

The Impasse of Tibetan Justice: Spain’s Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide

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INTRODUCTION

Universal jurisdiction is the progressive and contentious legal principle that courts have competence to adjudicate cases involving alleged violations of international law regardless of the nation in which those crimes occurred, the nationality of the victim, or the nationality of the perpetrator.¹ While the limits of more conventional theories of jurisdiction are defined by sovereignty, territory, and nationality, the exercise of universal jurisdiction is based solely on the nature of the crime alleged.² That is, when a crime is so serious that it violates peremptory norms of international law, courts are entitled, or even obliged, to hear those cases regardless of when, where, and by whom those crimes were committed.³

The cases at the heart of this Comment typify the use of universal jurisdiction in order to prosecute perpetrators of serious international crimes. In June 2005, Spanish nonprofit organizations, including the Committee to Support Tibet (*Comite de Apoyo al Tibet*) and the Tibet House Foundation (*Fundacion Casa del Tibet*), filed a complaint before the Spanish National Audience (*Audiencia Nacional*).⁴ The complaint accused former Chinese government and military officials of committing, *inter alia*, acts of genocide and torture in Tibet⁵ from 1950 to the present, including the murder or displacement of more than a million Tibetans.⁶ At first glance, it may seem audacious, or even outlandish, that the Spanish judiciary might concern itself with a complaint involving acts allegedly committed decades ago, thousands of miles from Spain, and by and against parties with no explicit connection to Spain.

1. BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 99 (2d ed. 2010).

2. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON UNIV., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001) [hereinafter PRINCETON PRINCIPLES], available at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

3. Stephen Macedo, *Introduction* to UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 4 (Stephen Macedo ed., 2004). This concept can be traced to a 1964 book by Frederick Mann. FREDERICK A. MANN, THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW 95 (1964), noted in ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 84 (2005).

4. Christine A.E. Bakker, *Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?*, 4 J. INT'L CRIM. JUST. 595, 596 (2006). The *Audiencia Nacional* has jurisdiction over international crimes and also hears appeals against magistrates' decisions. See *infra* Part II.B.

5. In this Comment, I use the designation "Tibet" in its broadest sense, recognizing the country's unique civilization, geography, languages, cultural, and religious traditions. While many of these characteristics are present in the contemporary territory known as the Tibetan Autonomous Region, the political boundaries of this territory were imposed by the Peoples Republic of China, effectively dividing the formerly unified three regions of independent Tibet, namely, Ü-Tsang, Kham, and Amdo. Much of eastern Tibet—Kham and Amdo—now exists in western Chinese provinces, including Qinghai, Gansu, and Sichuan.

6. Bakker, *supra* note 4.

Yet, as will be explored below, the involvement of a Tibetan immigrant and Spanish national named Thubten Wangchen Sherpa, in conjunction with the gravity of the crimes alleged, clearly qualified the complaint for consideration by Spanish courts.⁷ That is, Thubten's affiliation with both Spain and China served as a bridge connecting official Chinese acts and Spanish interests.⁸ Further, because the prohibition of genocide, torture, and other acts are regarded as *jus cogens*, customary international laws so fundamental that their violation is universally condemned, Spanish courts are entitled to hear claims alleging such violations.⁹ This is supported not only by the weight of international legal instruments that Spain is a party to, but also by Spain's own criminal law and judicial statutes.¹⁰ Of course, just because Spain has such a right in theory does not mean it has exercised this right fully in practice.

This Comment argues that Spain has a unique opportunity to provide at least a small measure of justice to countless Tibetans who have been the victims of serious crimes over the past sixty years. By agreeing to adjudicate the claims noted above, Spain can make a powerful statement that its judiciary will exercise universal jurisdiction—regardless of the politico-economic influence of the accused state or its representatives—when complainants have established a *prima facie* case that they have suffered violations of their fundamental human rights. In doing so, Spain can solidify its place on the vanguard of universal jurisdiction as a sorely needed leader in a tepid international system of justice that has been moving toward complacency, thereby abating the dangerous rise in impunity for state officials responsible for serious crimes.¹¹

The foundations and implications of these arguments will be examined in depth below, and integrated into the Parts of this Comment. Part I will discuss universal jurisdiction in general, a principle that, while having a provenance as ancient as human society itself, has only gained currency on a truly international stage within the past century. This historical background will proceed to a discussion of the theory underlying universal jurisdiction. Part I will conclude with references to relatively

7. See *infra* Part III.

8. José Elías Esteve Moltó, *The Progress of the Tibet Case Under Universal Jurisdiction in Spain: From the Preliminary Proceedings to the Arrest Warrants of Chinese Leaders* 26 (Sept. 19, 2014) (unpublished manuscript) (on file with author).

9. See, e.g., PRINCETON PRINCIPLES, *supra* note 2, at 29, Principle 2(1) (“[S]erious crimes under international law include: . . . genocide . . .”); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as . . . genocide . . .”).

10. See *infra* Part III for a detailed analysis of this assertion.

11. Justin McDonnell, *Spain Has Indicted Hu Jintao over Tibet*, DIPLOMAT (Nov. 18, 2013), <http://thediplomat.com/2013/11/spain-has-indicted-hu-jintao-over-tibet/>.

recent exercises of universal jurisdiction by national tribunals throughout Europe, not including Spain. The modern proliferation of universal jurisdiction in these tribunals will strengthen the arguments that follow in that Spain's prospective use of universal jurisdiction in the instant Tibet cases would neither be exceptional nor extralegal. In short, there is a wealth of precedents that should inform Spanish courts' decisions on whether to adjudicate Tibetan claims going forward.

Part II will discuss Spanish precedence and the legal grounds to support Spain's use of universal jurisdiction in the Tibet cases, including Spain's statute authorizing its courts to prosecute serious international crimes. This Part will proceed to a discussion of cases in which Spanish courts exercised universal jurisdiction in order to prosecute perpetrators of international crimes, including the seminal case of the former Chilean dictator, Augusto Pinochet. As in Part I, by demonstrating the numerous instances in which universal jurisdiction has been invoked, the present argument that it should be once again employed will be supported by an array of cases. Specific attention will be paid to cases involving genocide, a crime so heinous and universally condemned that its commission automatically inheres courts with the jurisdiction necessary to hear such claims.¹² Owing in part to international recognition and opprobrium of the mass atrocities committed during the first half of the twentieth century, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted by the United Nations (UN) in 1948.¹³ Both China and Spain have since ratified the Genocide Convention (albeit with numerous reservations and declarations), and are thus bound to its terms.¹⁴

Part III will discuss the Tibetan cases upon which this Comment is based. It will specifically investigate how Tibetan groups have found themselves in the curious position of asserting claims of genocide before Spanish tribunals. As a consequence of China's refusal to recognize the jurisdiction of international juridical bodies along with its failure to prosecute perpetrators of genocide within its borders, Tibetans have had little other recourse than to assert their right to justice in international fora.¹⁵

12. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 104 (2d ed. 2009); *see infra* Part II.

13. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention], *available at* <http://www.preventgenocide.org/law/convention/text.htm>.

14. *See Treaties and States Parties to Such Treaties: Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=357 (last visited Apr. 10, 2015).

15. *See infra* Part III.

As will be demonstrated by the cases' already tortuous procedural histories, Spanish courts' oscillation between accepting and rejecting jurisdiction over claims of genocide in Tibet is indicative of Spain's internal tension regarding not only its willingness to challenge Chinese politico-economic influence, but also its evolving conception of the authority of its judiciary to exercise universal jurisdiction. In short, Spanish courts' ultimate decision regarding whether to hear or shelve the Tibet cases could signal the trajectory of universal jurisdiction in Europe for years to come.

The conclusion will briefly summarize and argue that Spain should broadly exercise universal jurisdiction in order to combat impunity and provide justice to victims of violations of international peremptory norms.

At its broadest conception, this Comment is about international criminal legal theory with themes that go to the heart of the most basic notions of justice. At its narrowest point, it focuses on how such theories have been—and *should* be—instantiated in national tribunals' prosecution of perpetrators of serious crimes.

Finally, this Comment assumes that the factual elements of the serious crimes alleged (specifically, genocide) are true; Chinese state crimes against Tibetans have been well-documented and corroborated by submissions from the UN, international media outlets, nongovernmental human rights organizations, and fact-finding missions on the ground in Tibet.¹⁶ The plaintiffs in the suits mentioned below established such facts in order to bring their claims before Spanish national tribunals.¹⁷ Thus, this Comment will not delve into an already protracted argument as to whether Tibetans have in fact suffered myriad irreparable harms as a result of Chinese state-sanctioned crimes. Instead, it will focus on how Spanish courts have treated these claims against a fraught politico-economic backdrop of Chinese intimidation, and how Spanish courts should proceed in their adjudication of these suits despite such pressure.

I. A BRIEF HISTORY & THEORY OF UNIVERSAL JURISDICTION

A. Jurisdictions

While the relative efflorescence of universal jurisdiction is a modern phenomenon, the ideas on which its invocations have been based have ancient roots. As Cicero confidently augured in the first century CE,

16. See, e.g., U.N. Secretary-General, *Situation in Tibet*, U.N. Doc. E/CN.4/1992/37 (Jan. 5, 1992); TSERING SHAKYA, *THE DRAGON IN THE LAND OF SNOWS: A HISTORY OF MODERN TIBET SINCE 1947*, at 377–78 (1999); INT'L CAMPAIGN FOR TIBET, <https://www.savetibet.org> (last visited Sept. 3, 2015); TIBET JUSTICE CENTER, <http://www.tibetjustice.org> (last visited Sept. 3, 2015).

17. Moltó, *supra* note 8, at 5.

“There will not be different laws at Rome and at Athens, or different laws now and in the future but one eternal and unchangeable law will be valid for all nations and for all times.”¹⁸ Of course, Cicero was speaking in the context of empires, not of jurisdictional ambits, and his dreams have not come true. Yet, the statement reflects a very old conception of universality based on fundamental norms that people share and are entitled to. In lieu of pursuing imperial fantasies, how may courts seek to actualize a normative, universalist vision of justice? What stands in the way of courts doing so?

Jurisdiction—which includes the power to make laws, to decide legal disputes, and to enforce legal decisions—has historically been reserved to sovereign states.¹⁹ Integral to the notion of sovereignty is that of territoriality. In short, territorial jurisdiction is exercised by the state where an alleged crime was committed.²⁰ As international law prohibits one state from intervening in the domestic matters of another, a state “generally enjoys exclusive power within its territorial boundaries.”²¹ Another generally accepted principle of jurisdiction historically linked to sovereignty is that of nationality. Nationality or active personality jurisdiction is employed by a state whose national is a criminal suspect,²² including offenses committed outside the territory of that state.²³

Extending further outward from a state’s boundaries, passive personality jurisdiction is asserted by a state “whose national is the victim of a crime[.]” and protective jurisdiction enables a state to assert jurisdiction over crimes that are “injurious to its national security.”²⁴ This latter principle has been viewed as the basis for Israel’s prosecution of Adolf Eichmann, who was responsible for numerous atrocities committed during the Holocaust.²⁵ It would appear then that the ambit of a state’s jurisdiction would be effectively “universal.” However, what all of these principles share is a legal nexus between sovereignty, territoriality, and

18. MARCUS TULLIUS CICERO, DE REPUBLICA, DE LEGIBUS 3.22.33 (Clinton W. Keyes trans., Loeb Classical Library 1970) (51–46 BCE), quoted in Peter Weiss, *The Future of Universal Jurisdiction*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 29 (Wolfgang Kaleck et al. eds., 2007).

19. M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION, *supra* note 3, at 40.

20. MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 22 (2004).

21. *Id.*

22. *Id.* at 24.

23. CRYER, *supra* note 3, at 76.

24. MITSUE INAZUMI, *supra* note 20, at 24–25.

25. CRYER, *supra* note 3, at 77; see also *Attorney-General v. Adolf Eichmann*, 36 I.L.R. 5, 54–57, 304 (Dist. Ct. Jerusalem 1961).

nationality, or a combination of all three.²⁶ Beyond the scope of these principles is universal jurisdiction, which, as mentioned, is exercised by states having virtually no relation to the territoriality or nationality of the perpetrator or victim of a crime, and is, instead, based solely on the nature of the crime.²⁷ Thus, universal jurisdiction transcends traditional notions of sovereignty.

Bassiouni identified two primary theoretical bases for the development of universal jurisdiction. First is a normative universalist position “which recognizes the existence of certain core values that are shared by the international community.”²⁸ This concept is postulated to be rooted in concepts of natural law, which are themselves derived from Abrahamic theologies.²⁹ Second is a pragmatic, policy-oriented position “which recognizes that occasionally there exist certain shared international interests that require an enforcement mechanism not limited to national sovereignty.”³⁰ While these positions differ in various ways, they share a common assumption that universal jurisdiction is required to “deter and prevent crime, and ultimately enhance world order, justice, and peace.”³¹

While this assumption may initially appear quixotic, its development was based on a need to fill the jurisdictional lacuna for crimes outside the reach of any traditional jurisdiction.³² When the practice of universal jurisdiction was in its nascent stage, the protection of “human rights through individual criminal accountability was not a common idea.”³³ For example, the earliest instances of universal jurisdiction arose due to states’ shared concerns about piracy, a crime that when committed in international waters is, *ipso facto*, supranational.³⁴ Though piracy has been condemned since antiquity, the earliest laws codifying its interdiction arose between the fifteenth and nineteenth centuries.³⁵ Related to piracy, the proscription of slavery also gradually became grounds for the exercise of universal jurisdiction.³⁶

26. Bassiouni, *supra* note 19, at 42.

27. MITSUE INAZUMI, *supra* note 20, at 25.

28. Bassiouni, *supra* note 19, at 42.

29. *Id.* at 43.

30. *Id.* at 42.

31. *Id.*

32. PRINCETON PRINCIPLES, *supra* note 2, at 23.

33. MITSUE INAZUMI, *supra* note 20, at 32.

34. Bassiouni, *supra* note 19, at 47–49.

35. These laws situated nationality in ships on the high seas. *Id.* at 47.

36. *Id.* at 49.

B. The Problem of Impunity

It was not until the world was in the wake of the atrocities of the Second World War, however, that the international community recognized the growing need to address the “flaws of the traditional jurisdictional system,” and thus the need “to adjudicate certain crimes at the international level.”³⁷ Because state officials perpetrated many of the gross violations of human rights during the Second World War, there was a fear that the limitations of territorial jurisdiction would result in impunity for those responsible.³⁸ The *Eichmann* trial along with the establishment of the Nuremberg and Tokyo tribunals and the promulgation of the Geneva Conventions demonstrated this concern,³⁹ as did the adoption of international conventions on genocide, torture, and apartheid to name a few.⁴⁰

In his comments at the Rome Conference on the establishment of the International Criminal Court (ICC) in 1998, then-UN Secretary-General Kofi Annan noted:

With the use of weapons of mass destruction and the application of industrial technology to dispose of millions of human beings, the world had come to realize that relying on each State or army to punish its own transgressors was not enough. All too often, such crimes were part of a systematic State policy and the worst criminals might be found at the pinnacle of State power.⁴¹

Mr. Annan’s words speak to the problem of impunity, which, despite international measures taken after the Second World War, continue to be the rule rather than the exception.⁴² Further, impunity in the face of serious international crimes began to be seen not only as a threat to victims’ desires for retributive justice, but also to global political stability. As noted by former UN High Commissioner for Human Rights, Mary Robinson, “If serious human rights violations are not addressed and a climate of impunity is permitted to continue, then the effect will be to stoke the fires of long term social conflict. . . . [S]uch conflict can vent itself through cycles of vengeance over decades, and even centuries.”⁴³

37. MITSUE INAZUMI, *supra* note 20, at 33.

38. *Id.* at 34.

39. *Id.* at 55–57.

40. Bassiouni, *supra* note 19, at 53–56. See *infra* Part II for a more detailed discussion of the Genocide Convention.

41. U.N. Secretary-General, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶ 5, U.N. Doc. A/CONF.183/SR.1 (Nov. 20, 1998).

42. MITSUE INAZUMI, *supra* note 20, at 37.

43. Mary Robinson, Introduction, *Genocide, War Crimes, Crimes Against Humanity*, 23 *FORDHAM INT’L L.J.* 275, 277–78 (1999).

C. Universal Jurisdiction in Europe

Thus, due to the persistence of a trend in which perpetrators of serious international crimes were unconcerned about the possibility of their prosecution due to their state judiciary's inability or unwillingness to do so—or when international apathy implicitly endorsed the legality of the perpetrators' actions—the need for a broader exercise of universal jurisdiction became more widely acknowledged.⁴⁴ The exercise of universal jurisdiction was permitted—or even required—by international convention,⁴⁵ and prescribed by international legal experts.⁴⁶ Further, its use gained momentum in national courts throughout Europe in the 1990s after the establishment of international courts, such as the ad hoc tribunals to adjudicate crimes related to crises in Yugoslavia and Rwanda,⁴⁷ and the ICC, the founding statute⁴⁸ of which became the basis for the codification of universal jurisdiction in the legislation of various states.⁴⁹

Belgium, for example, developed an aggressive approach to the use of universal jurisdiction when it adopted legislation that provided its courts with comprehensive and unconditional competence to adjudicate international claims of genocide and crimes against humanity.⁵⁰ Further, restrictions on the exercise of universal jurisdiction found in the statutes of other states were notably absent in Belgium's law.⁵¹ The law permitted Belgian courts to exercise universal jurisdiction even if the accused was not present in Belgium.⁵² Such a progressive and permissive grant of universal jurisdiction enabled Belgium's Court of Assizes to try and convict four Rwandans accused of having committed or participated in the Rwandan genocide of 1994.⁵³ However, during another case that implicated the involvement of Israeli defense forces in the massacre of Pales-

44. It should be noted, however, that in deference to the perceived inviolability of state sovereignty, supranational tribunals, including the ICC, give states broad discretion to prove that they are either willing or able to prosecute serious crimes internally. *See* Weiss, *supra* note 18, at 33–34.

45. *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, *opened for signature* Dec. 10, 1984, 102 Stat. 3045, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*]; *see also* Bassiouni, *supra* note 19, at 55–56.

46. *See, e.g.*, PRINCETON PRINCIPLES, *supra* note 2.

47. MITSUE INAZUMI, *supra* note 20, at 83.

48. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

49. A. Hays Butler, *The Growing Support for Universal Jurisdiction in National Legislation*, in UNIVERSAL JURISDICTION, *supra* note 3, at 68–69.

50. *Id.* at 69.

51. *Id.*

52. *Id.* *See* MITSUE INAZUMI, *supra* note 20, at 26–28, for a discussion on “pure” universal jurisdiction, which permits even trials in absentia. Finally, *see infra* Part II for a discussion of how this concept has affected Spain's exercise of universal jurisdiction.

53. Michael Verhaeghe, *The Political Funeral Procession for the Belgian UJ Statute*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 18, at 139.

tinians and Lebanese, Belgium's Court of Appeals adopted a restrained approach, limiting its exercise of jurisdiction only to occasions in which the accused was present on Belgian soil.⁵⁴ Further, after Iraqis filed complaints against George H.W. Bush and Tommy Franks alleging the crime of aggression—and after significant United States economic and political pressure—the Belgian legislature acceded in 2003 and amended its universal jurisdiction statute, effectively limiting its reach.⁵⁵

Other states,⁵⁶ such as the United Kingdom, similarly adopted national legislation that mirrored that of the ICC's Rome Statute, authorizing British courts to hear claims of genocide and crimes against humanity, among other crimes.⁵⁷ Acting on this authority, in 2005, a British jury convicted an Afghan warlord of crimes against humanity committed during the Taliban's reign.⁵⁸ The House of Lords also played a substantial role in the prosecution of Pinochet, as did many other states, including Spain.⁵⁹ However, as exemplified in the House of Lords' decision in that case, the United Kingdom's approach to universal jurisdiction is more restrained than that of Belgium in that it retains common law immunity for heads of state while in office.⁶⁰

In conclusion, while relatively novel in its more expansive application, universal jurisdiction is a principle steeped in legal theory and history that recognizes the importance of states' abilities to adjudicate claims of serious international crimes despite not possessing archaic, static links to nationality or territory. The efflorescence of universal jurisdiction after the Second World War demonstrates the international community's justified growing concern with impunity for perpetrators of atrocities, a need to maintain peace and security, and also the trajectory of international law's necessary evolution. As will be discussed in the next Part, Spain's own exercise of universal jurisdiction has been mutually informative with progressive states like Belgium, as attested by numerous occasions on which it has served as the basis for the prosecution of perpetrators of international crimes. In short, Spain can simultaneously look to the international precedent to support its exercise of universal jurisdiction in the

54. *Id.* at 140. The Netherlands also grappled with the legal issues presented by trials in absentia in the case against Surinamese dictator, Desi Bouterse, in 2000. See MITSUE INAZUMI, *supra* note 20, at 91–93.

55. Verhaeghe, *supra* note 53, at 141–44. See also MITSUE INAZUMI, *supra* note 20, at 96–97.

56. For descriptions of universal jurisdiction in various legal systems, see LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 82–219 (2003).

57. Butler, *supra* note 49, at 71.

58. Weiss, *supra* note 18, at 31.

59. Butler, *supra* note 49, at 72.

60. *Id.*

Tibet cases, while also moving forward, transcending the politico-economic pressures that other states have yielded to.

II. UNIVERSAL JURISDICTION IN SPAIN

A. Spanish Law

Spain has been recognized as being at the forefront of the universal jurisdiction agenda, aggressively aiming to prosecute international atrocity crimes in its court since the mid-1990s.⁶¹ The ambit of Spanish criminal law derives from the jurisdiction of its courts as provided in Book I, Title I of the 1985 Organic Law of the Judicial Power (*Ley Organica del Poder Judicial*, or LOPJ).⁶² The universality principle is situated in LOPJ article 23.4, which states:

Spanish courts have jurisdiction over acts committed abroad by Spaniards and foreigners, if these acts constitute any of the following offences under Spanish law: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offences in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking; (g) any other offence which Spain is obliged to prosecute under an international treaty or convention.⁶³

This article does not expressly require the presence of the alleged perpetrator in Spain in order to initiate proceedings against him or her.⁶⁴ However, the article does not permit trials in absentia.⁶⁵ The responsibility of investigating crimes that have occurred outside of Spain sits with the central examining magistrate, “who can be seized by the public prosecutor, by the victim, or by *any* private citizen or organization” in a “popular action” (*accion popular*).⁶⁶ That is, Spanish citizens are entitled to file criminal complaints even without the support of—or, despite opposition from—the state prosecutor’s office.⁶⁷

61. Mugambi Jouet, *Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT’L & COMP. L. 495, 501 (2007).

62. REYDAMS, *supra* note 56, at 183.

63. LEY ORGÁNICA DEL PODER JUDICIAL art. 23.4, *quoted in* REYDAMS, *supra* note 56, at 183.

64. REYDAMS, *supra* note 56, at 184.

65. *Id.*

66. *Id.* The right to bring an *accion popular* is provided by Section 125 of the Spanish Constitution, which states: “Citizens may engage in popular action and participate in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.” CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 125, Dec. 29, 1978 (Spain), *available at* http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

67. Naomi Roht-Arriaza, *The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 18, at 114.

B. The Pinochet Case

One such magistrate was Baltazar Garzón,⁶⁸ who became famous in 1998 for demanding the extradition of the former Chilean dictator from the United Kingdom, where he had travelled for medical surgery.⁶⁹ The case began in 1996 when members of the Spanish Union of Progressive Prosecutors filed a complaint with the National Audience, the Spanish court that has jurisdiction over international crimes and also hears appeals against the magistrate's decisions.⁷⁰ The complaint accused Pinochet (and other junta leaders) of genocide, torture, and other atrocities committed during a seventeen-year dictatorship that was responsible for the death or disappearance of more than 3,200 people (including fifty Spaniards), along with the detention and exile of thousands more.⁷¹ Other complaints were filed against the Argentine military junta for its role in a six-year "Dirty War Against Subversion," in which an estimated 30,000 "leftists" were killed.⁷²

In 1998, the National Audience issued a decision that powerfully affirmed Spain's right to exercise universal jurisdiction, concluding that the Genocide Convention (ratified by Spain in 1968) does not prevent the exercise of extraterritorial jurisdiction.⁷³ The National Audience noted that although article VI of the Genocide Convention obligates states' parties to ensure that genocide is prosecuted by courts in whose territory the crimes were committed,

[I]t would be contrary to the spirit of the Convention,—which seeks a commitment on the part of the Contracting Parties to use their respective criminal justice systems to prosecute genocide as a crime under international law, and to prevent impunity in the case of such a grave crime—to interpret [a]rticle 6 as limiting the exercise of jurisdiction by excluding any jurisdiction not treated therein. That the Contracting Parties have not criminalized this offence universally in each of their domestic jurisdictions does not stand in the way of a State party establishing such a category of jurisdiction for an of-

68. Mr. Garzón was banned from the bench in 2012 after being found guilty of wiretapping conversations between attorneys and clients in a corruption investigation of Spain's conservative prime minister, Mariano Rajoy, and Rajoy's People's Party. While Mr. Garzón is no longer an examining magistrate, he has remained prominent in international headlines for his involvement with WikiLeaks. See Jon Henley, *WikiLeaks' Baltasar Garzón, the Man Edward Snowden Wants on His Side*, GUARDIAN (June 25, 2013), <http://www.theguardian.com/world/shortcuts/2013/jun/25/wikileaks-baltasar-garzon-edward-snowden>.

69. Jouet, *supra* note 61, at 502.

70. REYDAMS, *supra* note 56, at 184.

71. Jouet, *supra* note 61, at 502.

72. *Id.* at 496; REYDAMS, *supra* note 56, at 184–85; *infra* notes 73–79 and accompanying text for a discussion of this case.

73. REYDAMS, *supra* note 56, at 185.

fense that has a major impact worldwide, and that affects the international community directly, all of humanity, as is made clear in the Convention itself.⁷⁴

As may have been expected, Pinochet and the Chilean government objected that extradition would violate Chilean sovereignty⁷⁵ as Pinochet was Chile's former head of state and "Senator for Life."⁷⁶ Echoing this, the chief Spanish public prosecutor argued that Spain's extradition request violated principles of state sovereignty and nonintervention.⁷⁷ Yet, the National Audience disposed of these arguments quickly, stating that when Spanish courts employ LOPJ article 23.4, "they neither invade nor interfere in the sovereignty of the State in which the offence was committed; rather, they exercise Spain's own sovereignty in relation to international crimes."⁷⁸ A judicial panel of Law Lords in the United Kingdom agreed, citing its own codification of the Torture Convention, that Pinochet's crimes were extraditable offenses and that he did not enjoy absolute immunity from prosecution.⁷⁹

Ultimately, however, Pinochet was released by the British executive on humanitarian grounds, based on his failing health, and he returned to Chile.⁸⁰ Upon his arrival, Chilean courts stripped Pinochet of his immunity for crimes committed during his time as dictator, which opened the floodgates to more than 150 cases against him.⁸¹ Despite never facing prosecution (Pinochet died in 2006),⁸² the case marked a watershed moment for the exercise of universal jurisdiction not only in Spain, but also throughout the world. Some regarded the case as the "birth of a regime of worldwide punishment."⁸³ Pinochet's arrest, sixteen months in detention, and unsuccessful claim of immunity signaled "a shift in international practice toward ending impunity for brutal dictators."⁸⁴ This shift was demonstrated by the catalytic effect the *Pinochet* case had on

74. *Id.* (quoting THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 98 (Reed Brody & Michael Ratner eds., 2000)).

75. Jouet, *supra* note 61, at 502.

76. REYDAMS, *supra* note 56, at 185.

77. *Id.* at 186.

78. *Id.* (quoting THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 107 (Reed Brody & Michael Ratner eds., 2000)).

79. Jouet, *supra* note 61, at 502.

80. Roht-Arriaza, *supra* note 67, at 115.

81. Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of the Head of State Immunity*, 78 WASH. U. L.Q. 1583, 1602 (2000).

82. Jouet, *supra* note 61, at 534.

83. MITSUE INAZUMI, *supra* note 20, at 86 (citing William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 170-71 (2000)).

84. Jouet, *supra* note 61, at 502.

Spain's future exercise of universal jurisdiction as well as other states' similar desires to extradite Pinochet.⁸⁵ Further, the European Union passed a resolution in support of the Spanish and English procedures, the UN Committee on Torture issued similar support, and one German official succinctly observed the case's principal implication: "Dictators are not above the law."⁸⁶

C. Backlash, Reversion, and Resurrection

While the *Pinochet* case gave new hope to victims that they could use transnational mechanisms to seek justice when it was not available or possible to do so at home, it also led to vehement protestation by states whose officials were prosecuted.⁸⁷ As discussed above, the influence of such diplomatic and economic pressure led to some states reigning in their use of universal jurisdiction.⁸⁸ Further, owing to a variety of complaints filed without much apparent strategic vision, some national courts reigned in their exercise of universal jurisdiction on the grounds of official immunity—"a concept previously rejected in every international instrument dealing with crimes under international law."⁸⁹

Spain began to grapple with this backlash in 1995 during its prosecution of Adolfo Scilingo, an Argentine navy officer, who confessed to murdering dozens of people during Argentina's "Dirty War."⁹⁰ After voluntarily travelling to Spain to appear on a television show, Scilingo was arrested, whereupon he reiterated his confession.⁹¹ In 2004, after a series of appeals by Scilingo, Spain's Supreme Court (*Tribunal Supremo*)⁹² held that Spain had jurisdiction to try Scilingo for genocide, terrorism, and torture.⁹³ However, this holding was significantly narrower than in *Pinochet*. Essentially, the Supreme Court held that its exercise of jurisdiction required a procedural link to its national interests, and because some of Scilingo's victims were Spanish, this requirement was satisfied.⁹⁴ This holding significantly qualified Spain's exercise of universal jurisdiction in that, while Spain was still concerned with acting in the

85. *Id.*

86. James J. Friedburg, *The Wane in Spain (of Universal Jurisdiction): Spain's Forgetful Democratic Transition and the Prosecution of Tyrants*, 114 W. VA. L. REV. 825, 872 (2012).

87. Roht-Arriaza, *supra* note 67, at 116.

88. *Id.*; see also *supra* Part I.C.

89. Christopher Keith Hall, *Universal Jurisdiction: Developing and Implementing an Effective Global Strategy*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES, *supra* note 18, at 88.

90. Jouet, *supra* note 61, at 505.

91. *Id.*

92. The *Tribunal Supremo* is the highest court in Spain for all nonconstitutional matters. It is subordinate only to the Constitutional Tribunal (*Tribunal Constitucional*). See *id.* at 504.

93. *Id.* at 505.

94. *Id.* at 506.

common interest of confronting impunity, it would only prosecute henceforth where its national interests had been infringed.⁹⁵ Whereas in *Pinochet*, the National Audience had explicitly rejected Chile's arguments based on principles of sovereignty and nonintervention, here the Supreme Court cited those same principles as support for its decision.⁹⁶ While Scilingo was ultimately tried and convicted of crimes against humanity, and sentenced to thirty years in prison,⁹⁷ the Supreme Court's holding represented a major reversion to outmoded, tentative exercises of universal jurisdiction.

The Supreme Court based its holding in Scilingo's case on one of its own recent precedents.⁹⁸ In the hopeful aura resulting from the *Pinochet* case, a number of organizations and individuals, including Nobel Peace Prize winner Rigoberta Menchu, filed complaints with the National Audience in 1999.⁹⁹ Menchu's complaint accused former political and military leaders of Guatemala, including General Rios Montt, of committing acts of genocide, torture, and terrorism.¹⁰⁰ The allegations further included an assault on the Spanish embassy in 1980 in which thirty-seven people were killed.¹⁰¹ Despite the *Pinochet* precedent, and despite the fact that Spanish nationals had been the victims of Montt's crimes, the National Audience dismissed the complaint, holding that universal jurisdiction was supplemental to Guatemala's national jurisdiction (and thus subsidiary to it); and that, at the time, there were no legal obstacles to prosecution in Guatemala.¹⁰² The National Audience cited the principle of subsidiarity as support for precluding Spain's involvement, noting that articles VI and VIII of the Genocide Convention require that "a State should abstain from exercising jurisdiction over acts constitutive of genocide that would be tried by the courts of the country in which they occurred or by an international criminal tribunal."¹⁰³

The National Audience's reasoning seemed paradoxical considering that just a few years before in *Pinochet*, it had relied on the same convention to establish jurisdiction on similar allegations.¹⁰⁴ However, on appeal, the Supreme Court affirmed, narrowing the scope of Spain's universal jurisdiction, and laying the foundation for its decision in

95. *Id.*

96. *Id.* at 507.

97. *Id.* at 508.

98. *Id.*

99. REYDAMS, *supra* note 56, at 189.

100. MITSUE INAZUMI, *supra* note 20, at 88–89.

101. Jouet, *supra* note 61, at 508.

102. MITSUE INAZUMI, *supra* note 20, at 89.

103. *Id.* (quoting Michael Cotter, *Correspondents' Reports Spain*, in 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 587, 589 (2002)).

104. REYDAMS, *supra* note 56, at 191.

Scilingo.¹⁰⁵ Yet, this was not the end of Menchu's case. In 2005, Spain's Constitutional Tribunal (*Tribunal Constitucional*)¹⁰⁶ reversed the Supreme Court's decision, holding it to be unconstitutional, and finding it to have "practically de facto abrogated" article 23.4 of the LOPJ.¹⁰⁷ The Constitutional Tribunal's main qualm with the Supreme Court's decision was its wholly erroneous interpretation of the Genocide Convention.¹⁰⁸ The Tribunal averred that article VI—permitting Spain to prosecute perpetrators on Spanish soil—establishes only a "minimum requirement" that does not preclude Spain from exercising universal jurisdiction.¹⁰⁹ Further, it stated that article VIII, which the Supreme Court relied on as a basis for transferring the onus of prosecution to an international tribunal, only mentioned such recourse as a "possible" mechanism, and one that also does not prohibit Spain for exercising universal jurisdiction.¹¹⁰

Thus, even though the Genocide Convention may not explicitly require states' use of universal jurisdiction, the Constitutional Tribunal found it permissible to the extent that a more restrictive interpretation would be completely incompatible with its goal of "universally prosecuting genocide in order to avoid impunity."¹¹¹ Even more importantly, the Constitutional Tribunal rejected the Supreme Court's holding that the exercise of universal jurisdiction requires a nexus with national interests.¹¹² The Tribunal found the Supreme Court's use of precedential support to be shoddy, adding that the Court had "selectively omitted to mention a 'multitude of precedents' contrary to its position."¹¹³ Specifically, the Tribunal noted that requiring such a nexus would directly contradict not only the Genocide Convention, but also article 607 of the Spanish Penal Code, which provides that genocide is defined as the full or partial extermination of a "national, ethnic, racial, religious or specific group determined by the disability of its members" and does *not* require that the targeted group be Spanish.¹¹⁴ Finally, reiterating the purpose of LOPJ article 23.4, the Tribunal emphasized that this law was intended to punish genocide around the world, not simply acts occurring in Spain or

105. Jouet, *supra* note 61, at 508.

106. The Constitutional Tribunal upholds and interprets Spain's constitution and has review power over the actions of other state courts. *See id.* at 504.

107. *Id.* at 509.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 510.

113. *Id.*

114. *Id.*; *see also* CÓDIGO PENAL art. 607, available at <http://www.legislationline.org/documents/section/criminal-codes>.

against Spanish nationals.¹¹⁵ As a result of the Tribunal's decision, magistrate Santiago Pedraz issued arrest warrants for the eight defendants named in the Scilingo case.¹¹⁶ After initially agreeing to accept the warrants and to initiate extradition proceedings, the Constitutional Court of Guatemala reneged its previous agreement and the future of the case is still uncertain.¹¹⁷

To summarize, the decision of the Constitutional Tribunal established several themes of Spain's exercise of universal jurisdiction. First, both Spain's Organic Law on the Judiciary and its Penal Code permit the exercise of universal jurisdiction. Second, despite the Genocide Convention not explicitly providing for universal jurisdiction, it does not prohibit it either; doing so would run counter to the very spirit of the Convention's purpose. Third, the exercise of universal jurisdiction does not require links between Spanish national interests, citizens, or territory and the perpetrator of the crime, his nationality, or where the crime was committed. As will be noted below, however, such a liberal vision of universal jurisdiction is threatening to perpetrators of serious crimes, who, without the protection of their nationality or their states' sovereignty, have sought to invoke the political and economic might of their home states to ensure their immunity from Spanish prosecution.

III. THE TIBET CASES

A. The Complaint

While the Constitutional Tribunal was deliberating in the *Menchu* case, Thubten Wangchen Sherpa, a Tibetan victim of genocide in Tibet and a Spanish national, filed a popular action at the National Audience in June 2005.¹¹⁸ He was joined in this action by Madrid-based nonprofits Committee to Support Tibet and the Tibet House Foundation.¹¹⁹ The complaint implicated seven former high-ranking Chinese officials—including former President Jiang Zemin and former Prime Minister Li Peng—in their involvement in a variety of serious international crimes, including genocide, torture, state terrorism, and crimes against humanity.¹²⁰

115. Jouet, *supra* note 61, at 510.

116. *The Guatemala Genocide Case: In Brief*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://cja.org/article.php?list=type&type=83> (last visited Sept. 4, 2015).

117. *Id.*

118. Jouet, *supra* note 61, at 525; Moltó, *supra* note 8, at 5.

119. Bakker, *supra* note 4, at 596.

120. Moltó, *supra* note 8, at 9. The other officials named in the complaint were Ren Rong, former Party Secretary in Tibet; Yin Fatang, also a former Party Secretary in Tibet; Qiao Shi, former

The collation of these crimes sought to represent a list of acts that, in the aggregate, constitutes one of the most grave human rights catastrophes of the last century. In short, since the invasion and occupation of Tibet in 1950 by the People's Liberation Army, more than a million Tibetans have been murdered or displaced.¹²¹ Through a Chinese-coordinated plan of action, Buddhist institutions have been systematically oppressed, peaceful protestors have been tortured to death, and sexual violence has been endemic.¹²² There have been assassinations, extra-judicial executions, sterilizations, forced abortions, and infanticides.¹²³ Further, the Chinese government instituted a campaign of massive population transfer of Chinese to Tibet, where ethnic Han now outnumber ethnic Tibetans.¹²⁴ Finally, the complaint accused the named officials of perpetrating state terrorism, or "the use of violence as an instrument of political action," as evidenced by a long record of violent repression, disappearances, and summary and arbitrary arrests and executions.¹²⁵

As far back as 1960, the International Commission of Jurists recognized these acts as genocide.¹²⁶ In addition to finding numerous human rights violations, the Commission paid special attention to the persecution of—and plan to eradicate—Tibetan Buddhists as a religious group.¹²⁷ Of course, this report was followed by another fifty years of occupation and oppression in Tibet.¹²⁸ However, the complaint only principally details acts by Chinese officials committed after 1971, the year after Spain incorporated the Genocide Convention into its own criminal code, and three years after Spain's ratification of the Convention.¹²⁹ Despite the gravity and quantity of allegations, this complaint was the first of its kind to *ever* be filed against former Chinese leaders for acts in Tibet.¹³⁰ While this may appear surprising, both the aura of oppression and the impossibility of domestic prosecution have denied

Chief of Chinese security; Chen Kuiyan, former Party Secretary of the Tibetan Autonomous Region; and Peng Pelyun, former Minister for Family Planning. *Id.* at 9 n.24.

121. Bakker, *supra* note 4, at 596.

122. Moltó, *supra* note 8, at 6.

123. *Id.* at 7.

124. It is estimated that 7.5 million Chinese immigrants now live in Tibet compared to 6 million Tibetans. *Id.* at 7 n.19.

125. *Id.* at 8.

126. *Id.* at 5.

127. See LEGAL INQUIRY COMM. ON TIBET, INT'L COMM'N OF JURISTS, TIBET AND THE CHINESE PEOPLE'S REPUBLIC 3–6 (1960), available at <http://www.tibetjustice.org/materials/govngo/govngo2.html>.

128. See, e.g., TSERING SHAKYA, *supra* note 16.

129. Moltó, *supra* note 8, at 5–6.

130. Bakker, *supra* note 4, at 596.

Tibetans even the opportunity of bringing complaints within Chinese borders.¹³¹ Thus, in light of the *Pinochet* decision, a pathway to justice—albeit through the Spanish judiciary—finally became available to Tibetans.

B. Rejection, Acceptance, and Oscillation

1. Struggle for Admission

As the Constitutional Tribunal had not yet issued its final decision on the appeal in the *Menchu* case, Spain's public prosecutor issued a report, based on the Supreme Court's holding in *Menchu*, stating that the National Audience lacked competence to hear the Tibet complaint, and recommending its disposal.¹³² Despite the presence of a Spanish national (Thubten Wangchen Sherpa) as a party in the suit, the National Audience decided that the link between Spain and China was too tenuous to be sustained.¹³³ The complainants appealed, and, serendipitously, within three weeks of the National Audience's rejection, the Constitutional Tribunal issued its decision in *Menchu* that overruled the Supreme Court's imposition of a nexus requirement on Spain's use of universal jurisdiction.¹³⁴ This decision had immediate positive implications for international criminal cases that were pending before Spanish courts, including the Tibet case.¹³⁵

In January 2006, the National Audience issued an order granting leave to proceed with the case.¹³⁶ In its decision, the Audience affirmed that genocide is explicitly included in LOPJ article 23.4 and that universal jurisdiction could be exercised by Spain in order to prosecute its perpetrators.¹³⁷ Next, the Audience examined the complaint's allegations in light of article II of the Genocide Convention, which defines the crime.¹³⁸ In a concise holding, the Audience unequivocally stated "without a trace of doubt that the acts described [in the complaint] possess *prima facie* the characteristics and descriptions listed in . . . [a]rticle II."¹³⁹

The National Audience also evaluated whether the alleged crimes had been (or could be) prosecuted by either the ICC or within the Chi-

131. *See id.* at 600. For a discussion on the impossibility of Chinese courts hearing such a complaint, see *infra* notes 147–152 and accompanying text.

132. Moltó, *supra* note 8, at 9.

133. *Id.* at 10.

134. Bakker, *supra* note 4, at 597.

135. Roht-Arriaza, *supra* note 67, at 122.

136. Moltó, *supra* note 8, at 12.

137. Bakker, *supra* note 4, at 598.

138. *Id.*

139. Moltó, *supra* note 8, at 13.

nese judicial system in accordance with article VI of the Genocide Convention.¹⁴⁰ The Audience reviewed attempts by the international community to reach a peaceful solution to the situation in Tibet, including UN resolutions, and observations of the European Parliament and other countries, including the United States, condemning crimes committed against Tibetans.¹⁴¹ The Audience took into consideration that despite the UN General Assembly calling on China to respect the Tibetans' basic human rights, freedoms, and self-determination, China deflected these admonitions, calling them a "farce and illegal."¹⁴² The European Parliament and the Human Rights Commission issued similar resolutions, both of which condemned the killing of peaceful Tibetan protestors during the Tibetan uprising of 1989,¹⁴³ and China's practice of forced abortions and sterilizations.¹⁴⁴ The Audience held that such resolutions were further evidence of China's violations of the Genocide Convention.¹⁴⁵

With respect to the possibility of transferring the complaint to the ICC, the Audience found that the ICC would not possess competence to hear the case since the acts alleged in the complaint occurred before the Rome Statute's entry into force and because China neither ratified that statute, nor has it ever recognized the ICC's competence.¹⁴⁶

Next, the Audience examined whether Chinese courts could adjudicate the complaint and found that it was impossible.¹⁴⁷ First, the Audience reasoned that while the Genocide Convention was ratified by China in 1983, its provisions were never incorporated into Chinese national law.¹⁴⁸ Second, jurists have repeatedly verified the hollowness of criminal cases in China, noting that they are but "empty formalities."¹⁴⁹ Third, the Chinese Constitution does not provide for any separation of powers

140. Bakker, *supra* note 4, at 598. Article VI states:

Persons charged with genocide or any of the other acts enumerated in article III [i.e. punishable acts] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

See Genocide Convention, *supra* note 13.

141. Bakker, *supra* note 4, at 598–99.

142. Moltó, *supra* note 8, at 14.

143. For a detailed treatment of the nonviolent Tibetan opposition movement's uprising that began in 1987, see RONALD D. SCHWARTZ, CIRCLE OF PROTEST: POLITICAL RITUAL IN THE TIBETAN UPRISING (1994). For a discussion of Tibetan women's restricted reproductive freedom under Chinese rule, see Eva Herzer & Sara B. Levin, *China's Denial of Tibetan Women's Right to Reproductive Freedom*, 3 MICH. J. GENDER & L. 551 (1996).

144. Moltó, *supra* note 8, at 14.

145. *Id.* at 15.

146. Bakker, *supra* note 4, at 599.

147. Moltó, *supra* note 8, at 15.

148. Bakker, *supra* note 4, at 600 n.17.

149. Moltó, *supra* note 8, at 15 n.43.

within the Chinese government, thus giving the judiciary no independence, and rendering any decision against the internal political or military actions of the government ripe for suppression.¹⁵⁰ Further, the Audience found that there is abundant evidence that demonstrates the “complicity and coordination” of Chinese judges and security forces; all legal proceedings involving Tibetans alleged to have committed crimes against state security are done in camera.¹⁵¹ As Moltó notes, in 1997 alone, of the over 500,000 cases tried by Chinese courts, over 99% of the accused were found guilty.¹⁵²

Finally, the Audience subjected the complaint to a “test of reasonableness,” in which it asked whether the Tibet case would meet certain criteria, including whether the case would constitute an abuse of law, if it involved utterly foreign and distant crimes or places, and if the plaintiff had an actual relationship to the alleged crimes.¹⁵³ The Audience held that the complaint satisfied this test, including the “utterly foreign” criterion, as, again, LOPJ article 23.4 gives the Audience competence to hear claims of genocide.¹⁵⁴ As all questions regarding the legality of the complaint had been satisfactorily answered, the Audience decided to admit the case.

2. First Proceedings and Chinese Backlash

In June 2006, Thubten Wangchen Sherpa testified before the National Audience.¹⁵⁵ After making his first declaration, Thubten noted that it was a “historic day” as it was the first time that a Tibetan had the opportunity to tell a judge about the genocide in his homeland.¹⁵⁶ While recognizing the scope of the challenge that lay in front of his case, Thubten remained optimistic, and noted his hope that the case would bring further light to the situation in Tibet so “the Chinese government recognizes its errors and starts respecting human rights.”¹⁵⁷

In response to Thubten’s testimony, the Chinese Foreign Ministry immediately protested, declaring that the allegations were “a complete defamation and absolute lie,” and that they were orchestrated by the “Dalai Lama’s clique”¹⁵⁸—the Chinese government’s trite and pejorative designation for those advocating for human rights in Tibet. Further, the

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 16.

154. *Id.*

155. *Id.* at 19.

156. Jouet, *supra* note 61, at 525.

157. *Id.*

158. Moltó, *supra* note 8, at 19.

Ministry decried the allegations as “calumnies” that were “motivated by political reasons [in order to] damage the international image of China and bilateral relations between Spain and China.”¹⁵⁹ Finally, the Ministry declared that Spain lacked competence to hear the complaint.¹⁶⁰ After such strong statements, the Chinese government left it to Spain to “deal appropriately with this problem, in order that Sino-Spanish relations, might, with the effort of both sides, continue to develop healthily.”¹⁶¹

In light of this aggressive response, and in order to pacify the Chinese government while continuing to proceed with its investigation, the judge hearing the preliminary Tibetan testimonies employed a rogatory commission,¹⁶² which effectively delayed the investigation and occluded the case from international attention.¹⁶³ However, the commission, which sought testimony from exiled Tibetans living in India, failed when the Indian government refused to cooperate, noting that it did not recognize the principle of universal jurisdiction.¹⁶⁴ Thus, the Tibetan exiles were required to testify in Madrid in May 2008, precisely when international media attention became focused on China’s brutal crackdown on Tibetan demonstrations against the Beijing Olympics.¹⁶⁵

However, the preliminary proceedings progressed. In October 2008, the National Audience admitted a second suit alleging Chinese crimes against humanity, systematic killing of Tibetans, commission of grievous bodily harm, torture, and forced disappearances, all of which had been perpetrated since March of that year.¹⁶⁶ After the National Audience sent letters to the Chinese government requesting that it question former officials implicated in the complaint, the Chinese government again responded harshly, demanding that Spain take “immediate and effective” measures to block the “false lawsuit.”¹⁶⁷

159. Jouet, *supra* note 61, at 526.

160. Moltó, *supra* note 8, at 20.

161. *Id.*

162. A rogatory letter, or letter of request, is: “A document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case.” BLACK’S LAW DICTIONARY (9th ed. 2009).

163. Moltó, *supra* note 8, at 20–21.

164. *Id.*

165. *Id.* For a description of the Tibetan protests of 2008, see Michael C. Davis, *Crisis in Tibet: Can a Workable Solution be Found?*, 102 AM. SOC’Y INT’L L. PROC. 125 (2008).

166. Moltó, *supra* note 8, at 21–22.

167. *Id.*

3. Amendment to Spanish Law and Retraction

While the international human rights community remained resolute in its approval of Spain's adjudication of these cases, states within China's enormous economic sphere of influence, including Israel and the United States, began indirectly expressing support for China's sentiments by condemning what they perceived to be Spanish incursions into their own states' sovereignty.¹⁶⁸ Further, pressure within Spain began to build around what some Spanish politicians considered to be an excessive use of its judicial system to try international crimes.¹⁶⁹ Carlos Dívar, president of the General Council of the Spanish Judiciary, declared, "We cannot become the judicial policemen of the world."¹⁷⁰ While Spain maintains a meaningful separation of powers doctrine within its government, and although the Spanish executive was ultimately unauthorized to halt the Tibet cases, it was still very much affected by the power of Chinese political and economic influence.¹⁷¹

Thus, Spanish officials succumbed to *realpolitik* at the expense of justice and a movement began toward amending article 23.4 of the LOPJ.¹⁷² In the summer of 2009, the Spanish Parliament almost unanimously passed a bill that amended the law to include the following language:

Without prejudice to international treaties and conventions ratified by Spain, in order to take jurisdiction over the above offenses, it must be established that the alleged perpetrators are in Spain or that victims have Spanish nationality or that there is some important connection with Spain; and in any case, neither another jurisdiction nor international court has begun a procedure involving investigation and effective prosecution, if any, of such offenses.¹⁷³

This amendment codified a categorical reversion to the Supreme Court's holding in the *Scilingo* case by limiting Spain's exercise of universal jurisdiction to cases in which there is a nexus between the crime alleged and a Spanish national interest.¹⁷⁴ Thus, suddenly, the severity of the crimes alleged in the Tibet cases was insufficient to justify the National Audience's adjudication of those claims. It was not surprising then when

168. For example, the former Israeli foreign secretary protested the Spanish investigation of an Israeli bombing of Gaza in 2002. In the United States, President Obama repeatedly opposed a Spanish investigation into several cases of torture at Guantánamo. *See id.* at 23.

169. *Id.*

170. Dívar, *sobre la jurisdicción universal: 'No somos los gendarmes del mundo,'* EL MUNDO (May 4, 2009), <http://www.elmundo.es/elmundo/2009/05/04/espana/1241452393.html>.

171. Jouet, *supra* note 61, at 526–27.

172. Moltó, *supra* note 8, at 23.

173. Friedburg, *supra* note 86, at 888.

174. *See supra* Part II.

the Tibet cases were among the first to suffer the consequences of the amendment of article 23.4 due to their political implications.¹⁷⁵ In February 2010, Judge Santiago Pedraz held that the Tibet issue did not meet the amended statute's requirement, as there was not a sufficiently strong link between Spain and Tibet.¹⁷⁶

4. The Cases Proceed

Yet, this retraction was not the end of the story. Following Judge Pedraz's decision, another judge, Ismael Moreno, pressed forward with the investigation of claims on two bases.¹⁷⁷ First, Thubten was a naturalized Spanish citizen.¹⁷⁸ As such, Thubten had as legitimate a right as any other Spanish citizen to claim that he had been harmed by genocide, regardless of where it was committed.

Second, the amended law specifically states that a link to Spanish national interests applies "[w]ithout prejudice to international treaties and conventions ratified by Spain." Both the Geneva Conventions (ratified by Spain) and the Spanish Criminal Code provide that crimes included in their provisions be prosecuted under universal jurisdiction regardless of the nationality of the perpetrator.¹⁷⁹ Specifically, articles of the Geneva Conventions require that in the context of armed conflict (of which the occupation of Tibet certainly was), "Each [State] shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality, before its own courts.*"¹⁸⁰ While the Geneva Conventions establish standards of international law for war crimes, and while China has unwaveringly averred that its conquest of Tibet was a purely internal matter (i.e., not war), in March 2011, the National Audience held that the investigation of genocide in Tibet "be extended to war crimes foreseen in [the] Geneva Convention[s]."¹⁸¹ That is, Spain's international treaty obligations under the Geneva Conventions trumped the amended article's restrictive language.

After the National Audience's decision to maintain the Tibet cases, the Audience accepted further testimony from witnesses and victims, each substantiating the allegations of the original complaint, and solidify-

175. Moltó, *supra* note 8, at 26.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 27.

180. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, I, art. 49, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (emphasis added).

181. Moltó, *supra* note 8, at 30.

ing the accused officials' respective roles in the commission of each crime.¹⁸² Spain's public prosecution continually sought ways to end the case, arguing again that it be given over to Chinese courts.¹⁸³ However, the Audience again rejected this argument, stating that there was no indication that Chinese authorities had initiated any type of investigation into the allegations in the complaint.¹⁸⁴

At this same time, the complainants also requested the indictment of Hu Jintao, who, at the time, was the sitting president of China and thus protected by head of state immunity.¹⁸⁵ Yet, Hu lost this immunity when Xi Jinping took office in March 2013, and by October, the National Audience agreed to the complainants' indictment request, noting that in his former capacity as Secretary of the Chinese Communist Party in the Tibetan Autonomous Region, there was evidence that Hu was responsible, either directly or in an "organizational capacity," for the "harassment of the Tibetan nation and people."¹⁸⁶ The Audience buttressed its position with reference to evidence that showed

coordinated actions aimed at eliminating the specific characteristics and existence of the country of Tibet by imposing martial law, carrying out forced transfers and mass sterilization campaigns, torturing dissidents and forcibly transferring contingents of Chinese in order to gradually dominate and eliminate the indigenous population in the country of Tibet.¹⁸⁷

As expected, the Chinese response was immediate and stern. China's Foreign Ministry again accused the "Tibetan group" of possessing sinister motives aimed at destroying the "extremely friendly" relations between China and Spain,¹⁸⁸ and added that Spain's "despicable act" was doomed.¹⁸⁹ The Chinese government then summoned Spain's ambassador in Beijing and sent a Chinese delegation to the Spanish Congress.¹⁹⁰ Undeterred, the National Audience proceeded even further, issuing international arrest warrants for five Chinese leaders in February 2014.¹⁹¹

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 31.

186. *Id.*

187. *Id.* at 31–32.

188. *China Denounces Spanish Court's Tibet Case Against Hu Jintao*, VOICE OF AMERICA (Oct. 14, 2013), <http://www.voanews.com/content/reu-china-denounces-spanish-court-case-against-ex-president/1769123.html>.

189. Moltó, *supra* note 8, at 33.

190. *Id.*

191. Al Goodman, *Spanish Judge Issues Arrest Warrants for China's Former President*, Prime Minister, CNN (Feb. 12, 2014, 4:24 AM), <http://www.cnn.com/2014/02/10/world/europe/spain-chinese-officials-arrest-warrants/>.

5. Second Retraction

However determined the National Audience may have been to pursue justice in these cases, it still had to contend with the political forces within Spain, which took each of the Chinese reprimands seriously. As noted by Moltó, the conservative party currently in power in Spain “has not hesitated from sacrificing Spanish judicial sovereignty to economic interests.”¹⁹² Considering that China owns twenty percent of Spain’s debt (80 billion euros) and that Spanish companies are significantly invested in projects within China,¹⁹³ another internal political reprisal was not unexpected.

It was not surprising, therefore, when in June 2014, the National Audience voted to once again shelve the Tibet cases due to an insufficient connection between Spain and Tibet notwithstanding the Audience’s own holding just a year prior indicating otherwise.¹⁹⁴ China’s Foreign Ministry again spoke up, but this time it gave thanks to the Audience and offered a conciliatory, forward-looking message to Spain, stating that China is “ready to work with Spain to progress toward a complete strategic association.”¹⁹⁵

Soon after the National Audience’s recent decision, Director of the Committee to Support Tibet, Alan Cantos, derided the decision, calling it a “blatant and shameful” capitulation to pressure from Beijing.¹⁹⁶ In September 2014, the Committee appealed the decision to the Spanish Supreme Court, arguing that the judges who shelved the case had said nothing about Spain’s obligation to pursue war crimes pursuant to the Geneva Conventions as they had emphasized in their previous decision.¹⁹⁷ The Committee also reiterated the fact of Thubten Wangchen Sherpa’s Spanish citizenship.¹⁹⁸

Currently, human rights advocates around the world remain eager for further developments in the Tibet cases. Judging from the oscillation ad absurdum of Spanish courts’ rulings on the scope of universal juris-

192. Moltó, *supra* note 8, at 33–34.

193. *Id.* at 34.

194. Margarita Batallas, *La Audiencia Nacional archiva la causa que investigaba el genocidio del Tibet*, EL PERIÓDICO SOCIEDAD (June 23, 2014), <http://www.elperiodico.com/es/noticias/sociedad/audiencia-nacional-archiva-causa-investigaba-genocidio-tibet-3324853>.

195. *China Hails Spanish Court’s Decision to Drop Tibet Case*, VIDA LATINA (June 24, 2004), <http://www.vidalatinas.com/news/2014/jun/24/china-hails-spanish-courts-decision-to-drop-tibet/>.

196. Richard Finney & Rigdhen Dolma, *Spanish Group to Push Case Against Chinese Leaders’ Actions in Tibet*, RADIO FREE ASIA (July 17, 2014), <http://www.rfa.org/english/news/tibet/pursue-07172014132445.html>.

197. Press Release, Comité de Apoyo al Tibet, Appeal Lodged in Supreme Court against shelving of Tibet case; PM Rajoy visits China (Sept. 24, 2014), *available at* <http://www.tibetjustice.org/?p=657>.

198. *Id.*

diction in Spain, there is truly no predicting which way the Supreme Court will hold with regard to the Committee's most recent appeal. However, if the courts' recent trend of obsequiousness to Chinese political and economic might stays true, the Tibet cases' prospects appear grim.

CONCLUSION

Despite Spain's reluctance to proceed in its prosecution of former Chinese officials, the zeal with which its judiciary seeks to wield universal jurisdiction has apparently not diminished. In June 2015, Karenzi Karake, chief of Rwanda's intelligence service and a member of the country's governing party, was arrested by British authorities on a Spanish warrant seeking Mr. Karake's extradition.¹⁹⁹ The warrant stemmed from Judge Fernando Andreu's 2008 indictment against forty current and former Rwandan military officers, all of whom are alleged to have committed genocide and other human rights abuses during the 1990s, which included the deaths of three Spanish aid workers.²⁰⁰ Mr. Karake's arrest was a surprise owing to the fact that he had visited the United Kingdom prior to his arrest without incident.²⁰¹ Like China's Foreign Ministry, Rwanda's response was expectedly prompt and reproachful, deriding the arrest as "an outrage."²⁰²

The arrest and possible extradition of Mr. Karake illustrates the danger inherent in Spain's selective use of universal jurisdiction. Actively seeking to prosecute one perpetrator of genocide but not another invites criticism that the door to Spain's criminal justice system hinges on the relative political and economic stature of these perpetrators' patrias. Indeed, inconsistent and seemingly arbitrary application of universal jurisdiction is among the most problematic issues identified by both proponents and critics of the universality principle.²⁰³ Further, prosecuting an

199. Stephen Castle & Raphael Minder, *Britain Holds Rwandan Spy Chief on War Crimes Warrant from Spain*, N.Y. TIMES (June 23, 2015), <http://www.nytimes.com/2015/06/24/world/europe/britain-holds-rwanda-spy-chief-on-spanish-war-crimes-charges.html>.

200. *Id.*; Al Goodman, *Spanish Judge Indicts 40 Rwandan Military Officers for Genocide*, CNN (Feb. 6, 2008), <http://edition.cnn.com/2008/WORLD/europe/02/06/spain.indictments.rwanda>.

201. Castle & Minder, *supra* note 199.

202. *Id.*

203. *See, e.g.*, Roht-Arriaza, *supra* note 67, at 122–23 (lack of consistency exemplified by the dismissal of cases subsequent to *Pinochet*); Dr. Rephael Ben-Ari, *Universal Jurisdiction: Chronicle of a Death Foretold?*, 43 DENV. J. INT'L L. & POL'Y 165, 187 (2015) (criticizing "activist judges" and "politically motivated interest groups" for bringing "manipulative lawsuits"); Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July–Aug. 2001, available at <https://www.foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction> ("When discretion on what crimes are subject to universal jurisdiction and whom to prosecute is left to national prosecutors, the scope for arbitrariness is wide indeed.").

official of a small African state may certainly bring about further critiques of neocolonialist judicial intervention in the domestic affairs of formerly colonized nations.²⁰⁴

The high probability that the Spanish legislature's constriction of Spain's universal jurisdiction statute was intended to appease China highlights this prosecutorial inconsistency.²⁰⁵ Prosecuting Karezi Karake but not Jiang Zemin dilutes the solemnity of the international legal mechanisms upon which Spain's law is based—such as the Genocide Convention—and forces Spain's defense of universal jurisdiction again into the gauntlet of *realpolitik*, which is precisely the kind of morass the international human rights community sought to avoid in classifying acts such as genocide as *jus cogens*.²⁰⁶

Of course, Spain's attempt to prosecute Mr. Karake could also simply go the way of Mr. Jiang. Unsurprisingly, Mr. Karake has refused to be extradited,²⁰⁷ and his arrest has already drawn the ire of the African Union, which has called for Mr. Karake's "unconditional and immediate release."²⁰⁸ If Mr. Karake's case attracts the attention and criticism of the Tibet cases, it could also be shelved (or reserved for a more politically advantageous moment). A less cynical possibility, however, and one more aligned with the spirit of the Genocide Convention, would be for Spain to continue forward with its prosecutorial efforts against Mr. Karake, and to use this case as a platform for once again reopening the Tibet cases. Doing so would demonstrate Spain's commitment to combating genocide, truly regardless of where or by whom it was perpetrated.

The Tibet cases are among the most recent and visible examples of the principle of universal jurisdiction in action. While universal jurisdiction has roots stretching deep into the annals of legal history, the prominence of its exercise in the last thirty years has signaled a broad recognition by the international legal community that impunity for perpetrators of serious crimes will not be tolerated. However, despite this necessity,

204. See, e.g., Thomas W. Donovan, *Jurisdictional Relationships Between Nations and Their Former Colonies*, GONZ. J. INT'L L., 2002–2003, at 3, available at 6 GONZ. J. INT'L L. 3 (Westlaw).

205. Castle & Minder, *supra* note 199.

206. See, e.g., SCHABAS, *supra* note 12, at 426 ("Indeed, the main explanation for the relatively small number of universal jurisdiction trials for genocide is political rather than legal."); see also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 6, ¶ 64 (Feb. 3) (finding that the prohibition of genocide is "assuredly" a peremptory norm).

207. *Rwandan General Refuses Extradition to Spain from UK*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/aponline/2015/06/25/world/europe/ap-eu-britain-rwanda.html>.

208. *African Union Calls on UK to Release Rwanda's Spy Chief*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/reuters/2015/06/26/world/africa/26reuters-rwanda-britain.html>.

the application of universal jurisdiction has been aggressively contested by politicians, judges, and scholars alike.²⁰⁹

Spanish courts and legislators should not accede to the political and economic pressures of belligerent states like China. The Spanish judiciary has the support of history and precedent behind it and should not shirk from the vanguard of universal jurisdiction. As noted in Part III, resolutions issued by the UN, among other international legal authorities, have consistently reported on China's denial of its actions in Tibet despite overwhelming evidence demonstrating the contrary. One need only browse current news headlines of recent Tibetan self-immolations to glean that the human rights tragedy in Tibet is ongoing.²¹⁰ By ignoring the international community's censure of its actions, China has assured that its officials will continue to enjoy complete impunity, as exemplified by the Chinese judiciary's unwillingness to even hear allegations of serious crimes. Spain should stand firm behind its laws (though amended) that authorize its exercise of universal jurisdiction by again reopening the Tibet cases.

A conservative history of strict adherence to traditional concepts of sovereignty and territory has served to empower those seeking immunity from prosecution for the serious crimes that they have committed. While the preservation of a reasonable degree of sovereignty is undoubtedly in the international community's interest in maintaining comity and political stability, states' genuflection to—and blind faith in—the inviolability of these concepts is outmoded. Further, the conservatism underlying arguments against universal jurisdiction ignores the lessons of the Second World War, thereby dangerously permitting perpetrators to insulate themselves from prosecution.

Spanish judges may wonder if the risk of upsetting Spain's delicate political and economic relationships with China is worth the possibility of pursuing justice for Tibetan victims of serious crimes, especially when they understand the virtual impossibility of China agreeing to extradite its officials.²¹¹ Is the possibility of this limited impact worth all the trouble? It is this question that encapsulates the ongoing dilemma in which Tibetans have found themselves since 1950. If China refuses to acknowledge its record of serious crimes in Tibet and thus denies any

209. See, e.g., Kissinger, *supra* note 203; Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389 (2008); Stephen Krasner, *Pitfalls of International Idealism*, 8 UCLA J. INT'L L. & FOREIGN AFF. 61 (2003).

210. See *Self-Immolation by Tibetans*, INT'L CAMPAIGN FOR TIBET, <http://www.savetibet.org/resources/fact-sheets/self-immolations-by-tibetans/> (last visited Apr. 15, 2015); see also *Tibet Self-Immolation*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/tibet-self-immolation/> (last visited Apr. 15, 2015).

211. Bakker, *supra* note 4, at 600.

possibility of remedy to its victims, Tibetans have and will continue to seek assistance from the international community. When state officials are permitted to ignore their complicity and responsibility in serious international crimes, the victims of these crimes are denied the prospect of redress. Universal jurisdiction is one invaluable principle by which Spain and other states can rectify this dangerous trend of impunity, and thereby advance the cause of international human rights.