From national to universal justice and back again: Costs and challenges of political and judicial transformations of developed states

Maja Davidovic

American College of Thessaloniki

maja.a.davidovic@gmail.com

Abstract: *The era of globalization shifted the focus of the international community towards more pooled sovereignty and supranationalism in many areas, including justice. Emphasizing human rights and the rule of law, states have created international criminal justice mechanisms such as universal jurisdiction and the International Criminal Court. These changes, however, require political and judicial transformations, as well as shifts in both domestic and foreign policy even among those developed states which have had a good record with regards to the respect of human rights. The aim of this paper, therefore, is to explore changes and costs principles of universal justice have brought to Western states such as the United States and Spain, to analyze possible challenges international criminal justice is facing due to lack of transformation, integration and support of developed states and to draw conclusions about the future of a sovereign state on the road to universal justice.*

Keywords: universal jurisdiction, sovereignty, USA, Spain, ICC, judicial transformation, crimes against humanity

Introduction

In the era of globalization, Western democracies are known for having the highest records of human rights respect for their citizens. Nonetheless, even the most powerful countries of the West assert classical notions of sovereignty and often reject political principles of the universal human rights-oriented regime, facing international criticism and drastic legitimacy deficit (Levy and Sznaider 2006). Namely, human rights norms form a new universal legalism that challenges orthodox assumptions of national sovereignty and shapes international and domestic politics. Upon these transformations, human rights violations ceased to be solely a moral matter, but they now trigger a legal breach and involve legal responsibility of state officials. Through newly-created mechanisms such as the International Criminal Court (ICC) and the principle of universal jurisdiction, international legislative branch is testing the rule of a nation-centric raison d'état. Optimistically, rather than making states the dominant subjects of international law, these new mechanisms bring 'persons' to that position (Levy and Sznaider 2006). These emerging legal regimes are also significant for modifying current political policymaking in the international arena, restructuring the discourse of the overall international affairs in a legalist direction filled with responsible actions.

These novel 20th century mechanisms of international criminal justice are meant to put an end to the practice of impunity and exercise the promise 'Never Again' that was given at the Nuremberg trials. Yet, some like the ICC are disadvantaged due to lack of universal membership and often accused of being

neocolonial[1] (Kaleck 2009), whereas others as, for instance, the International Criminal Tribunal for Former Yugoslavia have been accused for offering high-quality treatment to top-level perpetrators and, in few instances, acquitting them[2]. Consequently, seventy years after the end of the World War II, the world has not kept the promise given in Nuremberg. Perhaps we have not experienced such a long and devastating world war ever since, but crimes that 'hurt our conscience'[3], resembling to Holocaust have certainly been repeated.

During the Cold War, many atrocities were committed by the Western allies, the creators of the Nuremberg trials. The victims of the Vietnam, Algerian and numerous proxy wars in Latin America might never receive their true justice, as the perpetrators have been prosecuted selectively[4]. Soon after the Cold War was over, the world was struck by terrible crimes that had not been seen since the 1940s – mass manslaughters in Rwanda and the former Yugoslavia. Both resulted in creation of ad-hoc tribunals – the International

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[1] All the on-going and completed cases at the ICC include African nationals.

[2] Recent examples include acquittals of Gotovina, Markac and Haradinaj.

[3] Mendez, 2001

[4] For instance, certain Guatemalan state officials such as Efrain Rios Montt responsible for the horrible crimes committed against the Mayan population in the 1970s and 1980s, faced prosecutions in the past years; yet, none of the US officials – most notably the Reagan administration – who were helping the Guatemalan government's crimes by providing weapons, finances, training and staff - have been held responsible for the tremendous losses of human lives.

Criminal Tribunal for Rwanda (ICTR) based in Arusha and the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. While the ICTR and ICTY have often been exposed to severe criticism, they are also praised for abolishing the victor's justice in the international criminal justice system, as well as for prosecuting heads of states, such as the former Yugoslav President Slobodan Milošević. The idea of holding individuals, military and political leaders, criminally accountable dates far earlier than the international criminal tribunals for former Yugoslavia and Rwanda, but it is certain that their creations have added to the legacy of global-level jurisdiction which started with the arrest of the Chilean General Pinochet who was the first former head of state to be prosecuted on the basis of the principle of universal jurisdiction. Ever since the Pinochet case, dozens of similar cases have been initiated *ex proprio motu* by prosecutors and judges, while a substantial amount of cases has been started by human rights organizations and lawyers (Kaleck 2009).

The aim of this paper is to, by comparing and contrasting universal jurisdiction practices and political and judicial changes and costs of two key players in the international judicial arena – Spain and the United States of America, evaluate the short history of universal jurisdiction and draw conclusions on its admirable successes, but also its necessary amendments. The paper begins with a brief overview of universal jurisdiction, and it then attempts to examine Spanish actions, transformations and costs related to universal jurisdiction practices, only to reach the point of contrast, by offering an analysis of most relevant US practices and transformations, followed by a couple case studies. The paper then slowly reaches concluding remarks, by

asking questions and drawing conclusions about universal jurisdiction's impact on transformations of national sovereignty, and the eternal debate about national versus global.

On Universal Jurisdiction

Those who commit offenses categorized under 'universal jurisdiction' are *hostes humani generis* – enemies of all mankind, and every state in the world can have the authority to bring them to justice (Bradley 2001). Even after the 'Never Again' promise was given, the world was exposed to many hostes humani generis, as an estimated 170 million civilians have been victims of gross violations of human rights such as genocide and war crimes to date (Jouet 2007). Atrocities committed by heads of states and other state officials have largely been tolerated by national and international communities; for example, the Argentinian military junta pursued a 'Dirty War Against Subversion' between 1975 and 1981, during which tens of thousands were tortured in secret prisons and killed in the most brutal ways. One of the survivors of the regime, Luiz Urquiza, fled to Europe only to discover upon returning to Argentina in 1994 that his repressors had become senior officials in the Argentine police (Jouet 2007). However, he did manage to testify about the torture he had been through and contribute to bringing justice to Argentina far away from where the crimes took place – in a Spanish High Court, addressing Judge Baltasar Garzon. Complaints filed by the Judge Garzon are usually marked as a beginning of the expansion of universal justice practices; however, as several examples show, the idea preexisted. Although

the Nuremberg tribunal was built on a doctrine somewhat different than universal jurisdiction, different military and civilian courts certainly claimed universal jurisdiction to prosecute the atrocities committed by the Nazis. One of the most famous examples was the Israeli Supreme Court which demanded it had the right to prosecute Adolf Eichmann under the principle of universal jurisdiction for committing crimes against humanity in countries other than Israel, without him being physically present in Israel or possessing an Israeli citizenship (Bradley 2001).

Defining the scope of universal jurisdiction is quite a challenging task, considering that there has not been a consensus on what universal jurisdiction should be. In pragmatic terms, countries engaging in universal jurisdiction differ on whether custody of the alleged perpetrator is needed prior to initiating proceedings or not. *Conditional universal jurisdiction* means that a state may prosecute a defendant only if he is in custody of that state; states who follow this principle include Austria, France and Switzerland (Jouet 2007). Throughout history, customary law has demanded states to exercise universal jurisdiction on pirates who happened to be in their custody. Furthermore, in international law, different treaties suggest states are either required to prosecute the defendant who is in their custody through universal jurisdiction or extradite them to the state where they allegedly committed grave breaches of 1949 Geneva Conventions, torture under the 1984 Torture Convention or other gross violations of human rights.

On the other hand side, *absolute universal jurisdiction* supposes that states may prosecute a defendant regardless of whether he is in custody of the prosecuting state; along with different Western European countries, Spain practices this kind of universal jurisdiction (Jouet 2007). In the past few decades, Judge Garzon and other notable Spaniards shaped the way the world views universal crimes, and largely contributed to the progress of universal jurisdiction practices.

The Accommodation of Universal Jurisdiction in the Spanish Judicial System

Spain has a democratic political system in which the Constitutional Court is the highest court that must uphold and interpret the Constitution and, similarly to the US Supreme Court, has the power of judicial review over other state organs' actions (Jouet 2007). Spain adheres to many international treaties and conventions, most notably the Convention on the Prevention and Punishment of the Crime of Genocide and the Torture Convention. Universal jurisdiction practices in Spain come from a combination of international treaty obligations and national procedural rules (Kaleck 2009). To be more precise, application of the principle of universal jurisdiction for grave crimes against humanity such as genocide and torture is authorized under Article 23.4 of the Organic Law for the Judiciary 6/1985[5]. Until it was amended, this law did not require cases to have any connection to the Spanish state in order to be filed.

[5] See Ley Orgánica Nº 6/1985 de 1 de Julio de 1985 del Poder Judicial. (1985). Retrieved 26 August 2014 http://www.wipo.int/wipolex/en/text.jsp?file_id=181467

Consequently, over the years, Spanish judiciary branch has developed substantial infrastructure to accommodate universal jurisdiction practices, which has certainly made it one of the most welcoming arenas for prosecuting international crimes.

According to the Organic Law, trials *in absentia* are generally prohibited (Kaleck 2009). Although in absentia trials are prohibited, absolute universal jurisdiction enables Spain to initiate proceedings even in cases where the defendant has never crossed Spanish borders (Jouet 2007). Allowing countries to demand extradition of perpetrators from other states, absolute universal jurisdiction gives a much broader application power to Spain and puts it on the very top of the judicial fight against crimes against humanity. On the other hand side, the role of judicial police in Spain has been limited and no significant investigations have been undertaken abroad, although the police are authorized to execute them under the direction of an investigative judge (Kaleck 2009). For this reason, in most cases, the non-governmental sector is the one pushing for locating more evidence and witnesses. Nonetheless, proceedings may also be initiated by an investigating judge *ex officio* in the aftermath of preliminary analysis of reported facts, regardless of whether criminal notice was primarily obtained by the police, prosecutor or an individual. In fact, individuals can submit private complaints if they are victims or Spanish citizens acting by the way of popular accusation, which has been a major driving force in bringing human right cases to courts.

Over the years, the Constitutional and the Supreme Court of Spain have had discrepancies on the scope of the kind of universal jurisdiction Spain should pursue under treaty law and Article 23.4. According to the Supreme Court's rationale, as shown in the case of Adolfo Scilingo in 2004, an Argentine navy officer involved in the Dirty War, jurisdiction is a representation of state's national sovereignty, and it should reach only as far as in national interests do; aiming further would mean intervening in other states' national sovereignty (Jouet 2007). Thereupon, the Supreme court is of an opinion that universal jurisdiction should only be justified when there is a union of 'the common interest in avoiding impunity for atrocity crimes with the concrete interest of a state in protecting its national interests' (Jouet 2007 p. 506). Citing Article 2.7. of the UN Charter as a bar to broad universal jurisdiction, the Spanish Supreme Court concluded that any broader universal jurisdiction application would violate the principle of non-intervention in another state's affairs, and that any exception to this principle on the basis of human rights violations should be decided between nation-states and international community.

The Constitutional Tribunal, on the other hand, argued that there is no need for a link to national interest, since universal jurisdiction is solely based on the substantive nature of serious violations of human rights having consequences on the entire international community (Jouet 2007). Thus, demanding victims of universal crimes such as genocide need to be Spanish citizens contradicts the nature of genocide as a crime and the idea of it being prosecuted universally. If such rationale was followed, Spanish courts would only be able to prosecute whoever was aiming to exterminate Spaniards,

whereas Article 23.4. of the Law on Judicial Power clearly intended to punish perpetrators aiming to exterminate anyone anywhere in the world.

Small Victories

Based on this ruling by the Constitutional Tribunal, Spanish magistrates were able to issue several international arrest warrants, most notably against former Guatemalan military ruler Efrain Rios Montt, who was later on tried in Guatemala and is currently awaiting retrial (Amnesty International 2013). In addition, some of the most prominent examples are represented in the activities of the notable Spanish judge Baltasar Garzon, who in 1996 started demanding extraditions and arrests of Argentina's erstwhile military leadership for their role in hundreds of unsolved murders and forced disappearances of Spanish citizens during the 'Dirty War' (Levy and Sznaider 2006). The event culminated in Garzon's ordering detention against General Augusto Pinochet, a Chilean dictator, at the time he was in London. Garzon's arguments consisted of allegations of Pinochet and other army personnel committing crimes against humanity similar to those committed in World War II by the Nazi officials. Consequently, Garzon's argued Spain had a full right to prosecute these perpetrators under the principle of universal jurisdiction. These bold attempts to try criminals who committed horrible atrocities across national borders resulted in the first prosecution of a former head of state for crimes like torture and genocide, and set a precedent for all other heads of state or high-tier officials to be prosecuted in a similar fashion anywhere in the world. Most importantly, this practice showed that state officials can be disabled from

benefitting from their sovereign immunity and demonstrated some important steps forward in the global battle for more pooled sovereignty and supranationalism in all spheres, including justice.

Along with Pinochet, another notable trial that was opened was against a former Argentine marine officer Adolfo Scilingo, detained while traveling in Madrid (Kaleck 2009). The case ended in his conviction for crimes against humanity and torture by the National Court. In addition, another former Argentine marine officer, Ricardo Cavallo was put on trial after being successfully extradited from Mexico in 2003; yet, five years later, he was eventually extradited from Spain to Argentina to be prosecuted by his home country. There are numerous on-going investigations; however, many cases have been dismissed and a lack of consistency in Spanish courts has been noticed.

Costs and Changes

Spanish high courts have often been of conflicting opinions about whether international law allows states to unilaterally prosecute crimes committed by foreign perpetrators against foreign victims in a foreign country, without any link to the prosecuting state. First attempts to amend the Spanish law started in November 2004 when the Supreme Court aimed to narrow Spanish application of universal jurisdiction by requiring an evident link to national interests in order to proceed with a prosecution, feeling that some

prosecutions had gone too far (Jouet 2007). A year later, the Constitutional Tribunal of Spain overruled this decision, authorizing Spanish courts to exercise broad universal jurisdiction. As a result of this authorization, alleged victims were able to file criminal complaints against the former Chinese president Jiang Zemin and other state officials of China for engaging in the Tibetan genocide, which endangered Sino-Spanish relations (Jouet 2007).

Besides causing anger among Chinese state officials, Spain's broad application of universal jurisdiction led senior Spanish executive officials to protest against prosecuting crimes in Argentina and Chile, including those crimes committed directly against Spanish victims (Jouet 2007). Most importantly, however, these practices caused political tensions with the United States of America, Spain’s strong strategic ally. Under the rationale that the action violated civilian rights protected by the Fourth Geneva Convention and was a general 'crime against the international community' (Jouet p. 526), Spain opened an investigation against three American soldiers for the death of a Spanish journalist who was killed in Iraq in 2003, when an American tank fired at Hotel Palestine. The Spanish magistrate who opened the case, Santiago Pedraz, argued that the US army was aware it was shooting at a civilian object and that it did so with an aim to endanger or end lives of the journalists who were critical of the war. These allegations were rejected by the US government, which claimed the soldiers were abiding by the rules of combat, targeting a sniper located on the hotel's roof, and did not commit a crime. Despite US threats and reluctance to cooperate, Spanish authorities still continued with an investigation and issued an international arrest warrant

against the three soldiers. As the US State Department spokesman at the time stated that it will be a 'very cold day in hell' before American soldiers are forced to answer to Spanish courts, it becomes very unlikely that the soldiers will ever be in Spain's custody (Jouet 2007).

While there are evident ambitions by notable Spanish judges and activists, judicial and prosecutorial authorities in this country hamper progress of certain cases due to vast political and economic costs and diplomatic pressures from abroad. Thus, amidst its exceptional record in fighting against universal crimes, in March 2014, Spain amended its universal jurisdiction law. Changes brought by the amendment include 'extensive and complex set of requirements' on perpetrators and victims' nationality and status in Spain that have to be met prior to applying the principle of universal jurisdiction (Human Rights Watch 2014). Namely, section 2, 4 and 5 concerning the Article 23 of the Organic Law on Judicial Power have been amended so as to limit the application of law to cases where: the perpetrators are physically present in Spain; the victims are of Spanish nationality, or the case has significant links to Spanish national interest[6]. The possible loophole in the amendment could be the interpretation of the third criterium which has a potential to be flexible and could help the law function largely unchanged (The Center for Justice and

[6] See Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal. (2014). Boletin Official del Estado, Núm. 63, Sec. I. Pág. 23026. Retrieved from http://www.boe.es/boe/dias/2014/03/14/pdfs/BOE-A-2014-2709.pdf

Accountability 2014). Nonetheless, under the new law, Spain placed itself in breach of certain international legal obligations it adheres to, such as the UN Convention against Torture. According to the Human Rights Watch (2014), Spain has already dismissed charges of crimes against humanity in at least one case involving El Salvador, leaving the case pending regarding other charges that do not require universal jurisdiction. If the Spanish judiciary will seek loopholes in the amendments in order to continue their remarkable practices is yet to be seen; however, it is evident that controversial actions have taken their toll and that the Spanish are, like many others, also weak under persistent political pressures from important allies.

US Law and Universal Jurisdiction

Ever since the early 1800s, it has been established in the US that there is no federal common law of crimes, but that federal criminal liability can be created only by a domestic enactment. Hence, neither customary international law of universal jurisdiction nor customary international law forbidding a particular conduct can by itself create criminal liability under US law (Bradley 2001). Moreover, treaties do not create domestic criminal liability although they might call for the criminalization of conduct or the exercise of jurisdiction. In other words, treaty provisions take effect on federal level only when Congress implements them. Evidently, it is Congress that has more control over the exercise of universal jurisdiction than federal courts or international law, although international law can surely have some importance in the interpretation of congressional enactments. For instance, most of the universal

jurisdiction statutes are implementations of treaties, demanding from states to prosecute or extradite perpetrators found in their territory. Under the Necessary and Proper Clause, US Congress has flexibility as to how different treaty commitments should be interpreted and applied (Bradley 2001). Yet, limitations of the Congress provided by the Constitution and the Bill of Rights should not be overlooked.

A relevant act is the Alien Tort Statute, first enacted in 1789 as a part of the First Judiciary Act. It creates a federal cause of action for torts that violate international law regardless of where they are committed (Bradley 2001). The statute states that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States', in a form of universal jurisdiction[7]. This means that parties lacking access to criminal justice can alternatively attempt to bring civil suits using the Alien Torts Claims Act to obtain justice, which is not as controversial as universal jurisdiction (Kaleck 2009). In fact, under this Statute, courts have adjudicated claims regarding human rights abuses in countries such as Guatemala, Ethiopia and the former Yugoslavia (Bradley 2001).

Apart from the general unwillingness to fully participate in international criminal justice practices, the US suffers from a few technical

[7] See Cornell University Law. (2014). *28 U.S. Code § 1350 - Alien's action for tort*. Retrieved 28 August, 2014 http://www.law.cornell.edu/uscode/text/28/1350

obstacles in its dealings with universal jurisdiction. For instance, the federal genocide statute of the US does not assert universal jurisdiction but it states that the offense must take place in the US or the offender must be a US national[8]. This not only limits US practices, but it also serves as a way of avoiding responsibility to act according to its powers as the most influential actor in the contemporary international arena. Another issue is the existence of a possibility that the US could impose a death penalty as punishment upon prosecuting perpetrators under the principle of universal jurisdiction (Bradley 2001). Criminal tribunals for former Yugoslavia and Rwanda, as well as most democratic countries have abolished death penalty, thus many are or might be unwilling to extradite the suspects to the US without an assurance that death penalty would not be an option.

The Donald Rumsfeld Case

One might expect the US to be highly engaged in prosecuting international war criminals, being a symbol of democracy in the world. However, rather than investigating and trying foreign perpetrators, the US is a very important case to analyze because it is so often being the one against whose nationals other states press charges. In 2006, several human rights organizations represented by the Berlin Attorney Wolfgang Kaleck filed a criminal complaint with the German Federal Prosecutor for purposes of

[8] See Cornell University Law School. (2014). *18 U.S. § 1091 – Genocide*. Retrieved 26 August 2014 http://www.law.cornell.edu/uscode/text/18/1091

opening an investigation of high-ranking US officials', most notably the Secretary of Defense, Donald Rumsfeld, responsible for authorization of war crimes during the so-called 'war on terror' in Iraq (German War Crimes Complaint against Donald Rumsfeld et al. 2014). A similar complaint was filed in 2004, but it was dismissed. The new complaint involved new evidence, defendants and plaintiffs, and followed after Donald Rumsfeld's resignation as the Secretary of Defense, and the adoption of the Military Commissions Act of 2006 in the US, when it was attempted to offer retroactive immunity from prosecution for war crimes to military officials. After the German Federal Prosecutor decided not to open an investigation, the human rights organizations in question appealed to the decision, but the Stuttgart Regional Appeals Court dismissed the appeal in 2009. A motion for reconsideration was filed in May 2009.

According to the prosecuting party, the US administration led by Secretary Rumsfeld treated at least hundreds, if not thousands of detainees in Abu Ghraib in Iraq and in Guantanamo in a coercive manner, using harsh interrogation techniques (German War Crimes Complaint against Donald Rumsfeld et al. 2014). Consequently, committing crimes of torture and/or cruel, inhumane and degrading treatment violated the 1949 Geneva Conventions, the 1984 Convention against Torture and the 1977 International Covenant on Civil and Political Rights – all of whose principles are signed and adhered to by the United States. For instance, the 1984 UN Convention against Torture, signed and ratified by the US, requires states to investigate allegations of torture committed on their territory or by their nationals, or extradite them

to stand trial elsewhere. [9] In addition, the Convention suggests that 'no exceptional circumstances what so ever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture', meaning that the US involvement in torture practices during the war in Iraq are not justified at any cost.

This particular complaint was filed under the Code of Crimes against International Law (CCIL), carried out by Germany in compliance with the Rome Statute which this country ratified. The CCIL enables Germany to act and prosecute according to the principle of 'universal jurisdiction' for the crimes that violate the CCIL, regardless of the nationality of the victims or suspects, or the place where the crimes took place (German War Crimes Complaint against Donald Rumsfeld et al. 2014). No other international or national courts were mandated to investigate and prosecute this case. Having refused to become a party to the Rome Statute, the US escaped the option of having its citizens facing a prosecution before it; in addition, it gave immunity from Iraqi prosecution to its entire military personnel in Iraq, so the Iraqi national courts were not authorized to go on with an investigation either.

Nevertheless, the complaints were not as meaningless. As soon as the first complaint was filed, the Pentagon made clear threats, stating US-German

[9] See Articles 2 and 5 of United Nations General Assembly Resolution 39/46. (1984). 1984 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

relations could be largely endangered if the complaint over Abu Ghraib proceeded (Deutsche Welle 2004). In addition, the Pentagon's spokesperson said that every government in the world, NATO allies in particular, should be aware of the grave effects on relations with the US whenever similar 'frivolous lawsuits' appear. Subsequently, no significant progress in the case has been made since 2009. Up to the present date, Germany remains home to thousands of US troops, many of which commute into and out of Iraq from German bases.

Other Troublesome Cases

Open political struggles in universal jurisdiction cases are not rare. In particular, political barriers become troublesome when criminal proceedings are brought against perpetrators from the states with whom the hosting state has politically, economic, military, and overall, friendly relations. Apart from the Donald Rumsfeld case, there have been several important attempts to prosecute US officials responsible for recently committed atrocities, both in and out warzones.

The CIA Extraordinary Rendition Flights Case

A good example of a controversial case that implies political barriers is the CIA extraordinary rendition flights case. The CIA rendition flights enable the outsourcing of torture and creation of a 'global spider's web' of detention

facilities and torture chambers in which, allegedly, fifteen European countries have been involved (Kaleck 2009). Much criticism about these centers is directed towards the US government, but also to European governments for being co-responsible for international crimes. In 2005, El Pais reported the landings of CIA planes in few Spanish islands including Palma de Mallorca (Democracy Now 2010); as a result, the notable judge Garzon pursued an investigation regarding the landings. Allegedly, the landings were exercised without any official knowledge of the Spanish authorities, thereupon breaching its national sovereignty. Nevertheless, in 2010, WikiLeaks reported that the US government, led by the American ambassador to Spain, worked with members of the Spanish government to thwart the investigation and the judicial process (Democracy Now 2010).

Violations and breaches committed through these CIA actions are plenty. The Inter-American Convention on Forced Disappearance of Persons states that 'the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of Rights and Duties of Man, and in the Universal Declaration of Human Rights' (Paust 2004 p. 1354). Furthermore, the Convention on Forced Disappearance sees forced disappearance as a grave crime and a serious offence 'against the inherent dignity of the human beings, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States' (Paust 2004 p. 1355). In a similar manner, the Convention recognized forced disappearance of persons as a crime against humanity. Although belonging to

the Organization of American states (OAS), the US has not ratified any of the OAS human rights treaties, including the Convention on Forced Disappearance (Rivera Juaristi 2014). It, thus, becomes clear that the United States of America is an exception when it comes to taking responsibility under international law for transferring persons to other states for purposes of torture and inhumane interrogation. As a result, the attempts to prosecute those responsible for the CIA extraordinary rendition flights did not go far.

The Bush Six Case

Several international organizations including the Center for Constitutional Rights (CCR) have filed cases against former US officials for committing the universal crime of torture. Nonetheless, as the US is one a few non-members of the International Criminal Court, the perpetrators would have to be brought to justice using the principle of universal jurisdiction in one of the nation-states who feel strongly about prosecuting crimes like torture regardless of whether they involve their own citizens. One of the on-going investigations includes the French investigation into the torture and serious mistreatment of three French citizens in Guantanamo, confirmed by the Appeals court in Paris in June, 2005. The US administration has been alleged of lack of cooperation in the pending case up to date (Universal Jurisdiction: Accountability for U.S. Torture 2014).

In a similar fashion, Judge Velasco of Spain took responsibility to decide whether there should be any proceedings in a case filed against the so-called 'Bush Six' for torture and war crimes in Guantanamo and other overseas facilities (The Spanish Investigation into U.S. Torture 2014). Spain had a direct incentive to file the case, as six of its citizens were held in Guantanamo and had reportedly been suffered directly from the Bush administration shifts from the international law (Borger and Fuchs 2009). His decision to proceed with prosecutions was appealed in 2011, but the appeal was dismissed in March 2012 just so that the victims could appeal to the Supreme Court of Spain in June 2012, which dismissed their appeal in 2013. Later in 2013, a petition for review was sent to the Spanish Constitutional Court (The Spanish Investigation into U.S. Torture 2014). This particular case was deemed very likely to endanger Spain's relations with the Obama administration, but there was a general feeling among the lawyers who filled in the lawsuit that, under the Spanish law, prosecutors had no other option but to go ahead with the case. The reason for denying the prosecution, used previously in a case against Donald Rumsfeld by the German court, was that such prosecutions should be held in and by the US. In early 2009, Obama stated his administration will look into past practices; nonetheless, none of the second-tier officials in question have been prosecuted so far (Borger and Fuchs 2009).

Although this argument has been used frequently by state officials, many scholars argue states do not have exclusive jurisdiction over citizens. According to Scharf (2001), 'when another state seeks to prosecute a state's national, 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 it be the exclusive forum for such prosecution'. This is another parameter of national sovereignty's decrease in the post-World War II era, in which the international community has largely recognized that one government's powers end where human rights of persons are being violated (Jouet 2007).

Like many other universal jurisdiction cases, the Bush Six case remains pending. Often the judiciary lacks sufficient data to draw concrete conclusions, or in other cases, like the Bush Six and the CIA extraordinary rendition flights cases, progress of a prosecution is being hampered by political and diplomatic pressures. As a matter of fact, WikiLeaks reported in 2009 that certain Spanish officials were warned by the Obama administration's diplomats about severity of the Bush Six case and the 'enormous impact' that the prosecution might have on the bilateral relations between the two countries (Egelko 2011).

In 2003, Belgium brought charges against the retired General Tommy Franks, who led the US invasion in Iraq, following the 1993 law that empowered its courts to practice universal jurisdiction (Deutsche Welle 2004). Donald Rumsfeld, the Defense Secretary at the time, threatened to stop funding inflows for NATO headquarters in Belgium, as well as to seriously consider whether the US would send any more officials to meetings in Brussels. The lawsuits against Franks, former president George H.W. Bush, Secretary of State Colin Powell and Israeli Prime Minister Ariel Sharon were all eventually aborted by the Belgian High court, as the Belgian law on universal jurisdiction had been drastically amended. Being aware of its power and

influence, the US managed to defeat the international criminal justice system again.

Fighting the ICC

The lack of effective and fair national justice in many countries that led to severe atrocities resulted in the need of the international community to establish an international court, which birth is a considered to be a significant victory as well as a historical advance for international justice (Begbeder 1999). The creation of the International Criminal Court (ICC) was preceded by multilateral intergovernmental negotiations, resulting in a formal international treaty to be approved and ratified by all the countries. The US was one of only seven states that voted against the Rome Statute in 1998, along with Israel, China, Iraq, Libya, Yemen and Qatar, and has not become a member to the present date (Human Rights Watch 2013). Choosing not to ratify the ICC statute puts the US in position where they are neither subject to the Court's jurisdiction nor obliged to provide cooperation. Unlike its precedents, the ICTY and the ICTR, which being part of the UN system impose a strict legal obligation on all UN member states to cooperate, the ICC leaves this obligation to operate on voluntary basis for the states that have not ratified the Rome Statute (Peskin 2002).

What was listed as the greatest concern of the Bush administration back in 2002 when the Rome Statute entered into force was the prospect that

the ICC might exercise its jurisdiction to conduct politically motivated investigations and prosecution of the US military and political officials (Human Rights Watch 2003). This reluctance to cooperate with the ICC soon culminated in the American Service Members' Protection Act of 2002 banning the US government from lending support to the ICC. The so-called *'Hague invasion clause'* was included in the Act, authorizing the President to *"use all means necessary and appropriate"* to free American personnel held in custody by the ICC (Peskin 2002 p. 252). In addition, it provides for the withholding of US military aid for governments ratifying the Rome Statute and a prohibition to the peacekeeping activities unless immunity from the ICC is guaranteed for the personnel (Human Rights Watch 2003). This renunciation of the Statute marked the beginning of a comprehensive US campaign to undermine the ICC and a much more hostile foreign policy.

Furthermore, the Bush administration requested states worldwide to approve bilateral, so-called "impunity" agreements that would require them not surrender any American nationals to the ICC. By the end of Bush's term in 2008, over 100 bilateral impunity agreements (BIAs) were signed (A Campaign for US Immunity from the ICC, 2013). Even though the US claimed that it did not pressure any of the states to sign BIAs, some US government officials said that a state's unwillingness to sign had affected US support for its membership in NATO. Different reports in the media and by foreign officials claim that threats of cutting both military and non-military aid were made towards smaller countries (A Campaign for US Immunity from the ICC, 2013). This so-called *'bullying'* was proven when the US ambassador to Zagreb published an

open letter warning that Croatia would lose $19 million in military assistance if it failed to sign the BIA. Another example would be Caribbean countries which have been threatened to lose hurricane assistance if they don't give the Americans what they want (Crawshaw, 2003).

In 2004, then-Senator Barack Obama said that the US should *"cooperate with ICC investigations in a way that reflects American sovereignty and promotes our national security interests"* (Statements of Barack Obama on the International Criminal Court, 2011). This was considered to be a big step, and indeed, myriad of changes in foreign policy of the US have been made since Obama became the President in 2008 with regards to the ICC. The US under the Obama administration has been providing support to prosecutions by providing assistance to certain requests made by the ICC prosecutor. Since November 2009, the US has participated as an observer in the ICC Assembly of States Parties (ASP) meetings (US Department of State, 2013). A clear example of better cooperation was the UN resolution that imposed tough sanctions against Libya in 2011, which was the first time that the US supported the ICC. However, this still means that if in 2011 the US dropped a bomb in the no-fly zone in Libya accidentally killing civilians, those responsible for the attack would be subject to jurisdiction of a US court only, not the ICC (Lederer, 2011).

The real question that needs to be raised is why the state that established the principles of war crimes trials in Nuremberg and Tokyo and advocated for the creation of the ICTY and the ICTR is now so eager to sabotage a court that promotes criminal justice worldwide. Perhaps the real

difference is the lack of American vulnerability in any of those ad-hoc tribunals as opposed to a complete and constant disposal the US would have to face at the ICC. Like with many human-rights Conventions, the US remains to be an exception to the Rome Statute up to the present day.

What Awaits

What will come next on the universal jurisdiction road remains uncertain, but there is much room for advancement. Human Rights Watch and other non-governmental organizations advocate for the creation of specialized units in police and prosecutorial authorities that will be adequately resourced and staffed, especially working towards investigating and prosecuting universal jurisdiction cases (Kaleck 2009). Evidently, the universal jurisdiction principle has limited application and much is left to be developed and advanced. According to Wolfgang Kaleck (2009), a German lawyer who filed a complaint against Donald Rumsfeld et al., there is a lack of appropriate implementing legislation in outlining when universal jurisdiction principle can be exercised and determining which crimes should be prosecuted under it. Furthermore, prosecutorial discretion and a very broad interpretation of political immunity in Europe and beyond prevent some prosecutions from making any progress.

Nevertheless, universal jurisdiction surely carries great political, legal and symbolic consequences on state actors as it reaffirms the new understanding of transforming national to supranational, while creating

individual responsibility in the arena of deterritorialized sovereignty (Levy and Sznaider 2006). The trials started by the judge Garzon and many others create legal precedents that can evolve into customs and, later on, harden into law. In fact, any ideas that were born along the lines of creating the universal jurisdiction mechanisms are now incorporated into practices of the recently installed International Criminal Court. The ICC is a recognition of the weakening of sovereign national states in many forms. While national self-determination and statehood remain the central political units in international law and driving forces behind many of the current affairs, the hierarchy of values in the international arena has been transformed. Human rights seriously challenge the leadership, and arguably supersede the previously untouchable status of national sovereignty. In legal terms, the idea of prosecuting crimes against humanity at any cost constructs a major shift away from national jurisdiction to international and rather universal one, while completely blurring differentiations between international and internal conflicts (Levy and Sznaider 2006). In theory, states are no longer able to exercise power over their citizens in any possible way, for an internal conflict might be just enough for any sort of humanitarian or military intervention that would undermine the importance of states' national sovereignty.

Judicial transformations are often intertwined with political changes, since international judicial bodies such as the ICC shift the focus away from protecting state borders and territoriality, which, while still important, weakens under the strains of the idea of more juridical dimensions of a state, such as the stability of peoples. The nation-centric notions are diminished and

the world is shifting towards increased global interdependencies in all spheres, some, like economic, being developed more than the others, but surely all speeding up their paces. Overall, all these new legal developments listed bring us to the emergence of a rather humanitarian-law oriented international regime, which is closely related with the modern phenomena of political transitions and highly developed interdependence in the era of globalization.

As it can be easily detected in the examples of Spain and the USA, universal jurisdiction remains quite limited. The National Audience of Spain has held that incumbent heads of state are immune from prosecutions, disabling Spanish courts to prosecute certain individuals such as Silvio Berlusconi or Fidel Castro at the time (Jouet 2007). This reaffirmed the ICJ's Arrest Warrant of 11 April 2000[10] decision, in which it was clearly stated that incumbent heads of state, ministers, and other senior officials are immune from jurisdiction while in office. In addition, the Rome Treaty required all parties to the treaty, including Spain to give preference to the ICC when it comes to prosecutions (Jouet 2007). Nevertheless, the ICC has very limited jurisdiction, partly because it is not universally recognized and that it suffers from complete absence of support of one of the most important players in the international arena – the US. The US, along with not supporting the work and progress of the ICC, keeps avoiding taking responsibility for actions of its well-developed, omnipresent

[10] See p. 22 of International Court of Justice. (2002). *Case Concerning the Arrest Warrant of 11 April 2000*. [Democratic Republic of the Congo v. Belgium]. Retrieved from http://www.icj-cij.org/docket/files/121/8126.pdf

military. The negative examples that come from the US, as well as a decrease in positive changes coming from Spain and other Western democracies such as Belgium, sadly show that, while undoubtedly being an incredible success, universal jurisdiction still has a long way to go before it earns a status of a mechanism strong enough to be beyond any state, their officials and their political and diplomatic pressures. Stronger implementing, monitoring and sanctioning bodies will surely take it there, but the real questions is, can thousands of civilians dying in conflicts around the world diurnally wait any longer?

The Point of It All

Shifting from national to global rights is a topic of interest for many notable scholars. Soysal (1994), for instance, describes post-national trends that dissociate national identity of a person from their rights, or the so-called universal status of personhood. These supranational notions tackle upon premises of national citizenship, but they also disturb the coordinates of national sovereignty. Evidently, national and ethic identities and memories are not being completely erased, but rather transformed and brought to a novel form of existence. There is still a good balance of the universal and the individual; nation-centric memories still exist and, as such, continue to inform the parameters of national sovereignty (Levy and Sznaider 2006). Nevertheless, current mechanisms of supranational institutionalization and jurisdiction of human rights not only threaten the existence of nation-states, but also make the application of their principles a mandatory prerequisite for

state legitimacy. The era of globalization is human rights-oriented, and much more emphasis is put on humanitarian-driven actions, both military and economic.

The Nuremberg trials were, undisputedly, legal and moral precedent of the recently established international criminal tribunals for the crimes committed in former Yugoslavia and Rwanda. What both the Nuremberg and the international criminal tribunals that followed did was challenge national sovereignty of states who committed grave violations of human rights. The ICTR and the ICTY differ from the Nuremberg in the sense that they were both placed outside the countries who went through an internal strife, rather than an international armed conflict, like Germany did during the WWII. Thereupon, domestic integrity was questioned by international law even more, and the internal and external boundaries were blurred (Levy and Sznaider 2006). Internal conflicts around South America became a part of the international legal system with Judge Garzon. Before Judge Garzon demanded Pinochet's extradition to Spain, the notorious dictator had been quite untouchable, despite the dreadful crimes he had committed. The Chilean government objected Garzon's demand, arguing Pinochet was immune from prosecution and that extraditing him would violate Chilean national sovereignty (Jouet 2007). It was only the British judicial panel that argued that, under the British adherence to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, extraterritorial torture was enough for demanding an extraditable offense in which Pinochet could not enjoy immunity from prosecution.

Yet, not everybody agreed with British reasoning. Along with the first major universal jurisdiction case for the Spanish courts, came much criticism. Many argued that Spain's actions could have seriously violated international customary law and endangered its diplomatic relations with other states; in addition, states whose citizens were being prosecuted complained about ignoring the importance of national criminal justice and violating national sovereignty (Jouet 2007). These anti-universal jurisdiction efforts were not in vain. Having faced similar allegations, Belgium eventually amended its universal jurisdiction law in 2003, significantly narrowing its scope, under much political pressure received from the United States, against whose state officials Belgium had started a few prosecutions. Once Belgium drastically changed its law and practices, Spain became the most desired destination for the victims of different atrocities, and human rights activists to file their criminal complaints. Under the pressure, eventually Spanish practices changed, too.

Although Spain and Belgium were the rare ones engaging in absolute universal jurisdiction, willing to prosecute former heads of states and state officials wherever they are, time has shown that both have amended their laws and practices and might not be able to endure under the strains of diplomatic pressure coming from the US and others. Precisely because of these political disputes and recriminations, many heads of states who established dreadful regimes have been enjoying impunity and luxurious lives ever since they stepped down from the leadership (e.g. Haiti's Baby Doc Duvalier). Consequently, human rights and justice are still left behind military and economic dominance in the hierarchy of the world's priorities. Yet, we live in a

world where political, judicial, economic and social transformations occur at a very fast pace, and where many are critical of the current regimes of power. Through a series of small victories, perhaps soon enough it will not be so unperceivable to see the Bush Six sitting in a courtroom, just like Generals Rios Montt and Pinochet had sat before them.

References

American Non-Governmental Organizations Coalition for the International Criminal Court. (2013). *A Campaign for US Immunity from the ICC*. [Columbia University Institute for the Study of Human Rights]. Retrieved 27 October 2013, http://www.amicc.org/usicc/biacampaign

American Non-Governmental Organizations Coalition for the International Criminal Court. (2011). *Statements of Barack Obama on the International Criminal Court*. [A program of the United Nations Association of the United States of America]. Retrieved 28 October 2013, http://www.amicc.org/docs/Obama%20on%20ICC.pdf

Begbeder, Y. (1999). *Judging War Criminals: The Politics of International Justice.* New York: St Martin's Press Inc.

Borger, J and Fuchs, D. (2009). Spanish judge to hear torture case against six Bush officials. *The Observer.* [The Guardian]. Retrieved 27 August 2014

http://www.theguardian.com/world/2009/mar/29/guantanamo-bay-torture-inquiry

Bradley, C.A. (2001). Universal Justice and US Law. *The University of Chicago Legal Forum*: 323-350.

Center for Constitutional Rights. (2014). German War Crimes Complaint against Donald Rumsfeld et al. Retrieved 27 August 2014 http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld,-et-al.

Center for Constitutional Rights. (2014). *Universal Jurisdiction: Accountability for U.S. Torture*. Retrieved 25 August 2014 http://www.ccrjustice.org/case-against-rumsfeld

Center for Constitutional Rights. (2014). The Spanish Investigation into U.S. Torture. Retrieved 24 August 2014 http://ccrjustice.org/spain-us-torture-case

Cornell University Law School. (2014). *18 U.S. § 1091 – Genocide*. Retrieved 26 August 2014 http://www.law.cornell.edu/uscode/text/18/1091

Cornell University Law. (2014). *28 U.S. Code § 1350 - Alien's action for tort*. Retrieved 28 August, 2014 http://www.law.cornell.edu/uscode/text/28/1350

Crawshaw, S. (2003). Why the US Needs This Court. *The Observer*, Global Policy Forum. Retrieved from http://www.globalpolicy.org/component/content/article/164/28428.html

Crossette, B. (2003). The Wrong Kind of American Exceptionalism. *UN Wire*, Global Policy Forum. Retrieved from http://www.globalpolicy.org/component/content/article/164/28441.html

Democracy Now. (2010). *WikiLeaks Cables Reveal U.S. Tried to Thwart Spanish Probes of Guantanamo Torture and CIA Rendition*. [Video]. Retrieved 25 August 2014 http://www.democracynow.org/2010/12/1/wikileaks_cables_reveal_us_tried_to

Deutsche Welle. (2004). *Lawsuit against Rumsfeld Threatens*. [Global Policy Forum]. Retrieved 27 August 2014 https://www.globalpolicy.org/component/content/article/163/29413.html

Egelko, B. (2011). WikiLeaks cables recount how U.S. pressured allies. *San Francisco Gate*. Retrieved 25 August 2014 http://www.sfgate.com/opinion/article/WikiLeaks-cables-recount-how-U-S-pressured-allies-2456987.php

Human Rights Watch. (2003). *The United States and the International Criminal Court*. Retrieved 27 October 2013, http://www.hrw.org/legacy/campaigns/icc/us.htm

Human Rights Watch. (2014). *Spain: UPR Submission June 2014*. Retrieved 28 August 2014 http://www.hrw.org/news/2014/06/16/spain-upr-submission-june-2014

International Court of Justice. (2002). *Case Concerning the Arrest Warrant of 11 April 2000*. [Democratic Republic of the Congo v. Belgium]. Retrieved from http://www.icj-cij.org/docket/files/121/8126.pdf

Jouet, M. (2007). Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond. *GA Journal of International and Comparative Law*, volume 35: 495-537.

Kaleck, W. (2009). From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008. *Michigan Journal of International Law volume 30:927-990*.

Lederer, E. (2011). US Supports War Crimes Tribunal for First Time. *The Washington Post*. Retrieved 27 October 2013,

http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030200163.html

Levy, D and Sznaider, N. (2006). Sovereignty Transformed: A Sociology of Human Rights. *The British Journal of Sociology*, Volume 57, Issue 4.

Ley Orgánica Nº 6/1985 de 1 de Julio de 1985 del Poder Judicial. (1985). Retrieved 26 August 2014 http://www.wipo.int/wipolex/en/text.jsp?file_id=181467

Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal. (2014). Boletin Official del Estado, Núm. 63, Sec. I. Pág. 23026. Retrieved from http://www.boe.es/boe/dias/2014/03/14/pdfs/BOE-A-2014-2709.pdf

Mendez, J. (2001), National Reconciliation, Transitional Justice, and the International Criminal Court. *Ethics & International Affairs*, *Volume 15.1*. Retrieved from

http://www.akira.ruc.dk/~fkt/filosofi/Artikler%20m.m/M%82ndez%20-%20National%20Reconciliation%20Transnational%20Justice%20and%20the%20International%20Criminal%20Court.pdf

Paust, J.J. (2004). Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions. *79 Notre Dame Law Review 1335*. Retrieved from http://scholarship.law.nd.edu/ndlr/vol79/iss4/6

Peskin, V. (2008). *International Justice in Rwanda and the Balkans: Virtual trial and the struggle for state cooperation*. New York: Cambridge University Press.

Rivera Juaristi, F. (2013). U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System. *Human Rights Brief* 20, no. 2: 19-25. Retrieved from: http://www.wcl.american.edu/hrbrief/20/2juaristi.pdf

Scharf, M.P. (2001). Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States. 35 *New England Law Review*.

Soysal, Y.N. (1994). *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press

The Center for Justice and Accountability. (2014). *Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction Law*. Retrieved 28 August 2014 http://www.cja.org/article.php?id=740

United Nations General Assembly A/RES/39/46. (1984). *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.* [Meeting no. 93]. Retrieved from http://www.un.org/documents/ga/res/39/a39r046.htm

US Department of State. (2013). *International Criminal Court*. Retrieved 27 October 2013 http://www.state.gov/j/gcj/icc/