branch refused to extradite Pinochet to Spain and allowed him to return to Chile,²⁵⁷ he was charged in Chile with ordering and covering up the killings of political opponents by a death squad shortly after his coup. Yet, the courts eventually deemed him mentally unfit to stand trial due to his poor health.²⁵⁸ Pinochet was ultimately re-prosecuted. In November 2005, he was arrested and "charged with tax evasion, passport forgery and other crimes associated with his possession of hundreds of illegal bank accounts, many of them in the United States."²⁵⁹ Additionally, in October 2006, Pinochet was placed under house arrest after being charged with kidnapping, torture, and murder at a secret detention center in the early years of his dictatorship.²⁶⁰ Even though Pinochet died before being tried, the Chilean attempts at

²⁵² de Diego, *supra* note 251, at 14–21; *see also supra* note 117 and accompanying text.

²⁵³ de Diego, *supra* note 251.

²⁵⁴ *Spain's Unchartered Foray into World Justice*, *supra* note 3.

²⁵⁵ *See* Kandell, *supra* note 40.

²⁵⁶ *See* Orentlicher, *supra* note 34, at 1124–27.

²⁵⁷ *See supra* note 48 and accompanying text.

²⁵⁸ Clifford Krauss, *Chile Court Bars Trial of Pinochet*, N.Y. TIMES, July 10, 2001, at 1; *see also* Orentlicher, *supra* note 34, at 1071–72 nn.76–78.

²⁵⁹ Monte Reel, *Pinochet Faces New Charges; Chile's Ex-Dictator Accused of Tax Evasion, Illegal Accounts*, WASH. POST, Nov. 24, 2005, at A22.

²⁶⁰ *Pinochet Under House Arrest in Prison Torture*, N.Y. TIMES, Oct. 31, 2006, at 6.

prosecution were meaningful. While Pinochet escaped justice, other elements from his past regime may not. Michelle Bachelet, the Chilean president, has been pushing for the revocation of an amnesty law that shields numerous abusers from prosecution.²⁶¹

Similarly, when Judge Garzón started his investigations, “none of the estimated 3,500 Argentines involved in the ‘dirty war’ were in jail for their crimes.”²⁶² At least 175 Argentine repressors have been charged in Argentina with gross human rights violations since the Spanish investigations began.²⁶³ Further, in August 2003, the Argentine Congress repealed two amnesty laws promulgated in the 1980s.²⁶⁴ This action was partly a response to Judge “Garzón’s issuance of warrants seeking the extradition of 45 Argentine military officers and one civilian.”²⁶⁵ The Argentine government also prevented suspected repressors from fleeing abroad.²⁶⁶ Of course, it is impossible to know whether Chile and Argentina would still have conducted these prosecutions without Spain’s involvement. While causality cannot be ascertained, it is probable that Spain’s intervention bolstered or invigorated efforts to prosecute gross human rights violators in Chile and Argentina.²⁶⁷ In turn, the prosecutions in Argentina and Chile have inspired human rights advocates in Brazil to try and prosecute key officers of that country’s past military dictatorship on allegations of torture against political prisoners.²⁶⁸ Thus, Spain’s efforts to prosecute foreign atrocity crimes may have far-reaching repercussions in Latin America by bringing forth a virtuous circle against impunity.

Despite its positive influence, it is uncertain whether Spain’s foray into international criminal law will last much longer. The Constitutional Tribunal’s

²⁶¹ Larry Rohter, *Chile’s Leader Attacks Amnesty for Pinochet-Era Crimes*, N.Y. TIMES, Dec. 24, 2006, at 13.

²⁶² *Spain’s Uncharted Foray into World Justice*, *supra* note 3.

²⁶³ *Id.*; see also *Slaking a Thirst for Justice*, *supra* note 194.

²⁶⁴ Orentlicher, *supra* note 34, at 1127. Since then, the Argentine Supreme Court unanimously invalidated pardons that former president Carlos Menem had granted to two former military chiefs who had previously been convicted and received life sentences. Jorge Marirrodiga, *Un Tribunal Argentino Declara Ilegal el Indulto a Dos Militares de la Dictadura*, EL PAÍS (Spain), Apr. 26, 2007, at 13. This decision was partly based on the ground that gross human rights violations are ineligible for a presidential pardon. *Id.*

²⁶⁵ Orentlicher, *supra* note 34, at 1127.

²⁶⁶ *Spain’s Uncharted Foray into World Justice*, *supra* note 3.

²⁶⁷ See *Slaking a Thirst for Justice*, *supra* note 194.

²⁶⁸ Larry Rohter, *Groups in Brazil Aim to Call Military Torturers to Account*, N.Y. TIMES, Mar. 16, 2007, at 12.

broad authorization of universal jurisdiction may have unintended consequences. Litigants from around the world could flock to Spanish courts to file criminal complaints, especially since Belgium has now mostly closed its courts to foreign victims. This litigation could lead Spain to face intense diplomatic pressure. Spanish legislators may resolve the matter by amending the law to significantly narrow universal jurisdiction as Belgian legislators did. Paradoxically, the Constitutional Tribunal accused the Supreme Court of having “practically de facto abrogated” universal jurisdiction,²⁶⁹ although the Tribunal’s decision might cause the same result if it leads Spanish legislators to emasculate the expanded universal jurisdiction law, unless Spain is prepared to pay the price for truly defending human rights.

VIII. CONCLUSION

The modern drive to prosecute foreign atrocity crimes in national courts based on universal jurisdiction is virtually unprecedented. Jurists sharply disagree over the appropriate scope of universal jurisdiction, as evidenced by the radically different views of Spain’s high courts. While broad universal jurisdiction may be permissible under international law, Spain and other countries nonetheless have an important responsibility to exercise procedural rigor in enforcing their laws. Moreover, the international legal system could benefit from the creation of a reasonable procedural mechanism to resolve competing jurisdictional claims by states seeking to try the same defendants. In any event, by prosecuting entirely foreign atrocity crimes in its courts, Spain will help deter human rights violations and reduce impunity for atrocities—assuming its universal jurisdiction law survives a potential I.C.J. challenge and assuredly intense political pressure.

The efforts by Spain and other countries to prosecute certain gross human rights violators sharply contrast with the impunity afforded to numerous other repressors. After stepping down, Haiti’s “Baby Doc” Duvalier enjoyed a lavish lifestyle in the French Riviera, Paraguay’s Alfredo Stroessner kept a mansion outside Brasilia, and Uganda’s Idi Amin stayed comfortably in Jeddah.²⁷⁰ Although universal jurisdiction could help avoid such impunity, attempts to prosecute abusers in foreign courts will remain controversial. When Pinochet was detained in England pursuant to Spain’s extradition

²⁶⁹ STC, Sept. 26, 1005 (S.T.C., No. 237).

²⁷⁰ Daniela Deane, *Former Dictators May Find Exile Not Quite As Safe*, USA TODAY, Oct. 28, 1998, at 14A.

request,²⁷¹ former British Prime Minister Margaret Thatcher, protested vehemently against this “tragedy.”²⁷² Notably, she declared that Pinochet was a British “friend” and ally, and that “there is no evidence of [his] involvement in, or even knowledge of, the cases concerned. . . .”²⁷³ She warned of “an international lynch-law which, under the guise of defending human rights, now threatens to subvert British justice and the rights of sovereign nations.”²⁷⁴ Thatcher’s arguments exemplified the belief that political interests somehow excuse or justify impunity for gross human rights violations. However, “[t]he notion that political imperatives immunize any individual from [prosecution for atrocities] is quickly losing credibility, and no democratic government . . . could champion such impunity and remain true to the fundamental governing principles of a modern civilized society.”²⁷⁵ Spain, essentially acting through its judiciary, is leading the international community by example in insisting that impunity for wide-scale atrocities simply cannot be tolerated.

²⁷¹ See Hoge, *supra* note 48.

²⁷² *Pinochet Was This Country's Staunch, True Friend: Full Text of Margaret Thatcher's Speech to the Blackpool Fringe*, GUARDIAN (London), Oct. 6, 1999, available at <http://www.guardian.co.uk/tory99/Story/0,,202256,00.html>.

²⁷³ *Id.*

²⁷⁴ *Id.* Thatcher also stated: “Pinochet was this country’s staunch, true friend in our time of need when Argentina seized the Falkland Islands . . . [b]ut how did the authorities under this Labour Government chose [sic] to repay it? I will tell you - by collaborating in Senator Pinochet’s judicial kidnap.” *Id.* In her eyes,

revenge by the Left, not justice for the victim, is what the Pinochet case is all about. Senator Pinochet is in truth on trial, not for anything contained in Judge Garzon’s indictment, but for defeating communism. What the left can’t forgive is that Pinochet undoubtedly saved Chile and helped save South America.

Id. Thatcher’s remarks overlooked the nonpartisan humanistic principle that human rights abuses are intolerable, whether committed by rightists, leftists, or others.

²⁷⁵ David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 52–53 (2002).

