*Spanish Practice in the Area of Universal Jurisdiction**

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CONTENTS

1. INTRODUCTION: FROM THE *ARGENTINEAN AND CHILEAN HEARINGS* TO THE *GUATEMALA CASE*

The accusations filed by the *Unión Progresista de Fiscales* (union of progressive public prosecutors) against those responsible for the military regimes in Argentina[1] and

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[1] *Accusation filed by the Spanish Union of Progressive Public Prosecutors giving rise to the hearings commencing on 28 March 1996 concerning the Spaniards missing in Argentina.* This accusation was subsequently enlarged on the 9th and 18th of April, 1996. At the trial the popular prosecution was represented by the political group *Izquierda Unida* (the united left), the *Asociación Argentina pro-Derechos Humanos Madrid* (the Argentinean pro human rights association of Madrid) and the *Asociación Libre de Abogados* (free association of

Chile[2] for their respective and coordinated policies aimed at the elimination of dissidents developed during the course of the dictatorships that afflicted these Latin American countries during the 70s and 80s, set off an exciting Spanish practice of exercise of universal jurisdiction that put Spain at the vanguard of the persecution of the most serious international crimes through the still controversial universality principle. If the objective was to hold the guilty parties accountable for the serious atrocities they committed, the so-called Argentinean and Chilean cases seem to have surpassed, to a certain degree, the very understandably pessimistic initial expectations.[3] It is also true, however, that seven years hence not one of the accused has been sentenced.[4] The arrest and opening of oral proceedings against A. Scilingo,[5] the

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lawyers). A large dossier of the hearing including numerous court decisions issued together with numerous briefs filed therein are available on the *Equipo Nizkor* Web page: *http://www.derechos.org/nizkor/arg/espana* (last visited on 21.5.03).

[2] *Text of the accusation filed in Spain against General Pinochet and others for genocide and other crimes. Filed in Valencia on 1 July 1996.* The accusation was subsequently broadened on 20 September 1996. At the trial the private prosecution was represented by the *Agrupación de Familiares de Detenidos y Desaparecidos de Chile* (union of family members of those arrested and missing in Chile) and approximately ten victims while the popular prosecution was represented by the *Fundación Salvador Allende* (Salvador Allende Foundation), *Izquierda Unida* (the united left), the *Asociación Argentina pro Derechos Humanos-Madrid* (the Argentinean pro human rights association of Madrid) and the *Asociación Libre de Abogados* (free association of lawyers). A large dossier of the hearing is also available on the *Equipo Nizkor* Web page: *http://www.derechos.org/nizkor/chile/juicio* (last visited on 21.5.03).

[3] See, for example, among the internationalist Spanish doctrine, the observations of J. A. Tomás Ortiz de la Torre, "Competencia judicial penal internacional de los tribunales españoles para conocer de ciertos delitos cometidos contra españoles en Iberoamérica", *Anuario IHLADI*, vol. 13 (1997), pp. 7 and subsequent; J. A. González Vega, "La Audiencia Nacional contra la impunidad: los 'desaparecidos' españoles y los juicios a los militares argentinos y chilenos", *REDI* , vol. 49 (1997), pp. 285 and subsequent, p. 289; M. Abad Castelos, "La actuación de la Audiencia Nacional española respecto de los crímenes contra la humanidad cometidos en Argentina y en Chile: un paso adelante desandando la impunidad", *Anuario da Facultade de Dereito da Universidade da Coruña* (1998), pp. 33 and subsequent, pp. 58–59; or J. Ferrer Lloret, "Impunity in Cases of Serious Human Rights Violations: Argentina and Chile", *SYIL*, vol. III (1993–1994), pp. 3 and subsequent, pp. 20–29.

[4] The main reason is rooted in the fact that the Spanish legal system does not make allowance for trials by default (Arts. 834 and subsequent of the 1881 *Code of Criminal Procedure*) coupled with the fact that the immense majority of the defendants were not to be found in Spanish territory and the Chilean and Argentinean authorities had voiced their opposition to the action taken in Spain. As regards this specific aspect, the important reform of 2002 does not affect the pre-existing regulation.

[5] The former military captain Scilingo, allegedly responsible for a number of the atrocities committed in the sinister *Escuela de Mecánica de la Armada (ESMA)* (School of Navy Mechanics) and co-author of the so called "death flights", appeared voluntarily before the Spanish authorities in October of 1997 thus becoming the only defendant with respect to which oral proceedings were initiated.

extradition process initiated in Mexico against R. M. Cavallo[6] and, of particular significance, the arrest and extradition process against A. Pinochet in the United Kingdom[7] are the most significant accomplishments of the legal actions that are still in process today[8] and that seem to be included among the determining factors giving rise to renewed efforts to bring responsible parties in Chile and Argentina to justice.

Although they are probably the most renowned, the so-called Argentinean and Chilean cases are not the only judicial actions taken based on the jurisdictional heading envisioned in Art. 23.4 of the 1985 *LOPJ*.[9] Together with the failed attempts

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[6] Also accused of having taken part in kidnapping, torture and murder committed in the *ESMA*, in February 2001 the Mexican government authorised the extradition of R. M. Cavallo (*Serpico*) to Spain. A challenge was filed before the Mexican judicial authorities with respect to the decision and on 10 June 2003 the Supreme Court of Justice finally authorised the extradition for a hearing in Spain for terrorism and Genocide. See *El País* newspaper of 11.6.03.

[7] As is well known, the arrest in London on 16 October 1998 of the ex-dictator of Chile gave rise to a long and complex extradition process in the United Kingdom that, with Britain's universal jurisdiction and Pinochet's immunity as a backdrop, culminated, on the one hand, with the decision taken by the House of Lords Appeal Committee in March 1999 that authorised extradition for the crimes of torture allegedly committed as of 8 December 1988 (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet* – March, 24, 1999, *ILM*, vol. 38–1999, pp. 581 and subsequent) and, on the other hand, with the 1 March 2000 decision taken by the British Secretary of State J. Straw not to process the request for extradition thus permitting Pinochet's return to Chile for humanitarian reasons based on his state of health. The Pinochet case has been the object of an abundant amount of bibliography. From an essentially juridic standpoint and without prejudice to numerous articles published in specialist journals, the work of A. Remiro Brotons, *El caso Pinochet. Los límites de la impunidad*, Madrid, 2000 especially stands out along with some group works such as those edited by D. Woodhouse, *The Pinochet Case. A Legal and Constitutional Analysis*, Oxford-Portland, 2000, and by M. García Arán and D. López Garrido, *Crimen internacional y jurisdicción universal. El caso Pinochet*, Valencia, 2000. See also, J. A. Corriente Córdoba, "El 'caso Pinochet' como episodio en la evolución del Derecho internacional Penal", in A. Blanc Altemir (ed.), *La protección internacional de los Derechos Humanos a los cincuenta años de la Declaración Universal*, Madrid, 2001, pp. 243 and subsequent.

[8] Although a new request filed by the public prosecutor's office for a stay of proceedings is pending over this legal action, prior even to the Supreme Court decision in the Guatemalan case. See *Escrito de la Fiscalía solicitando el archivo de las actuaciones en los casos argentino y chileno* (brief from the public prosecutor requesting a stay of proceedings with regard to legal action in the Argentinean and Chilean cases) of 26 November 2002. Available on the above-mentioned web page of the *Equipo Nizkor*.

[9] In accordance with the literal sense of that precept, "The Spanish jurisdiction shall also be considered competent to deal with acts committed by Spaniards or foreigners outside of national territory that can be classified in accordance with Spanish criminal law such as the following crimes: a) Genocide; b) Terrorism; c) Piracy and the illicit seizure of aircraft; d) Counterfeiting of foreign currency; e) Crimes related to prostitution and the corruption of minors or the declared unfit; f) Illegal trafficking in illegal psychotropic, toxic and narcotic drugs; g) and other crimes that, pursuant to international treaties or conventions, should be persecuted in Spain. The *LOPJ* was published in *BOE*, n. 157 of 2.7.85. Letter e) of

taken against different acting heads of State (*Hassan II, T. Obiang Nguema, F. Castro* or *H. Chávez*)[10] or against the former Honduran deputy official *Billy Joya*,[11] the so-called *Guatemalan Case* stands out especially. This is mostly because the Spanish Supreme Court, through a judgement that was taken after seven long months of deliberation and by a very small margin of eight to seven, has come a long way in defining the extent to which the extra-territorial competence of the Spanish courts is to be interpreted.[12]

The Guatemalan Case commenced with the charges filed on 2 December 1999 by the Nobel Peace Prize recipient Rigoberta Menchú[13] against those responsible for the

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Art. 23.4 reproduced above was introduced by Organic Law 11/1999 30 April (*BOE* n. 104, of 1.5.99).

[10] On these cases see section 4.b herein.

[11] In its ruling of 8 September 1998, Central Trial Court 2 denied the opening of proceedings basically because the *LOPJ* was from 1985 and thus the principle of non-retroactivity of the criminal law set out in Arts. 9.3 and 25.1 of the Spanish Constitution prevented the application of universal jurisdiction recognised under said law to crimes that had allegedly taken place in 1982. This ruling is also available on the *Equipo Nizkor* web page: *http://www.derechos.org/nizkor/espana/doc/joya/juri.html* (visited on 20.2.2002). A mere two months later, the plenary of the National Criminal Court rejected that argument in the record of proceedings meaning that the Spanish courts were still considered competent to deal with Argentinean and Chilean cases in light of that Court's understanding that Art. 23.4 of the *LOPJ* has the nature of a procedural and not a punitive regulation and therefore is not affected by the principle of criminal non-retroactivity. *National Court rulings of 4 and 5 November 1998. Rapporteur: the Honourable Carlos Cezón González*, Legal Ground number 3. Rulings are available on the already mentioned *Equipo Nizkor* web page and also with commentary from D. de Pietri, in *REDI*, vol. 51 (1999), pp. 639 and subsequent.

[12] A heated debate had already taken place regarding the universality principle among the Spanish judicature subsequent to the 31 May 2002 pronouncement made by section three of the National Criminal Court in the *Carmelo Soria* case giving rise to the very serious questioning of the scope within which Spanish courts have exercised universal jurisdiction (see "La Audiencia usa el 'caso Otegi' para anular la orden de detención de un ministo de Pinochet", (the National Court uses the 'Otegi case' to nullify the arrest warrant of a Pinochet minister), *El País* newspaper, 1.6.2002) and "El carpetazo al caso Soria abre la vía para archivar las causas de Chile y Argentina" (The shelving of the Soria case paves the way for a stay of proceedings in the Chilean and Argentinean cases) *El País* newspaper, 3.6.2002. That stance was subsequently corrected by the Supreme Court's criminal section itself when it indicated, *obiter dictum* in the *Otegi case*, that "There is no doubt that the prosecution of the actions constituting a crime of terrorism, or those constituting a crime of genocide or torture, are unquestionably subject to the principle of universal jurisdiction, an issue that, as such, is outside of the realm of this case." Supreme Court ruling (Criminal Section), of 14 June 2002, rapporteur P. Andrés Ibañez, R. J. Aranzadi 2002/4744. F. J. 2. See "El Supremo ratifica que no puede perseguir a Otegi por enaltecer a ETA en Francia" (The Supreme Court confirms that Otegi cannot be prosecuted for praising ETA in France) (*El País* newspaper, 15.6.2002).

[13] Subsequent to the opening of preliminary proceedings, charges were also filed by the family members of approximately twelve victims and by the *Confederación Sindical de Comisiones Obreras* (workers' trade union), the *Coordinadora Nacional de Viudas de*

Guatemalan dictatorship that governed that Central American country during the civil war years (1962–1996) and which accused them of perpetrating acts allegedly constituting crimes of genocide, torture, terrorism and kidnapping.[14] Once competence was declared in response to the charges filed and the legal process got under way,[15] the Public Prosecutor's Office filed a remedy of appeal against the ruling of Central Trial Court 1 thus demonstrating the same hostile attitude with respect to the Guatemalan case as it had to the Argentinean and Chilean cases.[16] In its resolution of that appeal, the Plenary of the National Criminal Court upheld the appeal arguing that, in light of the fact that the universal jurisdiction of the Spanish courts is of a subsidiary nature with respect to territoriality criteria, the judicial inactivity or ineffectiveness of the Guatemalan authorities in the persecution of the crimes denounced had not been

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Guatemala (CONAVIGUA) (national coordinating unit for Guatemalan widows), the *Asociación de Familiares de Detenidos-desaparecidos de Guatemala* (FAMDEGUA) (the association of family members of the imprisoned-missing of Guatemala), the *Asociación contra la Tortura* (association against torture), Spain's solidarity committees with Guatemala, the *Asociación Argentina Pro-derechos humanos de Madrid* (Argentinean pro human rights association of Madrid) and the *Asociación Libre de Abogados* (free association of lawyers).

[14] The Commission for Historical Clarification constituted pursuant to the peace agreement between the Guatemalan government and the *Unidad Revolucionaria Nacional Guatemalteca (URGN)* (Guatemalan national revolutionary union) in 1994 registered more than forty thousand victims, 83% of whom were individuals of the Maya ethnic group living in rural areas. The government itself was responsible for more than 90% of the victims either directly or by means of the so called Civil Self-defence Patrols or the death squadrons; *Guatemala. Memoria del silencio. Informe de la Comisión para el Esclarecimiento Histórico* (Guatemala. Silent memorial. Report of the Commission for Historical Clarification), 12 volumes, Guatemala, 1999. Also see the *Guatemala. Nunca Más* also known as the REHMI report, *Proyecto Interdiocesano de Recuperación de la Memoria Histórica* (the inter-diocesan recovery of historical memory project) 4 volumes, Human Rights Office of the Guatemalan Archbishop's Office, Guatemala, 1998. For a brief and excellent exposé of the occurrences that took place in Guatemala during the civil war and their possible classification as crimes against humanity and genocide, see I. Albaladejo Escribano, "Genocidio y crímenes de lesa humanidad en Guatemala" (Genocide and crimes against humanity in Guatemala), in A. Blanc Altemir (ed.), *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal* (International human rights protection fifty years after the Universal Declaration) Madrid, 2001, pp. 243 and subsequent, pp. 253 and subsequent.

[15] Central Trial Court 1, ruling of 27 March 2000. Court ruling available at the *Equipo Nizkor* web page: *http://www.derechos.org/nizkor/guatemala/doc/autojuz1.html* (visited on 12.2.2003).

[16] Already expressed in what is known as the "Fugairiño Document" ("Note regarding the jurisdiction of Spanish courts"; unsigned note circulated at the meeting of Supreme Court public prosecutors on 10 December 1997 the authorship of which is attributed to the chief prosecutor of the National Court), this attitude has resulted in the systematic challenging of action taken in the Argentinean and Chilean cases. For the last example to date, see the above-mentioned brief filed on 26 November 2002 requesting a stay of proceedings with respect to legal action taken. Both documents are also available on the *Equipo Nizkor* web page.

sufficiently accredited.[17] A Supreme Court appeal was filed against the ruling of the National Court and the Supreme Court's Criminal Section partially upheld the appeal confirming the jurisdiction of the Spanish courts although solely and exclusively for the criminal proceeding for acts denounced against Spanish citizens.[18]

According to the grounds of the ruling itself, the above-mentioned judgement was reached based on the affirmation according to which the proclamation of extraterritorial competence found in Art. 23.4 of the *LOPJ* must be made compatible with the requirements derived from the international system, bearing the principles of international public law in mind.[19] The following pages deal specifically with the most problematic aspects raised by the doctrine of universal jurisdiction applied by Spanish courts from the standpoint of international law.

2. UNIVERSAL JURISDICTION *IN ABSENTIA*?

It has been known for some time now that "among the many problems concerning the limits of the sovereignty of States, few are as difficult or as much disputed as that which concerns the extent of the right of a State to exercise its criminal jurisdiction as it pleases".[20] The spectacular development of International Criminal Law since the end of the cold war has made this an extraordinarily current issue as well. While the singular and ambiguous pronouncement on this subject made by the Hague Court in the almost eighty-year-old *Lotus*[21] case clearly contributed to the inherent difficulty of this issue, its current importance, stemming from the decided will on the part of

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[17] *Auto de la Sala de lo Penal de la Audiencia nacional Española disponiendo el archivo de la querella sobre el caso de Guatemala por Genocidio, de 13 de diciembre de 2000* (Ruling delivered by the Spanish National Criminal Court calling for a stay of proceedings with regard to the Guatemalan case for genocide of 14 December 2000). Also available on the *Equipo Nizkor* web page: *http://www.derechos.org/nizkor/guatemala/doc/autoan.html.*

[18] Supreme Court (Criminal section) number 327/2003 of 25 February 2003, Rapporteur: the honourable Mr. Miguel Colmenero Menéndez de Luarca. Also available at the following web site: *http://www.derechos.org/nizkor/guatemala/doc/gtmsent.html.*

[19] Judgement cited, Legal Ground 8, paragraphs 5 and 9.

[20] A. R. Carnegie, "Jurisdiction over violations of the Law and Customs of War", *BYIL*, vol. 39 (1963), p. 402.

[21] In that case the Permanent Court of International Justice, as a general rule, followed a criteria favourable to the extraterritorial jurisdiction of states: "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable". However, when it came to accepting the international legality of Turkey's intention to indict the French national responsible for the high seas boarding of a ship flying the Turkish flag, the Court based its ruling on the consideration that the boarding took place in Turkish territory and on the wide acceptance by States of the objective territoriality principle. PCIJ, *The Case of the S. S. Lotus*, Judgment n. 9, 1927 September 7th, Publications of the Court, series A, n. 10, pp. 3 and subsequent.

certain States to exercise universal jurisdiction, has led to the problem's return to the International Court of Justice in the case of two recent matters. The Court, evading a response in the first[22] and a judgement still pending in the second,[23] the ambiguities surrounding the universality principle continue to subsist.

From among these ambiguities, arguably the most controversial is the one related to the admissibility of pure or *in absentia* universal jurisdiction. To a large degree this is true because, although there are a relatively large number of instruments used in international practice (both conventional as well as institutional) that recognise States' capacity to bring to justice those responsible for committing certain internationally notorious crimes in the event that they are found within the territory itself, independent of the concurrence of any other connection and even making such legal process compulsory if extradition is not granted,[24] not one of these instruments

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[22] In the case related to the international arrest warrant, the Court went no further than to affirm, pursuant to the request formulated by the parties, that the issuance of an international arrest warrant by a Belgian judge against an acting minister of foreign affairs constituted a violation of the immunities and inviolabilities recognised under international law for such officials. The Court failed however to take a stand on the international legality of universal jurisdiction *in absentia* recognised under Belgian law that was the underlying basis of the Belgian judicial action. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, *ICJ Reports 2002*, pp. 3 and subsequent.

[23] The charges filed on 9 December 2002 by the Republic of Congo (Brazzaville) against France were in response to the action initiated by a French judge against Congo's Home Minister P. Oba and the former's intention to take a statement from the President D. Sassou Nguesso. As this text is being drafted, the Court's pronouncement on the request for provisional measures made by the complainant is imminent. Information can be found on this case (*Certain Criminal Proceedings in France*) at the ICJ web page: *http://www.icj-cij.org*.

[24] The following instruments, among others, can be cited: In the field of *International Humanitarian Law*, the four 1948 Geneva conventions (Art. 49 of I – *BOE* of 23.7.52, Art. 50 of II – *BOE* of 26.8.52, Art. 129 of III – *BOE* of 5.9.52 and 146 of IV – *BOE* of 2.9.52) and Protocol Additional I of 1977 applicable to them (Art. 85 – *BOE* of 26.7.89), the 1989 International Convention against the recruitment, use, financing and training of mercenaries (Art. 9.2 – not ratified by Spain), the Second Protocol Additional of 1999 to the Convention on the protection of cultural goods (Art. 16.1 – ratified by Spain although not yet published in the *BOE*), and the OAU Convention on the elimination of mercenarism in Africa (Art. 8). In the field of *international terrorism*, the 1970 Hague Convention on the illicit seizure of aircraft (Art. 4 – *BOE* of 15.1.73), the 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation (Art. 5 – *BOE* of 10.1.74), and its Protocol of the same year for the suppression of unlawful acts against the safety of international civil aviation (Art. 1 – *BOE* of 5.2.92–), the 1988 Rome Convention for the suppression of unlawful acts against the safety of maritime navigation (Art. 6.4 – *BOE* of 24.4.92) and its protocol of the same year for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf (Art. 3.4 – *BOE* of 24.4.92), the 1973 New York Convention on the prevention and punishment of crimes against internationally protected persons including diplomatic agents (Art. 3.2 – *BOE* of 7.2.86), the 1994 Convention on the safety of United Nations and associated personnel (Art. 10.4 – *BOE* of 25.5.99), the 1972 Convention on the physical protection of nuclear material (Art. 8.2 – *BOE* of 25.10.91),

expressly and unequivocally recognises that same right when the suspect is not found within state territory.[25] The International Law Commission itself in its draft Code of Crimes Against the Peace and Security of Mankind only considered compulsory universal jurisdiction (and following the *aut iudicare aut dedere* formula) in cases in which the suspect is found within the territory itself.[26]

In this context and simplifying what could be a broader debate, there are two major positions that emerge with respect to this modality of universal jurisdiction.[27] Pursuant to the first, international law would never have recognised in the past nor would it accept today a State's extending its criminal jurisdiction to events that are totally and completely separate from its population, territory or political organisation and thus, in the case of crimes of international concern committed abroad by foreigners and against foreigners, only the physical presence of the suspect within the territory of the State would enable said suspect to be put on trial.[28] In contrast, the second posi-

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the 1979 Convention against the taking of hostages (Art. 5.2 – *BOE* of 7.7.84), the 1997 New York Convention on the suppression of terrorist bombings (Art. 6.4 – *BOE* of 12.6.01), the 1999 New York Convention on the suppression of the financing of terrorism (Art. 7.4 – *BOE* of 23.5.02) and the 1977 European Convention on the suppression of terrorism (Art. 6 – *BOE* of 8.10.80). Also see section II, 5, b, of the *Declaration on measures to eliminate international terrorism* (Res. 49/60, of 17 February 1994), and the *complementary statement* (Res. 51/219). In the field of *International human rights law*, the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 5, – *BOE* of 9.11.87), and the OAS Conventions to prevent and punish torture 1985 (Art. 12) and on the forced disappearance of persons 1994 (Art. 4). Also see Article 14 of the *General Assembly declaration on the protection of all persons from forced disappearance* (Res. 47/133) as well as the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* adopted by ECOSOC in 1989.

[25] The only exception is concerning piracy on the high seas with respect to which both the 1958 Convention on the High Seas done at Geneva (Art. 19 – *BOE* of 27.12.71) as well as the 1982 United Nations Convention on the Law of the Sea (Art. 105 – *BOE* 14.2.97) recognise the right of all States to arrest and put responsible parties on trial.

[26] *ILC report on the work of its 48th session*. General Assembly, Official Documents, fifty-first session. Supplement no. 10 (A/51/10). For a broader analysis of the ILC's work on this subject see B. Graefarth, "Universal Criminal Jurisdiction and an International Criminal Court", *EJIL*, vol. 1 (1990), pp. 67 and subsequent; and A. Sánchez Legido, *Jurisdicción universal penal y Derecho internacional*, Valencia, 2003 (in press).

[27] For a recent analysis of the problems raised by the universality principle, see Henzelin, M., *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Bruxelles, 2000; Bassiouni, M.CH., "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, vol. 42 (2001), pp. 1 and subsequent; Benavides, L., "The Universal Jurisdiction Principle", *Anuario Mexicano de derecho internacional*, 2001, pp. 20 and subsequent; or J.-M. Simon, "Jurisdicción Universal: la perspectiva del Derecho internacional público", *REEI*, no. 4 (2002).

[28] For other opinions in this sense see, M. Abad Castelos, "La actuación . . .", art. cit., p. 55; M. Cosnard, "Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet", *RGDIP*, vol. 103 (1999),

tion tends to singularly and exclusively link the universality principle to the nature of certain crimes and, more specifically, to their character that is especially damaging to the essential interests of the international community, the only factor sufficing in authorising all States to initiate legal proceedings.[29]

a) The replacement of the universality principle by the passive personality principle in the Guatemala case

With respect to these two positions, a division similar to the one among the eight judges of the ICJ that ruled on this topic in the case concerning the international arrest warrant[30] once again emerged in the decision taken by the Spanish Supreme Court on 25 February 2003 in the Guatemala case. The slight majority against pure universal jurisdiction[31] ended up making the existence of victims of Spanish nationality an essential requirement for the application of the title of jurisdiction provided for in Art. 23.4 of the *LOPJ* in those cases in which the suspect is not found in Spanish territory. This decision limits the competence of Spanish courts based on said precept exclusively to acts committed against Spanish citizens.[32] The Supreme

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p. 323 ; J.J. Díez Sánchez, *El Derecho penal internacional. Ambito espacial de la ley penal*, Madrid, 1990, p. 179; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *AFDI*, vol. 55 (1999), pp. 62–63 or, in more detailed form, M. M. Martín Martínez, "Jurisdicción universal y crímenes internacionales", in A. Salinas de Frias (coord.), *Nuevos Retos del Derecho. Integración y desigualdades desde una perspectiva comparada Estados Unidos/Unión Europea*, Universidad de Málaga, 2000, p. 164; and A. Cassese, *International Criminal Law*, Oxford, 2003, pp. 286–295.

[29] Supporters of this view also take into consideration the fact that in most of the international conventions cited above and in conjunction with the state of custody's obligation to try or extradite, a clause is normally introduced stating that "no jurisdiction exercised by a State in accordance with its domestic law shall be excluded". This second view can be linked, for example, to A. Remiro Brotons, *Los límites . . ., op. cit.*, pp. 56 and subsequent; J. Pueyo Losa, "Un nuevo modelo de cooperación internacional en materia penal: entre la justicia universal y la jurisdicción internacional", in S. Alvarez González and J. R. Remacha Tejada (coords.), *Cooperación Jurídica Internacional*, Madrid, 2001, pp. 196 and subsequent; or C. I. Torres García, "Crímenes contra la paz y seguridad de la humanidad, jurisdicción internacional y jurisdicción universal", *Revista Jurídica de Castilla-La Mancha*, n. 34 (2003), pp. 182 and subsequent.

[30] In their separate opinions regarding the above-mentioned judgement of 14 February 2002, the following judges came out against universal jurisdiction *in absentia*: Guillaume (paragraph 12), Ranjeva (paragraph 8), Rezek (paragraph 6) and Bula Bula (paragraph 40) while other judges favoured its admissibility in international law: Van Den Wijngaert (paragraph 56), Higgins, Kooijmans and Buergenthal (paragraph 56).

[31] The majority position is based on the premise asserting that "no State is unilaterally responsible for stabilising order, turning to Criminal Law against all others and throughout the whole world, but what is rather needed is a point of connection that legitimises the extraterritorial scope of its jurisdiction", without the very nature of the crime serving in and of itself as one of those elements of connection, *F.D.* 9, paragraph 1.

[32] The existence of victims of Spanish nationality had been assessed in prior pronouncements

Court, not able to base its pronouncement on the literal sense of Art. 23.4 of the *LOPJ* nor on the parliamentary work giving rise to said Law,[33] based its majority sentence, quite unsystematically, on basically three elements of international practice in its arrival at this conclusion.

First of all, a very brief reference to the domestic practice employed in some neighbouring States that, in fact, is reduced to allusions to German and Belgian cases: on the one hand, the ruling handed down by the German Federal Supreme Court judge of 13 February 1994 in the *Tadic* case in which Art. 6.1 of the German Criminal

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made by Spanish judiciary bodies (Central Trial Court number 6 ruling of 20 September 1998 in the Pinochet case, *F.D.* 3, or the rulings of 4 and 5 November of the plenary of the National Criminal Court on the Argentinean and Chilean cases mentioned above, *F.D.* 9), but this was not always the case (see Central Trial Court number 5 ruling of 25 March 1998 on Argentinean cases, *F.D.* 9, or the ruling of Central Trial Court number 1 of 27 March 2000 in the Guatemala case, *F.D.* 2, in which arguments are made in terms of strict universality) and the Spanish nationality of the victims had never been the decisive criteria in affirming a jurisdiction considered based on the universality principle and not on the passive personality principle – which is not contemplated in the titles of jurisdiction of Art. 23 of the *LOPJ* – nor had its being taken into consideration ever involved a restriction, as regards to competence to hear a case, and to crimes committed against Spaniards.

[33] The definitive version of Art. 23 of the *LOPJ* is the result of amendment 390 tabled by the Socialist Group in the Senate with the aim of avoiding the referral that Article 35 of tbe draft legislation made to material criminal legislation in determining the jurisdictional scope of the Spanish courts in the criminal law system (F. Benzo Mestre (dir.), *Ley Orgánica del Poder Judicial. Trabajos parlamentarios*, vol. II, pp. 1807–1808). However, no allusion was made either in the justification of the amendment itself or in the corresponding parliamentary debates to possible limits regarding the exercise of a jurisdiction recognised simply with respect to "acts committed by Spaniards or foreign nationals outside of national territory, qualifiable under Spanish criminal law" such as some of the crimes cited in the above-mentioned precept. The conclusion could be reached that, in reality, Art. 23.4 only intended to extend the universal jurisdiction of the Spanish courts in cases in which it is thus foreseen on a compulsory basis in international treaties to which Spain is party. This view would in fact restrict such jurisdiction to cases in which the suspect is present in Spanish territory. Other amendments also tabled in the Senate followed along these same lines: number 47 from Senator Arespacochaga of the People's Parliamentary Group (*idem*, pp. 1659–1661) or number 686 of the Catalonian Parliamentary Group to the Senate (*idem*, pp. 1918–1919) of identical meaning, "this chapter on crimes committed abroad shall be interpreted without prejudice to special criminal laws or international treaties" with no indication of specific criminal categories. However, the fact that among the criminal categories tbat are mentioned in Art. 23.4 some can be found (genocide, piracy or narcotics trafficking) with respect to which no international treaty specifically calls for the mandatory exercise of universal jurisdiction and, especially the fact that specific mention is made of the latter case in sub-section g) ("any other that, pursuant to international treaties or conventions must be pursued in Spain"), serve as evidence that seems to make a case against the idea that the intention of Spanish lawmakers was to restrict the scope of jurisdiction provided for in this precept exclusively to cases in which there is an obligation by virtue of treaties to which Spain is party.

Code (*StGB*) was interpreted in the sense that the universal jurisdiction provided for therein required the existence of an additional connective link with Germany (legitimising link doctrine), considering the past residence of the suspect in German territory and his arrest therein valid in this respect.[34] It comes as a surprise, however, and as the dissenting judges point out in their individual vote,[35] the absence of references to subsequent developments in German practice, especially the 21 February 2001 judgement delivered by the Supreme Court (*Bundesgerichtshof*) in the *Sokolovic* case[36] and more especially the law with respect to the Code of Crimes against International Law of 26 June 2002 adopted with a view to adapting German criminal law to the ICC Statute. In accordance with a very authorised interpretation, the first article[37] of this law recognises universal jurisdiction such that "a case should be investigated not only when the suspect is found in German territory but also if the suspect's presence is foreseeable. This is reasonably taken to mean that a case will be taken into consideration if a real possibility exists that the person in question will be extradited to Germany upon request".[38]

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[34] A summary of this pronouncement can be found in the ICRC data base on the domestic enforcement of international humanitarian law available at *http://wwwcicr.org/ihl-nat.nsf/WebLAW?OpenView* (visited on 11.3.2003). For a critical analysis of this and other subsequent resolutions in the sense of requiring a legitimising link, see K. Ambos and S. With, "Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts (1994–2000), in H. Fischer, C. Kreb and S. Lüder (eds.), *International and National Prosecution of Crimes under International Law. Current Developments*, pp. 769 and subsequent; and S. Wirth, *International Criminal Law in Germany. Case Law and Legislation. Presentation to the Conference Combating International Crimes Domestically, Ottawa, 22–23 April 2002*, pp. 2 and subsequent. Available on the Internet at: *http://www.iuscrim.mpg.de/forsch/onlinepub/Ottawa.pdf* (visited on 14.3.2003).

[35] *STS* of 25 February 2003, individual vote, *F.D.* 9, paragraphs 2 and 3.

[36] In that judgement the German Supreme Court for criminal matters held that "The Court inclines, in any case under Article 6 paragraph 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention." (judgment of 21 February 2001, 3 *StR* 327/2000). The quotation was taken from A. Cassese, *International . . ., op. cit.*, p. 289.

[37] Pursuant to that first article, the law in question is enforceable for crimes envisioned therein (those of genocide, crimes against humanity and war crimes figuring in the ICC Statute – "even when the crime is committed abroad *and is not related in any way with Germany*" (words in italics added). An English translation of the law is available at the following Internet address: *http://www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/GermanCodeOfInternation4CI.pdf.* (visited on 13.3.03).

[38] H.P. Kaul, A. Mlitzke and S. Wirth, *International Criminal Law in Germany. The Drafts of the International Crimes Code and the Rome Statute Implementation Act.* Report presented by the German Delegation to the Preparatory Commission for the International Criminal Court during its 9th session held on 18 April 2002. Available on the Internet at: *http://www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/analysis/Comments%20on%20ICCode%20and%20E41.pdf* (visited on 13.3.03).

No less surprising is the reference made to the judgment delivered by the Belgian *Cour de Cassation* on 12 February 2003 in the *Sharon* case alluding only to the aspects contained therein related to the affirmation of the subsistence of immunity in the case of acting state officials and not, paradoxically, to that body's emphatic recognition of absolute universal jurisdiction provided for in Belgian legislation.[39]

The Supreme Court could have been somewhat more selective and meticulous in its assessment of States' domestic practice for it is unquestionable that the immense majority of domestic law links the exercise of universal jurisdiction to the presence of the suspect in national territory.[40] Despite that fact it cannot be ignored that a

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[39] In that judgement, the Belgian Supreme Court ruled inadmissible the suit filed against A. Sharon considering that preference over domestic Belgian law should be given to customary international law as concerns immunity for acting high-ranking officials as had been the interpretation by the ICJ concerning the international arrest warrant. In contrast, it did consider admissible the suit filed against commander A. Yaron being of the opinion that Article 7 of the 1993 Belgian law (amended in 1999) on the prosecution of serious infractions of International Humanitarian Law did not restrict the exercise of universal jurisdiction provided for therein to the presence of the suspect on Belgian soil. Cour de Cassation, Section Francaise, 2e. Chambre, arrêt du 12 fevrier 2003, *Aff. Hijazi S. et crts. C/ Sharon A. et Yaron A.*, n. JC032C1_1. The text of the judgement together with the conclusions of the *procureur général* Du Jardin, are available on the Cour de Cassation's web page: *http://www.cass.be/juris* (visited on 12.3.03).

[40] This is the case of France, for example, where the requirement of the suspect's presence in the territory, called for in the *Code de Procédure Pénal* (art. 689.1) as well as in the laws adapting French legislation to the resolutions by *ad hoc* international criminal courts, was the object, in the Javor case, of a particularly rigid interpretation by the *Cour de Cassation*, linking all judicial action in France based on the universality principle to the existence of clear evidence showing that the suspect is to be found in French territory. See B. Stern, "La compétence universal en France: le cas des crimes commis en ex Yougoslavie et au Rwanda", *GYIL*, vol. 40 (1997), pp. 292 and subsequent; F. Lattanzi, "La competenza delle giurisdizioni di Stati 'terzi' a ricercare e processare i responsabili dei crimini nell'ex Iugoslavia en el Ruanda", *Riv. Dir. Int.*, vol. 78 (1995), pp. 707 and subsequent; or R. Maison, "Les prémiers cas d'application des dispositions pénales des Conventions de Géneve par les jurisdictiones internes", *EJIL*, vol. 6 (1995), pp. 623 and subsequent. Similarly in Holland in the case regarding the former president of Surinam D. D. Bouterse, the Dutch Supreme Court held that, even though Dutch legislation does not require the presence of the suspect in Dutch territory, an individual cannot be tried for acts of torture committed abroad unless "one of the links foreseen in the convention for the establishment of jurisdictional competency is present such as the accused or the victim being of Dutch nationality or should be considered as such or the accused being in Dutch territory at the time of his arrest". For further information see J. K. Kleffner, "Jurisdiction over genocide, crimes against humanity, war crimes, torture and terrorism in the Netherlands", in A. Cassese & M. Delmas-Marty (eds.), *Crimes internationaux et juridictions nationales. Etude comparée*, París, 2002, available on the Internet at: *http://www.jur.uva.nl/aci/jann-kleffnerI.pdf* (visited on 3.6.02).

In addition to the cases mentioned, reference to the requirement of presence is a constant in the immense majority of legislations that foresee universal jurisdiction including the 1945 Australian law on war crimes amended in 1988 and 1999 (section 11); the Austrian

majority, no matter how large, is not synonymous with unanimity. Some legal systems foresee the possibility of exercising universal jurisdiction even when the suspect is outside of the boundaries of the country in question. In addition to the case of Belgian law 1993/1999 on the persecution of serious infractions of International Humanitarian Law,[41] mention should also be made of the Israeli Court's admittance of universal jurisdiction in the *Eichmann*[42] and *Demjanjuk*[43] cases or, more recently, New Zealand's law regarding the International Criminal Court[44] and the above-mentioned German law on the Code of Crimes against International Law.

The second type of element on which the Supreme Court majority judgement was based were the Treaties regarding International Criminal Law an analysis of which gives rise to the conclusion that said conventions "contain jurisdictional attribution criteria generally based on the territory or on active or passive personality and such criteria are subsequently supplemented by the commitment of each State to pursue crimes, regardless of where they may have been committed, when the alleged perpetrator is in its territory and does not agree to extradition thus providing for an orderly reaction against impunity and eliminating the possibility of their use as shelter against proceedings. However, it has not been expressly established in any of these treaties that each signatory state may pursue without any limitation and in accordance

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criminal code (article 64); the Danish criminal code (Article 8.6); the French code of criminal procedure (Article 689.1) and the laws adapting French legislation to the Security Council resolutions pursuant to which the *ad hoc* international criminal courts were created (Article 2); the 1974 Nicaraguan criminal code (Article 16); the 1997 Polish criminal code (Articles 110 and 113); the 1995 Portuguese criminal code (Article 5.1); the British and Scottish laws concerning the International Criminal Court requiring not only presence but also residence (sections 68 and 6.2 respectively); the Swedish criminal code (section 2, chapter 2); the Swiss criminal code (Article 6 bis); the Venezuelan criminal code (Article 4.9); and the South African law regarding the International Criminal Court (Article 4.2).

[41] Recognition of absolute universal jurisdiction by the cited law was the result of the expressed intention of the Belgian legislator. See A. Andries, E. David, C. Van den Wijngaert and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 rélative a la repression des infractions graves au droit international humanitaire", *Révue de droit pénal et de la criminologie*, 1994, p. 1173; and E. David, "La loi belge sur les crimes de guerre", *RBDI* (1995), pp. 677–678. During the course of questioning by the preliminary issues court of the *Tribunal de Grande Instance* in Brussels with regard to the *Sharon* case (decision delivered on 12 April 2002), the absolute nature of the universal jurisdiction provided for in the above-mentioned law was corroborated by the Cour de Cassation in its above-mentioned judgement of 12 February 2003. See, however, the very recent amendment to that law in note 102 below.

[42] The judgements delivered by the Jerusalem District Court and the Israeli Supreme Court regarding the Eichmann case, in *Int. Law Reports*, vol. 36 (1968).

[43] A very complete dossier on this matter can be found in the *Equipo Nizkor* web page at: *http://www.nizkor.org/hweb/people/d/demjanjuk-john* (visited on 26.3.2002).

[44] *International Crimes and International Criminal Court Act* (2000), section 8. Available in the above-mentioned ICRC data base.

only with its domestic legislation, acts taking place in the territory of another State; not even in the event that that latter state fails to pursue such act".[45]

It is undoubtedly true that none of those treaties expressly and literally provides for universal jurisdiction of an absolute sort but it is equally true that, as corroborated in the judgement delivered with respect to each one of the treaties and as the dissident minority highlights in its individual opinion,[46] almost all of the treaties include a clause pursuant to which no criminal jurisdiction exercised in accordance with national legislation is excluded.[47]

Thirdly and last of all, another two elements of international practice. On the one hand, the already cited judgement of the ICJ of 14 February 2002 on the arrest warrant issue with regard to which, however, the principal judicial body of the United Nations, in its acceptance of the petition filed by the parties, failed to make a declaration regarding the compatibility of universal jurisdiction provided for in Belgian law 1993/1999 with international law, and, on the other hand an International Criminal Court statute from which it does not seem to be able to extract anything shedding light on the extent to which international law admits universal jurisdiction.[48]

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[45] Judgement cited, *F.D.* 9, paragraph 7.

[46] *F.D.* 8, paragraph 6.

[47] Said clause is included in all of the conventions relating to *air safety* (the 1963 Tokyo Convention on offences and certain other acts committed on board aircraft, Article 3.3, *BOE* of 25.12.69; the 1970 Hague Convention, Article 4.3; the 1971 Montreal Convention, Article 5.3, as well as, in remittance to the latter, the 1988 Montreal Protocol, article 1) and *maritime safety* (the 1988 Rome Convention, Article 6.5 and its 1988 Protocol, Article 3.5); as well as to *certain practices and activities related to terrorism* (1973 Convention on internationally protected persons, Article 7; 1979 Convention on the taking of hostages, Article 8; 1979 Vienna Convention on the protection of nuclear material, Article 8.3; 1994 Convention on the protection of United Nations personnel, Art. 10.5; Convention on the persecution of terrorist bombings, Article 6.5; and Convention on the financing of terrorism, Article 7.6), in a number of different conventions adopted on issues of *transnational crime* as of the eighties (1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, Article 4.3, *BOE* of 10.11.90; optional 2000 Protocol to the Convention on the rights of the child with respect to the sale of children, child prostitution and the use of children in pornography, Article 4.4, *BOE* of 31.1.2002; and the 2000 United Nations Convention against trans-national organised crime, Article 15.6 and, in remittance to such Convention, the protocols on trafficking in human beings, trafficking in immigrants, Article 1.2 and illicit trafficking in firearms, Article 1.2 ratified by Spain although yet to be published), and in certain conventions also adopted as of the eighties in the field of *international humanitarian law* and *international human rights law* (1989 Convention regarding *mercenaries*, Article 9.3; 1999 protocol on the protection of *cultural goods*, Article 16.2; or the UN and OAS conventions on *torture*, Articles 5.3 and 12, respectively).

[48] For information see J. Alcaide Fernández, "La complementariedad de la Corte Penal Internacional y de los tribunales nacionales: ¿tiempos de ingeniería jurisdiccional?", in J. A. Carrillo Salcedo (coord.), *La criminalización de la barbarie: La Corte Penal Internacional*, Madrid, 2000, pp. 428–429; D. J. Scheffer, "War Crimes and Crimes Against Humanity", *Pace Int'l L. Rev.*, vol. 11 (1999), pp. 336–337; or our work cited above, *Jurisdicción universal penal y Derecho internacional*, (in press), section 3.1.2.

All things considered, what seems to be clear is that, in harmony with the reticence previously shown by the Spanish Government with regard to the earlier practice of Spanish courts in this area,[49] the new Supreme Court doctrine implies an extraordinary restriction on the universal jurisdiction of Spanish courts. Apart from the cases in which the suspect is found in Spanish territory, it appears that the exercise of universal jurisdiction in the future may only be applicable to cases in which the victims are of Spanish nationality.[50] Thus, as was stated in the individual vote of the dissenting

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[49] On 5 December 2002 the Council of Ministers sent to the General Council of the Judiciary and to the State Council the *Anteproyecto de ley orgánica de cooperación con la Corte Penal Internacional* (Preliminary draft of the organic law on cooperation with the International Criminal Court) (the report of the General Council of the Judiciary dated 24 January 2003 may be consulted in the section entitled *Documentos de interés: estudios e informes* of the official web page of said body: *http://www.poderjudicial.es/CGPJ* – visited on 22 February 2002–) which, together with the draft version of the organic law amending the criminal code (see the official gazette of Parliament: *BOCG, Congreso de los Diputados, VII Legislatura, Serie A: proyectos de ley, n. 145–I, de 5 de mayo de 2003*), seeks to adapt Spanish law to the developments that have taken place over the last several years in the field of International Criminal Law and, in a very special way, to the ICC Statute. Pursuant to its Article 7.2 (that, in accordance with the second additional provision, amends Article 23 of the *LOPJ*) the judicial bodies of Spain and the Public Prosecutor's Office shall abstain from proceeding *ex officio* and also when receiving a charge or accusation when the following three conditions are met: when the alleged perpetrators are not Spanish nationals; when the acts take place in other States; and when the crimes *are objectively the competence* of the Court (italics added). In a strict interpretation, war crimes, genocide and crimes against humanity (crimes that are the objective competence of the Court together with that of aggression pursuant to Article 5 of its Statute) committed abroad could only be tried in Spain when the perpetrators are of Spanish nationality, *translating into a blanket suspension of universal jurisdiction foreseen until now in Article 23.4 of the LOPJ*. Said suspension could be interpreted as a gesture of extreme respect for the International Criminal Court generally preventing that, by virtue of the complementarity principle (Article 17 of the ICC Statute), action by the Spanish courts could hinder the operation of the Court in criminal proceedings involving the mentioned crimes when committed outside of Spain and involving victims that are not of Spanish nationality. Now, considering that the mandate to abstain contained in the preliminary draft only requires that the crimes be included within the objective competence of the Court and not that the Court actually assume such effective competence, the jurisdiction of the Spanish courts would be excluded even if the crimes in question are committed within national territory or by nationals of States that are not party to the Statute and regardless of whether the suspect is found in Spanish territory or not. In this latter case, the precept in question is hardly compatible with the obligation to extradite or try and to not grant asylum or refuge corresponding to the State of custody.

[50] For the Supreme Court, the additional connection based on the Spanish nationality of the victims must be viewed in relation with the specific crime that is taken as the basis to confirm the competence and not with other crimes that could be revealed as the facts related to said crime unfold (*F.D.* 10, paragraph 15). Thus, in the ruling, Spanish jurisdiction is maintained exclusively with respect to the alleged torture committed against Spanish citizens and not with respect to this same crime committed in Guatemala against individuals of other nationalities. That same argument also rules out the competence of the Spanish courts to carry out criminal proceedings for the alleged crime of genocide committed in

minority, the Supreme Court has reinterpreted Article 23.4 of the *LOPJ* such that it would not envision the universality principle if the suspect is not present on Spanish soil but rather the passive personality principle,[51] the only one of the more or less generally accepted titles of jurisdiction to which no allusion was made in said law.

b) Assessment of the new Supreme Court doctrine from the standpoint of international law

An assessment of the effect that the new turn taken by the highest body of Spain's judiciary has had on Spanish practice with regard to universal jurisdiction obviously implies taking part in a debate that is still open and deeply impregnated with ideological connotations and in which personal conceptions of international law are projected. In the end, above and beyond cases of expressed, unquestionable and general recognition of the universality principle whether through conventions with broad-based and representative participation or through United Nations General Assembly resolutions that are adopted by consensus and are the object of systematic reiteration, acceptance of the operability of universal jurisdiction in accordance with general international law with respect to crimes of international concern – especially

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Guatemala in light of the fact that "no connection with a national interest of Spain is perceived with respect to this crime. It is possible to specify said connection in accordance with the nationality of the victims, but the perpetration of a crime of genocide against Spaniards has not been either denounced nor perceived. Neither is it directly linked with other relevant Spanish interests although such interests have been seriously affected by acts that could be qualified as different crimes committed in the same historical context (*F.D.* 10, paragraph 3).

[51] As pointed out by the dissenting judges, in practice the majority judgement replaces the universal jurisdiction criteria set out in Art. 23.4 of the *LOPJ* with passive personality criteria: "Application of the reasonability criteria put forward above could allow a national court to which extraterritorial competence is generally attributable in these cases, as is the case in Spain with the *Audiencia Nacional* (national court), to refuse the abusive exercise of jurisdiction in relation to alleged criminal acts that take place in countries that have no link, in a broad sense, with Spain, with Spanish citizens, with its interests or with its relations. This restriction can be assumed as long as its objective is reasonable, i.e. that of avoiding the effect caused by an excessive number of this sort of proceeding and guaranteeing the effectiveness of jurisdictional intervention given that in cases where there is a complete absence of connective links with the country and with the acts denounced, in the broad sense expressed above, the practical effectiveness of the proceeding could be null" (. . .). "If, however, we interpret the connective link, as is done in the majority sentence, in such a restrictive manner so as to only include cases in which there are victims who are Spanish nationals that, supposing that competence is based on genocide, must also form part of the ethnic group that has suffered that crime, we are eliminating in practice the principle of universal jurisdiction, repealing Art. 23.4 of the *LOPJ*. In practice, the criteria according to which jurisdiction is attributable in these cases would no longer be the nature of the crime as expressly set out in the precept, but rather the victim's nationality" (*F.D.* 11, paragraphs 7 and 8).

non-conventional war crimes, genocide or crimes against humanity[52] – is only possible if logical consequences are related to the developments that contemporary international law has undergone in the area of the individual's international responsibility. Thanks to the evolution in the so called legacy of Nuremberg[53] that has taken place since the end of the cold war, today there can be no possible doubt that certain acts that seriously violate the values and interests that are accepted by the international community as a whole as fundamental and that are within the framework of the types mentioned, are of a criminal character in accordance with an international legal system that, at the same time, views the repression of such acts as a structural and essential demand, so to speak, of international order itself.

Given that this is part of the unquestionable collective heritage of contemporary international law, the traditional absence of operational international criminal courts and the risk of impunity inherent therein should authorise all States, within the framework of a sort of *cosmopolitan functional double-duty*, to assume the tutelage of essential common interests exercising their *ius puniendi* to punish those who, for the perpetration of acts that are the focus of universal reprobation, earn the label of *Hostis humanis generis*, enemies of all humanity.

Acceptance of this reasoning presupposes admitting that the essential values and interests recognised by *positive* contemporary international law, rooted in basic considerations of humanity, cannot be reduced to mere rhetoric in light of the international community's institutional shortcomings. Universal jurisdiction is clearly not a panacea when it comes to preventing and punishing attacks against essential common interests. Moreover, it is not exempt from possible abuse especially in light of the fact that, for the most part, universal jurisdiction is not exercised by all who would like but rather by those who are also able to do so. Despite this fact, it appears essential to admit that, within certain limits and as an indispensable element in combating the traditional impunity with which perpetrators commit such crimes, the principle of universal jurisdiction is reasonable[54] and, collaterally, legally legitimate – at least

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[52] As is well known, the lack of repressive provisions contained in the Hague Convention IV of 1907 on the laws and customs of war on land and in Additional Protocol II to the Geneva Conventions, has meant that a large proportion of war crimes (mostly violations of the laws and customs of war alluded to in Article 3 of the ICTY Statute and violations of Article 3 common to the above-mentioned Geneva conventions) still lack today greater conventional coverage than that offered by the statutes of the international criminal courts only with regard to determining their competence. The same can be said of crimes against humanity in light of the very limited conventional provision for certain acts (torture, forced disappearance) that, under certain conditions, could be described as such. A different case is the problem of genocide, an indisputable crime of international concern in accordance with the 1948 Convention but with respect to which no more national jurisdiction is *expressly* recognised (compulsory jurisdiction, however) than that of the State in which the crime was perpetrated.

[53] For an excellent treatise on the subject in Spanish doctrine see V. Abellán Honrubia, "La responsabilité internationale de l'individu", *R. des C.*, vol. 280 (1999), pp. 137 and subsequent.

[54] As regards extra-territoriality in general – and therefore not only restricted to criminal matters – a defence has been made for some time now as to the need for a reasonability cri-

until which time the will of the majority in favour of the institutional development of international criminal jurisdiction becomes a full reality.

In short, the international responsibility of individuals for the most serious crimes of international concern, on the one hand, and the need to combat impunity in light of the international public order institutional deficit, on the other, are from our point of view and not without limits of course, the elements that, in and of themselves, allow for the justification of the exercise of universal jurisdiction with respect to such crimes as being reasonable and legitimate. This being the basis for the universality principle, it should also be used as the parameter to confirm whether the presence of the suspect in the territory ought to be an inexcusable requisite for the exercise of such principle, even to the point of excluding, in the event that such requisite is not met, the initiation of any investigative act and the activation of the mechanisms of international criminal cooperation (basically in the form of extradition) with a view to achieving the arrest and surrender of the suspect.

The potential for a State to initiate legal proceedings with a view to obtaining the arrest and carrying out the subsequent trial of suspects for crimes of international concern that are not found within their territorial borders – as was the case in the *Argentinean and Chilean cases* and in the *Guatemalan case* – can be based, in conventional terms, on the above-mentioned clause reiterated in numerous conventions on international criminal law pursuant to which "no criminal jurisdiction exercised in accordance with national legislation is excluded". For the Supreme Court in the Guatemalan case, that conventional affirmation does not seem to imply recognition of the universality principle. However, as it has been pointed out, "in light of the object and aim of these treaties, this provision can only be interpreted in the sense of broadening the possibilities foreseen in the Convention and that, possibly due to a lack of consensus, did not materialise. Could the party States establish universal jurisdiction for the repression of these acts in their domestic legal systems? What other interpretation could there be? Those that negotiated these conventions implicitly assumed the legitimacy of actions over and above those provided for in their provisions".[55] If this is true and it is also considered that the clause cited generally supplements and does not replace the other that, for the state of custody, establishes

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teria to add to the generally established jurisdictional links with a view to resolving conflicts of competence. Such reasonability may only be elucidated by contrasting, from the standpoint of the object and purpose of the regulation the extra-territorial enforcement of which is in question, the proximity of the case with the connective links in the enforcing state. For further information see F. A. Mann, "The doctrine of jurisdiction in International Law", *R. des C.*, 1964–I, T. 111, pp. 67 and subsequent; or B. Stern, "Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit", *AFDI*, vol. 32 (1986), pp. 45 and subsequent.

[55] E. Orihuela Calatayud, "Justicia universal y derechos humanos", in J. Soroeta Liceras (ed.), *Cursos de Derechos Humanos de Donostia-San Sebastián*, vol. III, Zarautz, 2002, pp. 131–132.

the obligation of trying or extraditing, the logical conclusion can be none other than the admissibility of universal jurisdiction *in absentia.*

The above-mentioned clause could be opposable *erga omnes*, and not only between the parties, when the corresponding convention is the object of general and representative participation as is the case with torture, terrorism in the area of air safety or narcotics trafficking.[56] Regardless of this fact, if the argument set out above on the recognition of universal jurisdiction in general international law is accepted, the very basis of the universality principle should justify, at least with respect to the most serious crimes of international concern, the non-compulsory exercise of such principle even in the absence of the suspect in national territory. In accordance with said reasoning, the object and purpose of the universality principle, that which makes its enforcement reasonable and therefore legitimate, is the fight against the extended impunity of the perpetrators of acts the punishment of which, in light of their grave affront to common essential values, is a requirement of international law itself. In this sense, at least in the case of crimes committed from the vantage point of power structures, when the will of the State to punish tends to be especially weak, refusal of universal jurisdiction *in absentia* could be synonymous with impunity.[57] Therefore,

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[56] On the degree of acceptance of the different international criminal law conventions see our work *Jurisdicción universal . . ., op. cit.*, section 2.3.

[57] It is the view of the Spanish Supreme Court that in the absence of other connective links based on the principles of territoriality, active or passive personality or protection of interests, only the presence of the suspect in national territory, in accordance with the principle of supplemental justice or law regarding criminal representation, would authorise a State's exercise of jurisdiction, "thus providing for an orderly reaction against impunity and eliminating the possibility of States being used as a refuge" (*F.D.* 9, paragraph 7, and *F.D.* 10, paragraph 13). Having accepted that the object and purpose of broadening the traditional titles of jurisdiction is to *combat impunity*, it stands to reason that compulsory universal jurisdiction *in presentiam* by means of the *aut iudicare aut dedere* formula (i.e. preventing perpetrators from taking refuge in other States), could be sufficient in achieving said objective when the States with the most direct connective links – especially the place where the act was committed, the nationality of the victims or the direct holder of the *individual* protected interests – tends to also show a will to prosecute. This is usually the case with transnational crime – trafficking in and exploitation of human beings or narcotics trafficking – or international terrorism, areas in which difficulties in effective prosecution are rooted in the transnational and generally organised nature of the crime or the frequent involvement of third States but not in a lack of will to prosecute on the part of the *most directly involved* States. In contrast, as international practice has demonstrated time and time again however, preventing other States from becoming places of refuge is without a doubt an absolutely insufficient measure within the context that could be denominated as *official criminality*. Within this scope that would include the majority of the most serious crimes of international concern – war crimes, crimes against humanity, genocide – and other crimes of international significance not necessarily included among those just listed – torture, forced disappearances, extra-judicial executions – the fact that these crimes are habitually or necessarily committed by the state power structures themselves means that the State that is supposed to take the greatest interest in the suppression of acts that represent a grave affront to not only individual but also common interests, generally lack the will to prosecute and tend to be the place of choice for perpetrators seeking refuge.

even if merely a warning, allowing a pre-trial investigation and the activating of the mechanisms of international criminal cooperation can serve not only as a reminder to the suspect of the consequences that the international legal system attaches to crimes allegedly committed, but also a relief, a relative one of course, as regards the rights that this same legal system affords to the victims.

c) *The limits of universal jurisdiction* in absentia: *proscription of extra-territorial executive jurisdiction and respect for the competence of the International Criminal Court*

The above does not mean, however, that all forms of universal jurisdiction with the purpose of combating impunity for crimes of international concern – not even the most heinous of them – have a place in contemporary international law. In this sense, despite reiterated violations by a very small number of States that consider legitimate the unilateral exercise of material coercion abroad for the capture and arrest of perpetrators of crime, the prohibition of *extra-territorial executive jurisdiction*, already proclaimed in the *Lotus* case by the Permanent Court of International Justice[58] and reiterated by the Security Council in the *Eichmann case*,[59] is not only supported by wide-ranging international practice[60] but also appears to be a logical and necessary corrective measure to the principle of universality rooted in the notion of sovereignty and its corollaries. Fortunately Spain's practice in matters of the arrest of alleged perpetrators of crimes of international concern, relatively prolific over the last several

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[58] "Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". Judgement cited, pp. 18–19. The same stance was taken more recently by two of the judges that formulated dissenting opinions in the *International Arrest Warrant* case (ODA, paragraph 13 and Van den Wijngaert, pararaph 49), as well as by the ECHR in its very controversial decision for a number of different reasons in the *Bankovic* case. ECHR, Grand Chambre, décision sur la recevabilité de la requête n. 52207/99, *Bankovic et autres contre 17 Etats parties*, 12 December 2001, paragraph 60, HUDOC REF. 00022674.

[59] SC Res. 434, of 13 June 1960. On the already mentioned aspect of the Eichmann case, J. E. S. Fawcett, "The Eichmann Case", *BYBIL*, vol. 38 (1962), pp. 184 and subsequent; L. Green, "Aspects Juridiques du Procès Eichmann", *AFDI*, vol. 9 (1963), pp. 153 and subsequent; or H. Silving, "In Re Eichmann: A Dilemma of Law and Morality", *AJIL*, vol. 55 (1961), pp. 311 and subsequent.

[60] See, for example, Articles 14 of the International Convention against the Taking of Hostages of 1979, 9 of the Rome Convention for the suppression of unlawful acts against the safety of maritime navigation of 1988, 4 of the Inter-American Convention on the Forced Disappearance of Persons of 1994, 18 of the International Convention for the Suppression of Terrorist Bombings of 1997, 22 of the International Convention for the Suppression of the Financing of Terrorism of 1999 or 4 of the United Nations Framework Convention against Trans-national Organised Crime of 15 November 2000.

years regarding narcotics trafficking with the more or less expressed consent of the flag-state,[61] has proven to be fully respectful of the demands of international law.

While this is widely accepted, the principle by which the international illegality of the international seizure of persons should be an obstacle to bringing a suspect to justice once he has been forcibly taken to the territory and is present therein[62] does not enjoy the same degree of acceptance. The illicit nature of such seizures in accordance with international law and its inconsistency with the fundamental right of personal freedom and security recognised in a number of instruments including Article 7 of the International Pact on Civil and Political Rights, should prevent the operability of the maxim *male captus bene detentus*, at least in those States that domestically claim to operate under the ideal of rule of law. Under rule of law, the end can never justify illicit means even if the latter are only implemented abroad.

That, however, is not the only limit that can be put on universal jurisdiction *in absentia*. If, as has been pointed out, that modality of universal jurisdiction is based on the fact that it is an indispensable instrument to combat impunity as regards crimes especially damaging to common interests, the development of international criminal institutions representative of the international community and capable of taking on that mission should advance along the path of, if not yet fully questioning its virtuality, reconsidering its scope and limits. In this sense, if the allowances that needed to be made permitting the creation of the International Criminal Court[63] prevent, at least in the middle or long term, being able to completely dispense with the universality principle, efforts should be made to avoid allowing said principle to stand in the way of the effective operation of the new Court. From this perspective, mindful

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[61] Reports on said practice can be found in the *REDI* publication in the section entitled "*Jurisprudencia española de Derecho Internacional Público*" (Spanish case law in international public law). See for example, the "Grisú" case with a note by C. F. Fernández Beistegui in *REDI*, vol. 48 (1996), pp. 180 and subsequent, or the more spectacular case relative to the capture of the "*Archangelos*" with a note by J. Zavala Salgado, in *REDI*, vol. 49 (1997), pp. 165–169. For a more complete analysis see V. Carreño Gualde, "Suppression of the illicit traffic in narcotic drugs and psychotropic substances on the High Seas: Spanish Case-Law", *SYIL*, vol. IV (1995–1996), pp. 100 and subsequent.

[62] With regard to this see V. Coussirat-Coustère and P.M. Eissemann, "L'enlèvement de personnes privées et le droit international", *RGDIP*, vol. 76 (1972), pp. 348–352 and 356–364; F. A. Mann, "Reflections on the Prosecution of Persons Abducted in Breach of International Law", in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, Dordrecht, 1989, p. 407; or, in Spanish doctrine, commentaries relating to the *Roldán* case by C. Espósito, "El caso Roldán: ¿Detención irregular?", *Meridiano CERI*, n. 3 (1995), pp. 21 and subsequent; and J. González Vega, "*Male captus, bene detentus*: extradición, detención y derechos humanos en el contexto del 'caso Roldán'", *REDI*, vol. 47 (1995), pp. 119 and subsequent.

[63] I take the expression from R. Zafra Espinosa De Los Monteros, "El establecimiento convencional de la Corte Penal Internacional: Grandeza y servidumbres", in J. A. Carrillo Salcedo (Coord.), *La criminalización . . .*, cit., p. 190. Said allowances fundamentally although not exclusively affect limits imposed on its jurisdiction by virtue of Articles 11 and 12 of the Rome Statute.

of the risks that the universality/complementarity combination causes for its effective operation,[64] it is not preposterous to propose an interpretation of the Statute according to which complementarity would only be able to operate with respect to national jurisdictions that have special connective links with the crimes in question.[65] The fact is that an effectively operating Court would make combating impunity by means of the exercise of universal jurisdiction unnecessary and thus such exercise would lose the reasonability that, in other cases and from our point of view, justifies it.

3. THE SUBSIDIARITY OF THE SPANISH COURTS' EXTRA-TERRITORIAL JURISDICTION

Reasons of principle, linked to the mostly territorial projection of sovereignty, but also very practical considerations related to ease in collecting and presenting evidence and for the development of the hearing, put the State in which the crime was committed in a privileged position for the trying of crimes of international concern. It is therefore not surprising that several elements of international practice,[66] recog-

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[64] Highlighted, among others, by F. Lattanzi, "Compétence de la Cour Pénale international et consentement des États", *RGDIP*, vol. 103 (1999), pp. 430–431; J. Alcaide Fernández, "La complementariedad . . .", *art. cit.*, pp. 399 and 433; P. H. Weckel, "La Cour Pénale Internationale. Présentation général", *RGDIP*, vol. 102 (1998), p. 986; A. Rodríguez Carrión, "Aspectos procesales más relevantes presentes en los Estatutos de los Tribunales Penales Internacionales: condiciones para el ejercicio de la jurisdicción, relación con las jurisdicciones nacionales", in J. Quel López, *Creación de una jurisdicción penal internacional*, Madrid, 2000, p. 174; C. Escobar Hernández, "Concurrencia de jurisdicciones y principio de complementariedad", in M. García Arán and D. López Garrido (coords.), *op. cit.*, pp. 258–259; I. Lirola Delgado and M. M. Martín Martínez, *La Corte Penal Internacional. Justicia versus impunidad*, Barcelona, pp. 162 and subsequent; or A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *EJIL*, vol. 10 (1999), pp. 158 and subsequent.

[65] Thus, the above-mentioned (see note 49) exclusion of jurisdiction provided for in Article 7.2 of the preliminary draft of the law on cooperation with the International Criminal Court should be well received if it were only to be applied *in cases in which that body has effective competence.*

[66] Article 12.2 of the ILC's draft Code of Crimes Against the Peace and Security of Mankind, for example, admitted as an exception to the enforcement of the *non bis in idem* principle, the possibility of a second national trial by the courts of another State when the acts in question had taken place in its territory. The commentary justifying such exception asserts that "the State within the territory of which the crime was committed has a firm interest" and "is more directly affected by the crime than other States". *Report . . .*, p. 89. This special link was also recognised by the same body two years earlier in Article 47.2 of the Draft Statute of an International Criminal Court in the sense of considering the domestic legal system of the place where the crime took place – among others – as regards the amount or duration of punishment imposed. *ILC report on the work carried out during the course of its 46th work session*, comment regarding Article 47 of the Draft Statute of an International Criminal Court, paragraph 2. Principle number 19 of the final report presented by the special rapporteur of the Human Rights Commission, L. Joynet, on the issue of the impunity

nise the special interest that said State has in the prosecution of such crimes and that, on occasion, this gives rise to the acceptance of the priority in the hearing on the part of the so called *iudex loci delicti commissi.*[67]

The conditioned priority placed on the State in which the crime was committed (equivalent to the subsidiary character of universal jurisdiction), is firmly rooted in the practice of Spanish courts regardless of the fact that the enforcement of that rule has not been governed by uniform criteria. Already in the cases involving the *Argentinean and Chilean hearings*, the plenary of the National Criminal Court rejected the interpretation of Article 6 of the Convention on Genocide in the sense of granting exclusive jurisdiction to the judges in the place where the crime was committed, proposing instead an alternative interpretation by virtue of which said precept "imposes subsidiarity status upon actions taken by jurisdictions different from those envisioned in the precept. Thus, the jurisdiction of a State should abstain from exercising jurisdiction regarding acts constituting a crime of genocide that are being tried by the courts of the country in which said acts were perpetrated or by an international court".[68]

In an additional step, in the *Guatemala case*, that same legal body not only proclaimed that the rule inferred from Article 6 of the 1948 Convention constitutes rule

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of the perpetrators of human rights violations – civil and political – affirms that "the territorial competence of the national courts continues to be the general rule." Doc. E/cn.4/Sub.2/1997/20/Rev.1. An idea that had already been expressed by the General Assembly when, in 1973, it proclaimed its "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", including the principle that "Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes". Resolution 3074 (XXVIII), of 3 December 1973, section 5.

[67] In the *Bouterse* case the Amsterdam Appeals Court affirmed its competence only after highlighting that, the press news on the development of investigations in Surinam having been confirmed – concerning which there was no trustworthy confirmation – the proceedings should be suspended and, in the event that they conclude with a final judgment, a stay of proceedings should be declared. The 20 November 2000 decision of that court can be found in the *International Committee of Jurists* web page: *http//:www.icj.org/objectives/decision.htm* (visited on 20.12.02). Along these same lines, during the course of a proceeding before the ICJ with respect to the examination of the *International Arrest Warrant* case, the Belgian authorities made an effort to underline the fact that action taken by their judicial bodies against the then Congolese Foreign Minister A. Yerodia Ndombasi, had only been initiated once evidence had been found regarding the Congolese authorities' lack of will to bring him to justice. See, for example, the statements made by the Belgian agent J. Devader and one of the Belgian counsels, D. Bethlehem, during the public hearing of 17 October 2001 (doc. CR 2001/8, p. 22). And also, in the *Eichmann Case*, the Israeli Supreme Court expressly recognised that the State of the territory "is the best place (*forum conveniens*) to hold the trial". Paragraph 12.d, *loc. cit.*, p. 302.

[68] Rulings of 4 and 5 November 1998, already cited, *F.D.* n. 2, *REDI*, vol. 51 (1999), pp. 639 and subsequent.

of a general (and imperative!) nature based on international law,[69] but also proceeded to a clearly disproportionate enforcement of that rule. In its ruling, the National Court considered that this issue should be resolved prior to establishing competence and that, moreover, unless the inactivity or ineffectiveness was due to legislation in force in the State of the territory or due to the passing of a long period of time, the burden of proof lay with the plaintiff.[70]

This way of applying the subsidiarity criteria, however, was questioned by the Supreme Court in its judgement of 22 February 2003 in relation with the same case. In the view of the high court, "the subsidiarity criteria is not satisfactory in the way it was applied by the instance court. The determination of when it is appropriate to intervene in a subsidiary fashion and move forward in the judicial proceedings of specific acts based on the real or apparent inactivity of the territorial State jurisdiction, implies a judgement on the part of the jurisdictional bodies of one State with regard to the capacity to administer justice of those same bodies in another State (. . .) A statement of this sort that can have extraordinary importance in the field of international relations should not be made by state courts. Article 97 of the Spanish Constitution provides for the Government to orchestrate foreign policy and the repercussions that a statement of this nature could have in this area cannot be ignored".[71] Even though the majority judgement is not explicit with regard to the way in which the Spanish courts should go about assessing the priority of the State in which the crime was committed, this does not seem to be a point of discrepancy for the dissenting minority[72] for whom "this criteria is not sufficient to exclude the enforcement of Art. 23.4.a) of the *LOPJ*, calling for the full accreditation of the inactivity or ineffectiveness of the criminal persecution on the part of the territorial jurisdiction as a requirement for the admittance of an extra-territorial suit for genocide (. . .). For a case of this nature to be admitted in a court of law, the same requirements that apply to acts allegedly constituting the crime of Genocide, apply here as well. The provi-

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[69] In its 13 December 2000 ruling the National Court held that the principle of universal persecution found in Article 23.4 of the *LOPJ* should be palliated "with the criteria of jurisdictional attribution of Article 6 of the Convention (. . .) and also with the general principle of subsidiarity that, in our view, forms part of the international 'ius cogens' that has crystallized in Article 6 of the Convention and, more recently, in Article 17 and subsequent of the Statute of the International Criminal Court". *F.D.* 2.

[70] Indeed, having pointed out that "there was no legislative impediment blocking the Guatemalan justice system's persecution of the crime of genocide allegedly committed in the territory of that country" (*F.D.* 3), the 13 December 2000 ruling concluded that "there is no evidence of rejection in the State of the territory (. . .) of the accusation and connected charges filed before Central Trial Court number 1 and we cannot infer judicial inactivity by virtue of the passage of time as was feasible in Chile and Argentina given the number of years that had gone by since the end of the military dictatorships because, as has been pointed out, the material serving as the main nucleus of the case, the initial charge, was first made on 25.02.99 and the claim was filed on 02.12.99 and no Guatemalan court decision was attached rejecting such charge" (*F.D.* 4).

[71] Judgement cited, (*F.D.* 6, paragraphs 5 and 6).

[72] As is recognised in the individual vote. *F.D.* 1.

sion of serious and reasonable evidence that the serious crimes denounced have not, to date, been effectively followed up on by the territorial jurisdiction, for whatever the reason, does not imply any sort of negative judgement on the political, social or material factors that led to said 'de facto' impunity".[73]

This stance taken in Spanish practice, based on recognition of the priority of the judge in the place where the crime was committed, is fully coherent with the foundation upon which, from our point of view and as we have pointed out, the universality principle is based. If the State of the territory has the effective capacity and will to punish the perpetrators of the crime in question, there is no reason to combat impunity where the connective links to the crimes are limited to those provided by the community and essential nature of the interests damaged. However, it could be necessary to make some clarifications as regards such a generic proclamation on the subsidiarity of our courts' extra-territorial jurisdiction. Without prejudice to the fact that recognition of the special status of the State in which the crime was committed should be an incentive for extradition or surrender, the absence of a general obligation as concerns international criminal cooperation imposing such extradition or even legal requirements concerning human rights that could stand in the way of such extradition, cannot be ignored.

In this sense, the priority of the State in which the crime was committed should not serve as a pretext making it possible for Spain to fail to fulfil the obligation – general in our view[74] – that it has to put on trial, if it does not extradite, the perpetrators under its custody of the most serious crimes of international notoriety. In accordance with this interpretation, therefore, the priority of the *iudex loci delicti commissi* could in fact be an obstacle to the exercise of universal jurisdiction *in absentia* – or as the Supreme Court put it, for the implementation of the passive personality principle – but

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[73] Individual opinion, *F.D.* 4.

[74] The wide ranging and representative participation in some of the conventions that provide for universal jurisdiction under the formula *aut iudicare aut dedere* are a reflection of a general consensus as concerns the existence of an extra-territorial obligation to prosecute, in the event of non-surrender, with respect to crimes such as serious infractions of the Geneva Conventions, torture or certain terrorist acts against air safety. Also, recognition of this same obligation by institutions representing the international community, especially resolutions of the General Assembly adopted by consensus and through statements reiterated periodically regarding international terrorism or forced disappearances could also serve as the basis for affirming the existence of an general obligation to prosecute with respect to the State in the territory of which the suspect is found. In this sense, despite frequent failure to fulfil this obligation, that set of pronouncements may mean that, by virtue of general international law, no State can become a land of refuge or a safe haven of passage for the perpetrators of acts that are an affront to the essential interests and values of the international community as a whole. Moreover, especially when it comes to the most serious crimes of international notoriety and independent of conventional coverage or not, the arresting state, as seems to be insinuated in the preamble of the ICC Statute, would very probably be in violation of international law if it failed to put the suspect on trial despite having opted to not extradite or surrender said suspect. For more detailed development of these ideas see my work, *Jurisdicción universal . . ., op. cit.*, section 4.1.

not for its exercise by Spanish judges when the competent authorities decide not to extradite or, in light of juridical problems, cannot extradite, because any other solution would be equivalent to impunity in clear contradiction of the object and purpose of the obligation to extradite or put on trial.

4. EXTRA-TERRITORIAL JURISDICTION AND IMMUNITY OF FOREIGN STATE REPRESENTATIVES

The fact that, given their massive and/or systematic nature, the most serious crimes of international concern tend to be perpetrated from within the very structures of state authority with the participation of the highest ranking state officials, has led to the emergence of the issue of the virtue of traditional immunity and inviolability that international law affords such officials and their functionality as a limit with respect to extra-territorial jurisdiction. As demonstrated by the *ad hoc* criminal courts in the *Milosevic*[75] or *Kambanda*[76] cases, there can be no doubt today that the principle of the international responsibility of the individual for especially serious crimes of international concern prevails over immunity[77] and that such prevalence is fully operational, within the framework of its competences, before international courts. In contrast,

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[75] The indictment against the former Yugoslav President, S. Milosevic, was adopted in May 1999, a year and a half before he was overthrown on 6 October 2000 and while he still figured as the head of the Yugoslav State. ICTY, case IT-02–54, *Prosecutor against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljus Ojdanic, Vlajko Stojilykovic*, Indictment of 24 May 1999.

[76] Following his confession, the ICTR sentenced *J. Kambanda*, prime minister of the provisional government of Rwanda from 8 April to 17 July 1994, to life imprisonment for his involvement in the genocide of the Tutsi people. ICTR, Chambre I, *Le Procureur c. Jean Kambanda*, affaire ICTR-97–23, jugement du 4 septembre 1998. Subsequent to an appeal, the judgement was confirmed on 19 October 2000.

[77] One of the most firmly rooted rules in international criminal law is that which is derived from the principle of irrelevance of official position. The fact is, while the origin of the idea of the international criminal responsibility of the individual is generally rooted – without prejudice to other more remote precursors – in Article 227 of the Versailles Treaty and in the pretension foreseen therein – and failed in practice – regarding the prosecution of the former German emperor William II of Hohenzollern, the principle of irrelevance of official position was reiterated time and time again in practically all international instruments on the subject, whether in the statutes of all of the international criminal courts created or foreseen to date – from the Statute of the International Military Tribunal of Nuremberg (Art. 7) to the Statute of the International Criminal Court (art. 27.1), from the Statute of the Tokyo Tribunal (Article 6) to the Statutes of the International Criminal Tribunals for the Former Yugoslavia (Article 7) and Rwanda (Article 6) – in all of the ILC projects focusing on the essential principles of international criminal law – from the principles of international law recognised under the Statute and by the judgements of the 1950 Nuremberg Tribunal (principle III) to the draft Code of Crimes Against the Peace and Security of Mankind of 1954 (Art. 3) and 1996 (Art. 7) – or in one of the most significant conventions on this subject – the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Art. 3).

it has not always been so clear – and in some aspects remains unclear – just where to situate the exact point of balance between the two institutions when the responsibility requirement takes place before national courts.[78]

a) Exclusion of functional immunity (ratione materiae) *in the case of former state representatives*

At any rate, in accordance with the most recent international practice, it now appears necessary to make a distinction between state officials that have left office or those that are still in office at the time that the exercise of extra-territorial jurisdiction is sought. With respect to the first supposition, in some recent cases – especially the *Pinochet* case in the United Kingdom[79] and Belgium,[80] but also the *Bouterse*

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[78] For recent treatment of these issues in Spanish doctrine see F. Jiménez García, "Justicia universal e inmunidades estatales: Justicia o impunidad ¿una encruicjada dualista para el Derecho Internacional?", *ADI*, vol. 18 (2002), pp. 63 and subsequent.

[79] In accordance with the majority position defended in the House of Lords second appeals committee as regards this case, although the criminal nature of certain acts does not preclude their consideration as acts carried out in the exercise of official functions (in contrast with the assertion made by the majority of the first appeals committee – Lord Nicholls, *ILM*, vol. 37/1998, p. 1333; Lord Steyn, *ibid.*, p. 1337; and Lord Hoffmann, *ibid.*, p. 1339–, and two of the lord-judges of the second committee – Lord Browne-Wilkinson, *ILM*, vol. 38/1999, pp. 593–594; and Lord Hutton, *ibid.*, pp. 638–639), the institution of the immunity of former state representatives would be incompatible with the notion of crimes against international law and, with respect to such crimes, an exception to the mentioned general rule of immunity *ratione materiae* was made. The grounds for that exception are based on the imperative (and therefore prevalent) nature of the rule that outlaws and orders the prosecution of crimes against international law (Lord Hope of Craighead, *ILM*, vol. 38/1999, pp. 625–626; Lord Phillips of Worth Matravers, *ibidem*, p. 661; and especially, Lord Millet, *ibid.*, p. 651), as well as the existence of an implicit renouncement of immunity inherent in the international criminal type, torture, that foresees the involvement of civil servants or state officials as both a necessary and habitual element (Lord Saville of Newdigate, *Ibid.*, pp. 642–643). For an exhaustive analysis of the different positions taken in British justice in this respect, see A. Remiro Brotons, *El caso . . ., op. cit.*, pp. 109 and subsequent. In light of the different opinions reflected in the Pinochet case, it is no easy task, as was pointed out by S. Villalpando ("L'affaire Pinochet: beaucoup de bruit pour rien? L'apport au droit international de la décision de la Chambre des Lords du 24 mars 1999", *RGDIP*, vol. 103/1999, pp. 416 y 418), to decipher the sense in which the case can be considered as a precedent. The options range from minimalist interpretations that would limit the exclusion of immunity to cases of conventional crimes that, like torture, include the action of official agents as an element of the type, to maximalist positions that, highlighting the prevalence of the values that are safeguarded from crimes against international law, would exclude all possible invocation of immunity by former state representatives suspected of committing these types of crimes regardless of whether such crimes have explicit conventional backing or not. However, despite the fact that there are still many open issues, there is something that, as was pointed out by J. M. Sears ("Confronting the 'Culture of Impunity': Immunity of Heads of State from Nuremberg to ex parte Pinochet", *GYIL*, vol. 42/1999, p. 146), seems clear in the wake of the Pinochet case: the notion of the absolute immunity of former State representatives is unsustainable today.

[80] In his decision of 8 November 1998 regarding the jurisdiction of the Belgian justice system

case[81] and, to a lesser degree, the *Habré* case[82] – one can observe a clear tendency against the operability of functional immunity (*ratione materiae*) in the case of former state officials once they have left office. This may be so because it is understood that by applying the exception of the general rule envisioned in Article 39.2 of the 1961 Vienna Convention on diplomatic relations, crimes of international concern could never fall under the scope of application of said immunity because such crimes could never be considered as acts performed in exercise of official functions – i.e., because the rule of immunity would not be applicable – or it may be because, even if still considered as such kind of acts, prosecution of such crimes is an international requirement that prevails over the general rule thus blocking its operability.

The practice of the Spanish courts as concerns the immunity of former state representatives is clearly aligned with the tendencies outlined above although it is surprising that, in light of the effort made by the Public Prosecutor to block the action taken by Spain's National Court based on the universal jurisdiction title of Article 23.4 of the *LOPJ*, the issue of immunity was not even suggested, at least initially, in the Spanish version of the *Pinochet* case or in the *Guatemala* affair. The fact that, in the first of the two cases, the National Court affirmed its jurisdiction and the fact that in the latter the Supreme Court ended up backing very limited extra-territorial jurisdiction of Spanish courts for the prosecution of torture committed during the Guatemalan dictatorship against Spanish citizens, despite the fact that some of the alleged per-

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to hear the suits filed in that country against ex-dictator Pinochet, Judge Vandermeersch of the Brussels First Instance Court refused to give crimes of international concern any possible consideration as acts carried out in the line of official functions. See the note by 701.

[81] In response to the allegation of the defence of D. D. Bouterse that held that the acts for which he was being tried had been committed at a time during which the accused presided over the military junta that governed Surinam and were therefore covered by his immunity as the former Head of State, the appeals court answered as follows: "The Court of Appeal can leave aside whether that insufficiently reasoned argument on Bouterse's position is correct. After all, the commission of very serious offences – as are concerned here – cannot be considered to be one of the official duties of a head of state". Decision ('beschikking') of 20 November 2000. Available on the International Commission of Jurists' web page: *http://www.icj.org/objectives/decision.htm* (visited on 21.2.02).

[82] The decisions of the Prosecution section of the Dakar Appeals Court of 4 July 2000 and of the *Cour de Cassation* of Senegal of 20 March 2001, refusing to grant jurisdiction to the courts of that country for criminal proceedings against former Chad president, H. Habré were based exclusively on the lack of a domestic provision for universal jurisdiction foreseen in Article 5 of the 1984 Convention against torture and did not take possible immunity *ratione materiae* into consideration at all. On this case see, I. Sansani, "The Pinochet Precedent in Africa: Prosecution of Hissène Habré", *Human Rights Brief*, Center for Human Rights and Humanitarian Law, Washington College of Law, vol. 8 (2001), pp. 32–35, as well as a lengthy dossier on the web page of Human Rights Watch at the following address: *http://www.hrw.org/french/themes/habre-decision.html* (visited on 22.2.02).

petrators identified in the suits are sheltered by *ratione materiae*,[83] are factors that could legitimately be taken as an acceptance, on the part of our courts, of the interpretation according to which such immunity does not cover acts that, under international law, are considered crimes. In this specific aspect, Spanish practice appears to be in line with the most recent trends in this area and is therefore well received.

b) The subsistence of personal immunity (ratione personae) *in the case of acting state representatives*

In contrast, when the case involves high-ranking acting state representatives, the position most defended by the doctrine,[84] supported by certain domestic practice – the *Gadafi* case in France[85] – as well as by Article 98.1 of the Statute of the International

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[83] This is the case of, at least, the former heads of Government, E. Ríos Mont and O. H. Mejías Víctores, and of the former President of the Republic, F. R. Lúcas Garcu.

[84] Among others, see, M. CH. Bassiouni, *Crimes Against Humanity in International Law*, 2nd ed., Haya-Londres-Boston, 1999, p. 508; M. Cosnard, "Les immunités du chef d'Etat", Rapport introductif, SFDI, Colloque de Clermont (juin 2001), *Le chef d'Etat et le droit international*, p. 24; Ch. Dominice, "Quelques observations sur l'immunité de jurisdiction pénale de l'ancien chef d'Etat", *RGDIP*, vol. 103 (1999), p. 301; S. R. Ratner y J. S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, 2nd ed., 2001, pp. 141–142; A. Remiro Brotons, *El caso . . ., op.cit.*, pp. 117 and 121–122; or A. Watts, "The legal position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *R. des C.*, vol. 247 (1994), p. 54. Also, in Article 2 of its Resolution on the immunity of Heads of State and Government adopted by the *IDI* during its 2001 Vancouver session, it affirmed that "(e)n matière pénale, le chef d'Etat bénéficie de l'immunité de juridiction devant le tribunal d'un Etat étranger pour toute infraction qu'il aurait pu commettre quelle qu'en soit la gravité". In the opposite sense, contrary to the subsistence of any sort of immunity in the case of the most serious crimes of international concern see, A. Bianchi, "Immunity versus Human rights: The Pinochet Case", *EJIL*, vol. 10 (1999), pp. 260 and subsequent, as well as the Committee on International Human Rights Law and Practice of the ILA, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, London Conference (2000), p. 14 and conclusion number 4, p. 21.

[85] In its judgement of 13 March 2001, the Court of Cassation repealed the decision of the Paris Appeals Court through with the latter body affirmed that the immunity of acting Heads of State could not be extended to terrorist acts. The repeal was based on the fact that "international customs go against allowing acting Heads of State, in the absence of international provisions stating otherwise that are imposed upon the parties involved, to be the held liable before the criminal jurisdictions of a foreign State (. . .) . In accordance with the current state of international law the crime denounced, regardless of its gravity, does not form part of the exceptions to the principle of jurisdictional immunity covering acting foreign Heads of State and thus, in delivering its judgement, the *chambre d'accusation* has failed to recognise said principle". The text of the judgements delivered by the Cour d'Appel de Paris (arrêt du 20 octobre 2000, n. A 1999 0591) and by the *Cour de Cassation* (arrêt n. 1414 du 13 mars 2001) can be consulted in extract form in *RGDIP*, vol. 105 (2001), pp. 473 and subsequent. The decision of the Cour de Cassation, however, does give rise to some doubts as concerns just what would be considered possible exceptions to the personal immunity of acting State officials. As S. Zappala has pointed out "(a)n *a contrario* interpretation of this passage leads to the conclusion that there are crimes that constitute exceptions to juris-

Criminal Court, has been confirmed by the International Court of Justice in the case relating to the *International Arrest Warrant* (Democratic Republic of Congo versus Belgium), in asserting that said persons "benefit from full immunity from criminal jurisdiction and inviolability abroad".[86]

This latter idea, even before being proclaimed by the International Court, was already relatively well established in the practice of the Spanish courts. In this sense, and along the lines already established by Central Trial Court number 5 in the *Obiang Nguema* and *Hassan II* cases,[87] the confirmation by the plenary of the criminal section of the Spanish National Court of the non-admission of the lawsuit filed against *Fidel Castro* for the crimes of genocide, terrorism and torture, among others, was based on "absolute jurisdictional exemption" derived from the office held and that this loquacious and long-lived dictator continues to hold. In the view of the above-mentioned judicial body, "if Spain recognises the sovereignty of the Cuban people and has diplomatic relations with that country, Spanish criminal jurisdiction cannot be attributed to the prosecution of allegedly criminal acts . . . as long as one of the accused is the Honourable Mr. Fidel Castro Ruz who, as concerns Spain, represents the sovereignty of the Cuban people".[88]

As for the rest, the doctrine established by the ICJ in the judgment regarding the international arrest warrant has been followed by both the Supreme Court in the *Guatemala Case*, alluding to the immunity of acting Heads of State and Government as a limit to the exercise of extra-territorial jurisdiction on the part of national courts[89] as well as by Central Trial Court number 4 that has turned to the same doctrine – as well as to the previous doctrine of the National Court itself in the Fidel Castro case – in its non-admission of the suit filed against the Venezuelan President H. Chávez for alleged crimes of terrorism and crimes against humanity committed during the tragic events of 11 April 2002 in Caracas.[90]

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dictional immunity of the Heads of State". "Do Heads of State in office enjoy Immunity from jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation", *EJIL*, vol. I2 (2001), pp. 600 and subsequent. F. Poirat has spoken out in a similar fashion, "Immunauté de juridiction pénale du chef d'Etat étranger en exercice et règle coutumière devant le juge judiciaire", *RGDIP*, vol. 105 (2001), pp. 480–481.

[86] Judgement of 14 February 2000, *cit.*, paragraph 54.

[87] Rulings of 23 December 1998. See "Garzón archiva las acusaciones contra Hassan II y Obiang", *El Mundo*, 24 December 1998.

[88] As is pointed out in another passage of the ruling, it is the condition of acting representatives that is the determining element of the operability of immunity: "It goes without saying that the above solution in no way contradicts a recent resolution delivered by this same Plenary in which the accused was the Senator of the Republic of Chile, General Pinochet, in light of the fact that he was not a foreign Head of State and had already abandoned that office when the appeal filed against the admission of the lawsuit was rejected". National Court Ruling of 4 March 1999; Rapporteur: the Honourable Mr. Jorge Campos Martínez. The most relevant extracts of the ruling may be found, with a note by J. González Vega, in the *Anuario Español de Derecho Internacional Privado*, vol. I (2001), pp. 811–816.

[89] STS cited of 25 February 2003, *F.D.* 8, paragraph 11.

[90] Ruling of 24 March 2003. See: "La Audiencia Nacional remite la querella contra Chávez

Thus,[91] full guarantee of the integrity of the representative functions of such offices seems to constitute an interest meriting special attention in an international society that, given its eminently interdependent nature, needs to conserve the channels through which inter-state relations are conducted. However, as the Court itself recognised in its judgement concerning the *Yerodia Ndombasi* case, the subsistence of personal immunity cannot be synonymous with impunity. In this sense, the essential character of common interests and values, the safeguard of which is at stake, especially points to the need to move forward in the process fortunately under way of institutionalising international criminal justice the jurisdiction of which, as stated in Article 27 of the Rome Statute, cannot be affected by any sort of immunity. But it also points to the need to call for and require, from all members of the international community, greater commitment in the assumption of responsibilities – not the same for all – incumbent upon all in the prevention, and not only the repression, of the most serious crimes of international concern.

5. EXTRA-TERRITORIAL JURISDICTION AND TRANSITION PROCESSES

As has already been pointed out, the fact that the most serious and horrendous crimes against international law can normally only be committed, for practical reasons, from the vantage point of state power structures, coupled with the traditional absence of international criminal courts and the subsistence of a sort of practically absolute *ratione personae* immunity, are factors that oftentimes explain why the prosecution of those responsible is only possible subsequent to the fall of the political regime established and/or maintained by the criminals themselves. When this fall is the result of a popular uprising, a military takeover or any other circumstance against the will of the regime, the demand for responsibilities can take place in the very State in which the crimes were allegedly perpetrated under conditions that, however, are not

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a la Corte Penal Internacional", *El País*, 25 March 2003; and E. Bobourg, "Spain Sends the Case Brought Against Venezuelan President Hugo Chavez to the International Criminal Court", *International Enforcement Law Reporter, June 2003, Victims Compensation*; Vol. 19, No. 6, 1578.

[91] In its judgement of 12 February 2003 mentioned above, the Belgian Supreme Court ended up declaring the non-admissibility of the charges brought against A. Sharon – not so with the charges against the commander A. Yaron – giving preference to common international law over Belgian law; a view shared by the ICJ in the *International Arrest Warrant* case: "Attendu que, sans doute, aux termes de l'article 5.3 de la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, l'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de ladite loi; Attendu que, toutefois, cette règle de droit interne contreviendrait au principe de droit pénal coutumier international précité si elle était interprétée comme ayant pour objet d'ecarter l'immunité que ce principe consacre; que ladite règle ne peut donc avoir cet objet mais doit être comprise comme excluant seulement que la qualité officielle d'une personne puisse entraîner son irresponsabilité pénale à raison des crimes de droit international enumérés par la loi . . .".

always respectful of the most essential guarantees.[92] Ever since the end of the 80's, however, the replacement of dictatorial regimes with allegedly democratic political systems or the overcoming of situations of civil confrontation, has been the result of national reconciliation processes, implemented more or less by consensus, that have almost always entailed the adoption of amnesties. Although not all amnesty laws adopted are of the same nature, almost all of them do try to prevent the prosecution of crimes committed during the former regime or civil confrontation, under the pretext of not reopening wounds from the past and with a view to achieving reconciliation between social sectors formerly pitted against one another.

With this backdrop, the problem that arises from the perspective of universal jurisdiction has to do with the virtuality that such amnesties could have in preventing the prosecution of crimes pardoned by the courts of other States. In the *Pinochet* case, the stance taken by the E. Frei government was based on the consideration that the exercise of universal jurisdiction by the Spanish authorities, ignoring domestic decisions taken in Chile to make a peaceful transition process possible, could amount to unacceptable interference in the internal affairs of this State. Although the 1978 Amnesty Decree-Law was not mentioned – the dictator's defence strategy before the British courts was that Pinochet should not be prosecuted, but rather that such prosecution should take place in Chile – that is the underlying idea in the letter sent by the then Foreign Affairs Minister of Chile, J. M. Insulza, to the UN Secretary General a few weeks subsequent to the detention of the ex-dictator in London. According to that letter: "In societies undergoing a peaceful transition from an authoritarian regime to a democratic one, there is an inevitable tension between the need to seek justice for all of the human rights violations and the need to achieve national reconciliation. Overcoming this tension is a very delicate task that can only be undertaken by the people of the country in question (. . .) External intervention in this affair, regardless of the intentions of those that have initiated it, does not aid in the achievements of any of these aims but, to the contrary, contributes to the polarization of the society and the deepening, for many years to come, of the differences that still subsist among Chileans".[93]

The invocation of the principle of non-interference in domestic affairs to justify the virtuality of national amnesty measures as an impediment to the exercise of extraterritorial jurisdiction for the repression of the most serious crimes of international concern boils down to using a notion of domestic jurisdiction typical of another historical period and unsustainable in contemporary international law. Without prejudice to the fact that not all transition processes are identical and that not all guarantee the total impunity of those responsible for large-scale atrocities committed under former regimes,[94] a large proportion of the amnesties, as has been recognised by different

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[92] Remember, for example, the tragic end of the Ceaucescus in Romania.

[93] Cit. by A. Remiro Brotons, "La responsabilidad penal individual por crímenes internacionales y el principio de jurisdicción universal", in J. Quel López (coord.), *Creación de una jurisdicción penal internacional*, Madrid, 2000, pp. 225–226.

[94] As S. Wiessner and A.R. Willard remind us, a minimum of 25 countries have used a com-

international human rights organisations,[95] are not only a serious violation of the obligation to investigate, persecute and punish imposed on states under international law but also of the correlative fundamental rights that that same law bestows upon the victims.

In addition to doubts concerning its legality, it is very questionable to attribute generalised effect to a unilateral domestic measure, so that it prevent third States from exercise of a faculty recognized by international law, when this is not the case with the enforcement of an obligation required by it. In this sense, without prejudice to a state that, out of courtesy or for some other reason, imposes limits upon itself regarding its faculty to determine the lawfulness of foreign rules or decisions (as is the case with the Anglo-Saxon doctrine of "act of state")[96] or with respect to the need to acknowledge the effects of such acts in its own territory, neither of the two is in any way an international legal requirement.[97]

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bination of amnesties and truth commissions and reconciliation to make transition processes possible. The results are very diverse, however. Carte blanche amnesty is not the same as a system under which individual pardons are granted in exchange for sincere and complete confessions as seems to have been the case in South Africa. "The responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", *AJIL*, vol. 93 (1999), pp. 330 and subsequent. In a similar sense, A. Cassese, "Reflections on International Criminal Justice", *Modern Law Review*, vol. 61 (1988), pp. 1 and subsequent; or J. Dugard, "Dealing with Crimes of the Past, is Amnesty Still an Option?", *Leiden Journal of International Law*, vol. 12 (2000), pp. 239 and subsequent.

[95] Ranging from the Human Rights Committee and the Anti-Torture Committee to the Court and the Inter-American Commission on Human Rights. On doctrine regarding guarantee bodies dealing with amnesty and immunity law issues, see N. Roth Arraza and L. Gibson, "The Developing Jurisprudence on Amnesty", *Human Rights Quarterly*, vol. 20 (1998), pp. 864 and subsequent; K. Ambos, *Impunidad y Derecho Penal Internacional*, 2nd ed., Buenos Aires, 1999, pp. 69 and subsequent; or V. Abellán Honrubia, "Impunidad de violaciones de los derechos humanos fundamentales en América Latina: aspectos jurídico internacionales", in A. Mangas Martín (ed.), *La escuela de Salamanca y el Derecho internacional en América. Del pasado al futuro*, Salamanca, 1993, pp. 202 and subsequent. A substantially similar idea is found in Article 18 of the United Nations General Assembly Declaration on forced disappearances, section 60 of the second part of the 1993 Declaration of the Vienna Conference on human rights, principle 18 of the Principles on the effective prevention and investigation of extra-judicial, arbitrary and summary executions adopted by ECOSOC in 1989, or in the judgement of 10 December 1998 delivered by First Instance Court number II of the ICTY in the *Furundzija* case. For a more detailed analysis of this subject see my work *Jurisdicción Universal . . ., op. cit.* (section *4.5.1. La legalidad de las amnistías en Derecho internacional).*

[96] On this topic see, A. Soria Jiménez, "El controvertido significado y alcance de la doctrina del acto de Estado en el Derecho estadounidense", *Revista Jurídica de Castilla-La Mancha*, vol. 20 (1994), pp. 179 and subsequent.

[97] As has been pointed out by B. Stern, "A State is under international duty to respect the limits imposed by international law to the exercise of its own jurisdiction but it is under no international obligation as concerns its attitude with respect to the exercise – in compliance with international law or not – of jurisdiction by other States" "Quelques observations sur les regles internationales relatives à l'application extraterritoriale du droit", *AFDI*, vol. 32 (1986), p. 51. Along these same lines by the same author, "L'extraterritorialité revisitée. Oú il est question des affaires Alvarez-Machain, Pâte de bois et de quelques autres", *AFDI*, vol. 38 (1992), p. 260.

It is not simply the case, however, as has been widely recognised in the doctrine,[98] that amnesty laws lack extra-territorial enforceability in the sense of not being able to prevent the prosecution of the perpetrators by the courts of other States if the latter so choose.[99] It must also be considered that, mindful of the fact that the obligation to suppress crimes against international law is not limited to the State in which the crime was committed but also – at least by virtue of international criminal law conventions – extends to the State in the territory of which the suspect is found – generally under the *aut iudicare aut dedere* formula – it is unlikely that amnesty laws imply the disappearance of such obligations. Admission of this fact would mean acceptance of a unilateral provision of rights or interests that very likely would extend beyond the scope of faculties of the State in which the crime was committed. This is undoubtedly the underlying idea in Article 51 of Geneva Convention I – and precepts corresponding to the other three conventions – when it excludes the possibility of one party exonerating any other party of its responsibilities when it comes to serious infractions. Confirmation of this interpretation means that amnesty laws,

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[98] See, among others, A. Bianchi, "Immunity . . .", *art. cit.*, p. 275; E. Orihuela Calatayud, "Aplicación del Derecho internacional humanitario por las jurisdicciones nacionales", in F.J. Quel López (ed.), *Creación . . ., op. cit.*, pp. 261–262; A. Remiro Brotons, *El caso., op. cit.*, pp. 73–74; or M. Weller, "On the hazards of foreign travel for dictators and other international criminals", *International Affairs*, vol. 75 (1999), pp. 330 and subsequent. This same opinion is expressed in the report of the Committee on International Human Rights Law and Practice of the ILA, by virtue of which "(e)ven if at least some types of amnesties are not incompatible with international law, it would appear that in any case they lack extra-territorial effect. They do not affect treaty obligations or entitlements under customary international law to bring gross human rights offenders to justice wherever they are . . .", however, "(a) bona fide amnesty could be taken into account by a prosecutor when exercising his or her discretion whether or not to bring a prosecution . . ." (*Final Report . . ., cit.*); and principle number 7 of the *Princeton Principles*, in accordance to which "the exercise of universal jurisdiction with respect to serious crimes under international law shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state". *The Princeton Principles on Universal Jurisdiction*, Princeton, 2001, p. 31 (Available through internet: *http://www.princeton.edu/-lapalunive-jur.pdf* – visited on 5.5.02). Also, the concession of impunity for humanitarian reasons to improve the chances of hostages in the framework of the 1978 Convention does not seem to have any effect on third states. See, M. Abad Castelos, *La toma de rehenes como manifestación del terrorismo y el Derecho internacional*, Madrid., pp. 197–198; and J. Alcaide Fernández, *Las actividades terroristas ante el Derecho internacional contemporáneo*, Madrid, 2000, p. 114.

[99] This was basically the opinion expressed by the Montpellier trial judge who ruled in favour of the prosecution for torture of the Mauritanian official *Ely Ould Dha* arguing, in his 25 May 2001 ruling with respect to the invocation of the 1993 Mauritanian amnesty law, that "regardless of the legitimacy of that amnesty within the framework of a local reconciliation policy, that law is not enforceable except within the territory of the affected State and in third countries does not affect the enforcement of international law. It therefore does not have any effect on public action taken in the enforcement of the law in France". More information on this case in the following web page: *http://www.fidh.org/justice/ely.htm* (visited on 24.2.02).

regardless of whether they comply or not with international law, would in no way affect the faculty or the obligation to exercise universal jurisdiction that, by virtue of international law, corresponds to third States.

For those reasons, the stance taken in this respect in Spanish legal practice when it comes to universal jurisdiction is quite encouraging. In the *Pinochet* case, in response to allegations of litispendency and *res judicata* by the Public Prosecutor in a call for a stay of proceedings based on the existence of a number of resolutions calling for dismissal delivered by Chilean courts in application of the 1978 amnesty Decree-law, the plenary of the criminal court affirmed that "regardless of whether the 1978 Decree-law 2191 can be considered contrary to international *ius cogens* or not, said Decree-law should not be interpreted as a true pardon pursuant to Spanish law applicable in this process but rather should be described as a de-criminalizing rule for reasons of political convenience. Its enforcement does not affect the case of an accused party absolved or pardoned abroad (letter c of section two, Article 23 of the *LOPJ*) but rather, in the case of non-punishable conduct – by virtue of a subsequent de-penalising rule – in the country in which the crime was perpetrated (letter a of the same section two of Article 23 of the same Law), and thus has no bearing on cases concerning the extra-territorial scope of Spanish jurisdiction due to the application of the principles of universal protection and persecution in light of section five of the frequently cited Article 23 of the *LOPJ*. The four cases referred to, not to mention a host of other similar ones, cannot be considered judged or pardoned in Chile and justify the application of the jurisdiction being argued for".[100]

Thus, although the appraisal of the National Court focused, from a strictly internal perspective, on denying that the prosecution of Pinochet is incompatible with the *non bis in idem* principle as formulated in Article 23.2c of the *LOPJ*, it seems to be clear that foreign amnesty laws, when they guarantee the impunity of the perpetrators – if not the above-mentioned subsidiarity rule of the universality principle would come into play – do not constitute an obstacle to the exercise of extra-territorial jurisdiction on the part of Spanish courts.

6. CONCLUSION

Sovereignty and human dignity are values and principles that are equally essential in contemporary international law and serve as the basis for the oftentimes conflicting rules that on occasion are extraordinarily difficult to reconcile.[101] Resorting to

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[100] National Court ruling of 5 November cited above. *F.D.* n. 8, *REDI*, vol. 51 (1999), pp. 642 and subsequent.

[101] This is what P. M. Dupuy called the confrontation between the logic of Lotus and that of Nuremberg. "Editorial. Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes", *RGDIP*, vol. 103 (1999), pp. 292–293. For an overall analysis see J. A. Carrillo Salcedo, *Soberanía de los Estados y derechos humanos en el Derecho internacional contemporáneo*, Madrid, 2001.

decentralised mechanisms to guarantee compliance with international rules that seek to protect essential common interests, including those meant to suppress barbarity, may be justifiable and legitimate, under certain circumstances, so that these fundamental rules are not reduced to worthless print. Having said that, we do not ignore the risks inherent to said mechanisms. In addition to not being accessible to all in the same degree, their unilateral character makes them especially prone to abuse. Thus, the clearly best way to fill this void, up to now occupied by the universality principle, is to delve deeper into the institutionalisation process of international criminal justice represented by the International Criminal Court. The aim is not to replace the State in the task of repressing the most serious crimes of international concern, but rather to get those with the greatest responsibility in this area to effectively assume that responsibility and so that, if this is not the case, the fight against impunity is able to develop with full guarantees from unequivocally representative authorities of the international community. However, until that becomes a reality, universal jurisdiction continues to be vital in the fight against the impunity of the perpetrators of the most serious atrocities.

This seems to have been the understanding of the Spanish courts that, based on the *open texture* of Article 23.4 of the *LOPJ*, put Spanish practice at the vanguard of the spectacular developments that international criminal law has undergone in general, and the universality principle in particular, during the 90's. Those developments, however, politically awkward for daring to put the fight against impunity before other interests – seemingly more important – lately find themselves beating a veritable retreat.[102] There is no doubt that Spanish Supreme Court doctrine in the Guatemala case, anticipating governmental reform projects focusing on the domestic legal framework, bears witness to this fact.

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[102] Evidence of this is the reform tabled, as of 7 May 1993, in what can probably be qualified as the national vanguard instrument on issues of universal jurisdiction, the Belgian law of 1993/1999 on the repression of serious infractions of international humanitarian law. By virtue of an amendment law dated 23 April 2003, the universal jurisdiction provided for in that law continues to be operational "indépendamment du lieu où celles-ci auront été commisses et même si l'auteur présumé ne se trouve pas en Belgique". In that case, however, unless the victim is not Belgian or had not resided in Belgium for at least three years, public action can only be initiated by the general attorney (*procureur général*). Although the latter is obliged to exercise this authority an exception is made, together with other more justified circumstances, when "des circonstances concrètes de l'affaire, il ressort que, dans l'interêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction est compétente, indépendante, impartiale et équitable". A decision of this nature is susceptible to jurisdictional control. The amendment law, published in *Moniteur Belge*, n. 167 on 7 May 2003 can be consulted at the following internet address: *http://193.191.208.7/mopdf/2003/05/07_2.pdf#Page2* (Visited on 22.5.2003).