

# Universal Justice, The new dimension of Transitional Justice

Vidal Martín\*

## Introduction

International criminal justice arose from custom and as such is continually changing, responding to new challenges and introducing new mechanisms in response to new crimes.

During the inter-war years and in the face of the “supreme” sovereignty of the state, the need arose to counteract the flagrant impunity of some national powers which had perpetrated crimes that horrified the world. These crimes would later be termed crimes against humanity.

Thus universal justice was born, a concept whose development in recent decades is a new response to difficulties previously addressed by other mechanisms. Its analysis therefore requires a global approach of international justice, one which does not justify in errors of implementation the general advance in the protection of human rights.

This working paper will analyse the origin and evolution of universal justice with the aim of interpreting its place amongst the battery of legal mechanisms that protect human rights. Likewise, it will analyse the benefits of this kind of jurisdiction, as well as the dangers which lie ahead for both the international community and the democratic state and its division of powers in light of recent global events.

## 1. Advances of International Criminal Justice

An overview of the evolution of international criminal justice from the perspective of universal justice has to begin, at the very least, in 1945 and the 8th of August, one month before the Second World War officially ended, when the four big ally powers published an agreement which would mark a watershed for international law. The London Charter was a response to the social alarm set off by the serious nature of the crimes committed by Hitler’s armies during the Second World War.<sup>1</sup>

\*Vidal Martín is a researcher in human rights and international justice. He previously formed part of the Peace, Security & Human Rights area of the Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE, Madrid) and the Irish Centre for Human Rights of the National University of Ireland (ICHR, Galway). Contact: vidalmartin@hotmail.com The author would like to express his thanks for comments made by Dante Negro (OEA, Washington), Pablo de Greiff (ICTJ, New York), Manuel Ollé (APDHE, Madrid) and Alán Cantos (CAT, Madrid).

<sup>1</sup> United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)*, the 8th of August, 1945. <http://www.unhcr.org/refworld/topic,4565c22538,4565c25f443,3ae6b39614,0.html>

Through the Charter, an International Military Court was created which was to judge the main culprits responding to geographical criteria as the principle of territorial jurisdiction. The Nuremberg Tribunal was intended to judge those crimes which could not be assigned a specific geographical location. There was reference at the time of crimes against humanity, but no mention was made of genocide, which appeared only in the prosecutor's closing speech to the tribunal. Proceedings were undertaken against specific individuals, thereby attributing them with individual criminal responsibility, something with direct antecedents in the Treaty of Versailles of 1919<sup>2</sup>

There are many precedents of a non-territorial conceptualisation of justice (from Hugo Grocio or Francisco de Vitoria), and historically the concept had already been applied in piracy or slavery cases. However, it was the London Charter which crystallised the first international grand pact – between France, the United Kingdom, the US and the Soviet Union – enshrining the principle and acting “in the interests of all the United Nations”, which then brought together 32 different countries. Subsequently, another 19 states signed up to the London Charter.

That agreement emerged in a specific context after a global need had made itself apparent. Up until this point, there had been no international judicial instrument which allowed for “major war criminals” to be brought to trial, and so the concept can be understood as a new global concern.

From this moment on, the international community has very much borne in mind the need and has created a number of different mechanisms calling for accountability for these kinds of extremely serious crimes. The evolution of this idea has taken shape in several settings and situations, culminating in the Geneva Conventions of 1949, which saw the first classification of the crimes in question: the pursuit of crimes against humanity, war crimes and genocide. Thus, article 146 of the Fourth Convention establishes that: “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”<sup>3</sup>

An obligation for nation states is thus set down<sup>4</sup> and this will be subsequently reiterated in the Convention on Genocide (articles 1 & 6),<sup>5</sup> of the same year. Besides, it is worth remembering that the Universal Declaration of Human Rights (1948) had appeared only the year before, with both instruments of the same spirit as the Geneva Conventions.<sup>6</sup>

This process, rising to a crescendo over the last 60 years, has been expressed in a whole number of international agreements and numerous declarations by the General Assembly of the United Nations. Later, as a result of these advances, several international tribunals were created in response to specific situations involving mass humans rights violations: the Tokyo Tribunal (1946), the ad hoc tribunals for the former Yugoslavia and for Rwanda (1993 and 1994 respectively), the special tribunals (also called ‘internationalised’ tribunals) for East Timor (2000), Sierra Leone and Bosnia Herzegovina (2002), Cambodia (2006) and Lebanon (2007).

Subsequently, other tribunals within national borders were formed which, even if they did not respond to the same international criteria as the above, still aimed to bring to justice crimes against humanity, genocide and war crimes, such as that of Iraq (2005). From the UN, the tools used in the fight against impunity have been progressively modified, with varying results.

The international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were created on an ad hoc

<sup>2</sup>Treaty of Versailles, dated June 28th, 1919. Available at: [http://avalon.law.yale.edu/subject\\_menus/versailles\\_menu.asp](http://avalon.law.yale.edu/subject_menus/versailles_menu.asp)

<sup>3</sup>Treaty of Versailles dated June 28th, 1919. Available at: [http://avalon.law.yale.edu/subject\\_menus/versailles\\_menu.asp](http://avalon.law.yale.edu/subject_menus/versailles_menu.asp)

<sup>4</sup>A more thorough examination of the duty of the state when it comes to investigating, judging, sanctioning and offering reparations is developed in Chinchón Álvarez, Javier. *Derecho internacional y transiciones a la democracia y a la paz. Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana*, Ed. Parthenon, Seville, 2007, p. 235-269.

<sup>5</sup>Convention against Genocide, Paris, the 9th of December, 1948. Available at <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html>

<sup>6</sup>The detailed evolution of these instruments and others which have appeared in recent years in defence of human rights can be found at Gómez Isa, Felipe and Pureza, José Manuel. *La protección internacional de los derechos humanos en los albores del siglo XXI*, Universidad de Deusto, Bilbao, 2003

basis by the Security Council, independent of national judiciaries of the countries involved, with international judges, lawyers and the other personnel financed by the international community. Both tribunals, now in their final stretch, have received many criticisms along the way, especially on account of the time required to carry out the trials and the expense they have involved.

In 16 years, the ICTY has indicted 161 people.<sup>7</sup> Two of the most important alleged culprits of the Balkan conflict continue at large, namely Ratko Mladic and Goran Hadzic. Factors to be underlined in favour of the Tribunal include the support offered to the implementation of the War Crimes Court of the Bosnia-Herzegovina Tribunal, and the decision to despatch 13 cases to national courts, thus strengthening the jurisdiction of national judiciaries to deal with serious violations of international humanitarian law, for the past and also the present.

In the case of Rwanda, seventy nine trials have been held over a period of fifteen years<sup>8</sup>, with few cases sent on to other courts to date, no more than two. However, the Rwandan government has invested a lot of work in making the Rwandan justice system capable of taking on those outstanding ICTR cases when it comes to an end and the cases still pending have to be referred to national jurisdictions.

The UN has not repeated this model of tribunal again, instead creating tribunals which combine the host country's judiciary with the international justice system since then, such as the Internationalised Tribunals of Sierra Leona, Cambodia, East Timor, Bosnia Herzegovina and Lebanon.<sup>9</sup> For these kinds of tribunals, no single model has been designed, meaning that each tribunal has specific characteristics. These tribunals have also received harsh criticism over the deficiencies of some of the clauses of their statutes and regulations; failing to fit in with the norms of international justice; the low number of trials held; problems which have arisen for the cooperation of other states; economic difficulties (financially dependent on voluntary contributions from states, some of which have not paid up); and a lack of impetus given to the investigation, not ruling in the national ambit but only focussing on international crimes.

In spite of these deficiencies, the overall consensus in the international community is positive, with the impunity which went before the tribunals were created very much in mind. That tendency, in line with the search for new global tools, culminated in the creation of the International Criminal Court (ICC) in 1998 through the statute of Rome.<sup>10</sup> By 2010, the ICC has already been ratified by 110 countries, though it is also true that some of the big world powers like the USA and China have still not ratified the Statute.

The ICC is currently facing a very delicate period due to various criticisms received in recent years.<sup>11</sup> Perhaps some of the severest remarks refer to mistakes made by the Prosecutor's office in the case of Thomas Lubanga, the former leader of the Union of Congolese Patriots (UPC) rebel movement.<sup>12</sup> The decision by the Prosecutor to begin a new case twelve days after Court I had reached its ruling –perhaps with the aim of diverting attention- against the Sudanese president al-Bashir was similarly criticised. But perhaps the most common criticism of the ICC refers to the fact that indictments have only been made against countries which do not feature amongst the most powerful in the world. This has delegitimized the court's activity to a certain extent, and has led to a feeling that the relationship between the political and the judicial spheres is based on interest, bearing in mind the ICC receives its economic support from the world's most powerful states and the EU in the main.

The ICC amounts to a new and important path for the defence of human rights and the fight against impunity.<sup>13</sup> Likewise, it has strived to bring about the maximum number of ratifications of the Statute of Rome possible. However, certain adjustments need to be made. Firstly, the procedures the Prosecutor's office follows must

<sup>7</sup> To consult all of the details of the trials, see: <http://www.icty.org/sections/TheCases/KeyFigures>

<sup>8</sup> See "Status of Detainees", in the section "Press Centre", <http://www.icty.org/default.htm>

<sup>9</sup> For more information on 'internationalised' tribunals see Capellà i Roig, Margalida. *La tipificación internacional de los crímenes contra la Humanidad, Tirant Lo Blanch*, Valencia, 2005, p. 265-302

<sup>10</sup> The Statute of Rome of the International Criminal Court, dated July 17th 1998, came into force on July 1st 2002. Available at: [http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/140177/Rome\\_Statute\\_Spanish.pdf](http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/140177/Rome_Statute_Spanish.pdf)

<sup>11</sup> Some of the recommendations which the ICC already received in its first years make for interesting reading; see Ingadottir, Thordis, *The International Criminal Court. Recommendations on policy and practice*, Transnational Publishers, 2003.

<sup>12</sup> Thomas Lubanga was accused of enlisting and recruiting minors for their active participation in the D.R. Congo conflict between September 2002 and August 2003. For a synthesis of the case, see: <http://www.icc-cpi.int/cases/RDC/c0106.html>.

<sup>13</sup> In this regard, see Roth, Kenneth, *Response: The Case for Universal Jurisdiction*, Foreign Affairs 80, 2001, p. 150-154; and Weiss, Peter, in the Epilogue of Ratner, Michael & The Centre for Constitutional Rights, *The Trial of Donald Rumsfeld: A Prosecution by Book*, The New Press, 2008, p. 214.

be looked into so as to avoid the mistakes made in the Lubanga case and comply with the norms of a fair trial. Secondly, the Court's organisation and working ought to be strengthened, in order to remedy the shortcomings which have been revealed. At the same time, the geographic criteria need to be widened and action undertaken in other continents. Attention is beginning to focus on countries such as Colombia, Afghanistan and, more recently, Georgia. Furthermore, the ICC must carry out a policy whereby political and economic interests are clearly defined and separated, otherwise the judiciary could see itself adversely affected, given it is supposed to be independent above all else. The independence of the Prosecutors' Office should also be strengthened so that when it has sufficient evidence relating to the commissioning of genocide and crimes against humanity, it can act free from external pressure.

The main role guaranteeing the independence of the Court falls to the UN Security Council, General Assembly and Secretary General. Similarly, if the principle of universal jurisdiction is abused for political reasons, then this must be brought to attention, the case made and proved before the corresponding Appeals Chamber, in line with existing international treaties and national jurisdiction.

## 2. Other instruments for accountability. Transitional Justice

Parallel to this process and even before the creation of the modern international tribunals, the need arose within the international community – and especially in civil society - to complement judicial action against those responsible for the most serious crimes perpetrated against society.<sup>14</sup>

From the end of the 80's, certain social movements in Latin America and Eastern Europe demanding multi-directional reparation for the victims gained strength in response to situations of total impunity and political change.<sup>15</sup> This reparation was not only to be judicial, but also economic, social, cultural and political, without adversely affecting the democratic process developing at the time. It was hence generally understood that, with the aim of reparations in mind, there were instruments which had to be put to use compatible with accountability before the law.

Applied during times of transition to democracy, this set of tools was given the name of transitional justice.<sup>16</sup> This can be defined, in line with the definition of the International Centre for Transitional Justice as “a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse”.<sup>17</sup> In 2001, a number of experts on the matter drafted the guiding principles of universal jurisdiction under a Princeton University project.<sup>18</sup>

Taking the legal prosecution of the culprits as a given, there are - at least – another four tools which are required to fulfil these objectives

- **The search for truth.** Eshedding light on the criminal acts which a society has endured is one of the key steps when it comes to building a stable future. To this end, Truth Commissions are created, instruments geared to investigating and gathering information of abuses committed. These can originate from the state,

<sup>14</sup> For our purposes, we will focus on the development of transitional justice in the twentieth century. However, precedents from long ago can be found, going as far back as ancient Greece. This evolution, as well as a very interesting conceptualisation can be found at Elster, Jon. *Closing the books. Transitional Justice in historical perspective*, Cambridge University Press, Cambridge, 2004. .

<sup>15</sup> A close inspection of reparation criteria can be found in, Martín Beristain, Carlos. *Diálogos sobre la reparación. Qué reparar en los casos de violaciones de derechos humanos*, Ministerio de Justicia y Derechos Humanos, Quito, 2009, p. 197-226

<sup>16</sup> The International Centre for Transitional Justice (ICTJ) is an organisation which helps countries trying to face up to a legacy of atrocities or human rights abuses. For more information, see [www.ictj.org](http://www.ictj.org)

<sup>17</sup> A wide-ranging look at the concept can be found in Bickford, Louis, *The Encyclopaedia of Genocide and Crimes Against Humanity*, Macmillan, New York, 2004, vol. 3, p. 1045-1047.

<sup>18</sup> See the final document of the project, with its 14 principles and comments at: <http://www.derechos.org/nizkor/espana/doc/princeton.html>

individual initiatives or from the international community. Generally speaking, the state apparatus takes the lead, though this not always the best option.

- **Reparation for the victims.** These state reparation programmes combine material and moral reparation for the harm done by abuses in the past. The reparation can range from financial compensation to official apologies to the victims which are “tools that should occupy a special place in way out of a conflict or towards democracy.”<sup>19</sup>
- **Reform of judiciary and security system.** The transformation of the armed forces, the police, the judiciary, and all other official institutions with links to past repression and corruption takes on a predominant role in the context of efforts to rebuild state institutions so that they work to serve local populations.
- **Memory.** The commemoration of the past takes on special meaning; its aim is to publicly recognise the victims and promote reconciliation. Street monuments, museums or publications preserving the victims’ memory can all be used to heighten the moral consciousness of the abuses committed so that they are not repeated in the future.<sup>20</sup>

The experience of various peace transition processes show that these measures can be combined, and do not need to be applied all at the same time or place.<sup>21</sup> Each case of transitional justice requires its own specific treatment. What’s more, there are more measures available than can be applied, and in some cases, certain measures are not advisable in keeping with the objectives of justice and peace. Applying the measures on a temporary basis is also a variable. Experience indicates that whilst the most suitable point for the introduction of some measures is a decade from peace breaking out, in other cases measures have been taken earlier and also led to a positive effect. Distance in time can directly affect the effectiveness of the process, though it has been demonstrated that in some exceptional cases this has been carried out successfully after several decades.

As Pablo de Greiff notes “Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as “blood money”—an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims’ legitimate expectations of justice, truth and reparation, is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.”

Transitional justice must be centred on strengthening democracy and peace as fundamental objectives, with these being understood as parallel processes. This requires using international law as a basis. Part of the judicial structure which transitional justice rests on can be found in the decision of the Inter-American Court of Human Rights in 1988 in the case of Velásquez Rodríguez against Honduras,<sup>22</sup> where the Court found that all states have four fundamental obligations in the human rights area:

- To take reasonable measures to prevent violations of human rights;
- To carry out a serious investigation when abuses take place;
- To adequately sanction those responsible for violations;
- To guarantee the reparation of the victims of violations.

These principles have been explicitly affirmed in subsequent decisions by the court, and backed by the European Court of Human Rights (TCHR) and the United Nations Human Rights Committee.<sup>23</sup> The creation of the ICC was also significant given that its statute includes obligations incumbent on the state which are

<sup>19</sup> De Greiff, Pablo. *The Handbook of Reparations*, Oxford University Press, Nueva York, 2006.

<sup>20</sup> An interesting inter-disciplinary study of memory can be seen at Gómez Isa, Felipe. *El derecho a la memoria*, Alberdania, 2006.

<sup>21</sup> An analysis of the transitions processes experienced in Argentina, South Africa, Rwanda or Spain can give an idea of the heterogeneous nature of these processes in their origin, measures applied and subsequent development

<sup>22</sup> International Court of Human Rights, Case - Velásquez Rodríguez vs Honduras, Sentence dated the 29th of July, 1988, [www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_esp.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.doc)

<sup>23</sup> See in this regard the TEDH sentence *Kolk y Kislyiy vs Estonia*, January 2006, for example, or the International Covenant on Civil & Political Rights established by the UN Committee of Human Rights through Resolution 2200 A (XXI) of the General Assembly, passed on the 16th of December, 1966.

vitaly important for the fight against impunity and the respect of the victims' rights.

The links of transitional justice with other areas, like peacebuilding, are also very necessary coordination tasks. Building peace would appear to be essential in cases like Bosnia and Herzegovina, Liberia or the Democratic Republic of Congo. Ethnic cleansing and displacement, the reintegration of ex-combatants, the reconciliation between communities, the role justice plays in peace, have all become very relevant questions. In recent years, in consequence, the defence of human rights has been included in military peace operations deployed on the ground. This change of approach is highly important, though it does require better coordination<sup>24</sup>

Traditional justice – local forms of exercising justice rooted in custom and tradition – has been another important tool used over recent decades in transition processes. In some countries, like Rwanda, Sierra Leone or Uganda, traditional rituals are carried out to encourage the reconciliation of belligerent parties or to re-integrate ex-combatants.<sup>25</sup>

### 3. Universal Justice, a national response to a global challenge: Origin, causes and outstanding matters

Despite the progress described above, in the last decade of the twentieth century, and partly due to the special characteristics of these tribunals, the need to carry out a wider fight against impunity became even more pressing. The fact that most of the tribunals were circumscribed in time and place (territory) meant that a large number of massacres at the global level went unpunished. In terms of the ICC, whose jurisdiction began in 2002 and is limited geographically to those states which have ratified the Rome Statute (110 in February 2010), the goal of bringing crimes against humanity across the globe to justice revealed itself to be impossible bearing in mind the natural limitations of the allocation of both personnel and economic resources.

The EU and the AU discussed several different matters relevant to both regions at the “European Union Ministerial Troika – African Union”. The twelfth meeting held in Luxemburg on the 29th of April, 2009 focussed on the question of universal jurisdiction, and a report compiled by members of both continents led by Antonio Cassese and Mohammed Bedjaoui was presented, the aim of which was to provide the principle with a juridical meaning, analyse its application on both sides of the Mediterranean, and make recommendations with the aim of obtaining a mutual understanding in light of differences previously experienced.<sup>26</sup>

The definition of universal criminal jurisdiction was broached then as “the affirmation by a state of its jurisdiction on crimes allegedly committed in the territory of another state, or by another state against its nationals, or by another state where the alleged crime does not represent a direct threat for the vital interests of the states which affirms its jurisdiction.” And it is subsequently emphasised that the inclusion of piracy in this area implies that the principle of universal jurisdiction is not a new legal concept in any shape or form, but instead has a lengthy tradition as a principle *aut dedere aut iudicare*.<sup>27</sup>

The report was presented in April 2009 and the ministers agreed to take it on board, and to distribute it amongst the various bodies of both institutions and their member states in addition.<sup>28</sup>

<sup>24</sup> The case of Haiti is paradigmatic in this regard, because the international aid deployed in the country has manifestly suffered from poor coordination. This lack of coordination has been repeated in the deployment of the international aid meant to provide a response to the earthquake registered on the 12th of January, 2010 in just the same way. Whilst it is true that there are many international bodies deployed on the ground, the success has not been of the order desired. See in this regard Gauthier, Amélie & Aguirre, Mariano. *Haití y la comunidad internacional de donantes*. El País, the 30th of November, 2006. <http://www.frider.org/publicacion/230/haiti-y-la-comunidad-internacional-de-donantes>

<sup>25</sup> The use of Gacaca Tribunals in Rwanda or the Mobile Courts in the D.R Congo are worth highlighting as traditional tribunals used to combat impunity after mass violations of human rights. ([www.inkiko-gacaca.gov.rw](http://www.inkiko-gacaca.gov.rw)).

See in this regard Clark, Phil, “Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda” in B. Bowden, H. Charlesworth and J. Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict*, Cambridge: Cambridge University Press, 2009.

<sup>26</sup> See the whole document published by the Secretariat of the European Union: [http://ec.europa.eu/development/center/repository/troika\\_ua\\_ue\\_rapport\\_competence\\_universelle\\_EN.pdf](http://ec.europa.eu/development/center/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf)

<sup>27</sup> *Aut dedere aut iudicare* is a basic principle of human rights of international law which means “either extradite or try”.

<sup>28</sup> See the press statement released by the Council of the EU summing up the interministerial meeting: [http://ec.europa.eu/development/center/repository/troika\\_ua\\_ue\\_council\\_press\\_en.pdf](http://ec.europa.eu/development/center/repository/troika_ua_ue_council_press_en.pdf)

An analysis of the ICC takes on special relevance on this point. The principle on which universal jurisdiction is based differs from that which international tribunals are founded on, more specifically, the ICC itself. The Court enjoys jurisdiction subject to temporal and geographic limitations, resting therefore on the principle of complementarity, whereby the ICC first and foremost recognises its own limits and summons national judiciaries to carry out the majority of trials.<sup>29</sup> It is not the same principle, though both jurisdictions do go deeply into the same kind of terrain.

One of the consequences of this difference is the preponderant role which falls to national judiciaries in the fight against impunity. The appropriate prosecution of national criminals by their own courts would reduce the number of cases international tribunals have to try to only those which national courts cannot or will not bring to trial. The national dimension of competence goes both ways, to states suffering massive humanitarian crimes in their territory,<sup>30</sup> and also third party states which have tried crimes, though they do not have direct links with the crimes. It is essential in this point to differentiate therefore between the two types of jurisdiction to which we have referred - that of states by themselves, and that of international criminal tribunals.<sup>31</sup>

Moreover, given the distribution of competences of the other international tribunals and their temporal limitations, there are many extremely serious crimes which would go unpunished if it were not for the national courts.

## Evolution and introduction of the concept

After the recognition of the principle of universal jurisdiction in the Geneva Conventions of 1949, the idea began to gain strength that there are certain crimes which cannot be subject to either geographical or subjective legal limitations given their gravity; and that in consequence, these must be prosecuted by all states. To begin with, attention was centred on the matter of piracy, followed later by drug trafficking and, more recently, crimes against humanity.<sup>32</sup>

The application of the principle in national jurisdictions has grown considerably since then, with the case undertaken in Spain against Chile's General Augusto Pinochet considered a landmark given that a national jurisdiction took legal action against a foreign citizen for events carried out beyond its borders. On that occasion, Spanish judge Baltasar Garzón lent heavily on the fact that Spanish victims were involved to get the international arrest warrant executed, though he also did underline Pinochet's responsibility in creating an international organisation which conceived, planned and carried out a systematic plan of illegal arrests, kidnapping, torture, murder and the disappearance of Argentinean, British, American, Chilean citizens and other nationalities.<sup>33</sup>

The effects of the ensuing trial were not just direct; which is to say, the fact that international justice was not able in the final instance to bring to trial and condemn General Pinochet did not amount to a defeat, as was expected beforehand.<sup>34</sup> More than ten years after that case, at least three clear consequences have made themselves felt.

<sup>29</sup> An interesting analysis in this regard can be found in Robertson, Geoffrey. *Crímenes contra la humanidad. La lucha por una justicia global*, Siglo XXI, Madrid, 2008, pp. 423-428. or Kaleck, Wolfgang. *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, Michigan Journal for International Law, 2009, p. 964-965. <http://students.law.umich.edu/mjil/article-pdfs/v30n3-Kaleck.pdf>

<sup>30</sup> Whilst the judicial arm of a country which has just gone through massive violations of human rights does not usually have sufficient resources to see justice done, there is a need to reflect on the different strategies that can be followed in this regard. The judicial work carried out by organisations in defence of human rights in Argentina is especially interesting here: Centro de Estudios Legales y Sociales (CELS), *Litigio estratégico y derechos humanos. La lucha por el Derecho*, Siglo Veintiuno Editores, Buenos Aires, 2008.

<sup>31</sup> The report of the group of UA-UE experts clarifies a great deal in this regard. See *AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction Report*, paragraph 29: "As a technical and conceptual matter, universal jurisdiction is to be distinguished at all times from the jurisdiction of international criminal courts and tribunals. Universal jurisdiction relates to the competence of a state to prosecute persons before its own courts, rather than to the prosecution of those same persons before an international judicial body." The complete report can be found at: [http://www.africa-union.org/root/ua/Conferences/2009/avr/EA/15avril/Report%20UJ%20\\_FINAL%2015%2004%2009\\_%20clean%20-%20Website.pdf](http://www.africa-union.org/root/ua/Conferences/2009/avr/EA/15avril/Report%20UJ%20_FINAL%2015%2004%2009_%20clean%20-%20Website.pdf)

<sup>32</sup> The application of this principle to crimes against humanity set off a flurry of theoretical exchanges between different experts. See Garcés, Juan, "Kissinger and Pinochet facing universal jurisdiction" in Davis, Madeleine, *The Pinochet Case: origins, progress and implications*, Institute of Latin American Studies, 2003, p. 25-42

<sup>33</sup> To find out about the vicissitudes of the case against Augusto Pinochet, the following are interesting: Kornbluh, Peter. *The Pinochet File. A declassified dossier on atrocity and accountability*, The New Press, Nueva York, 2004, p 465-515. Or in the words of the judge himself, in Garzón, Baltasar. *Un mundo sin miedo*, Plaza y Janés, 2005, p. 193-201.

<sup>34</sup> An interesting contribution to the reconciliation difficulties experienced in Chile in its move towards democracy can be found in Loveman, Brian y Lira, Elizabeth. *El espejismo de la reconciliación política*. Chile 1990-2002, Ed. Lom, 2002.

First of all, it served as a precedent for the whole international community working in International Human Rights Law and caused the presentation of a whole number of cases and lawsuits before several different national courts, under the principles of universal jurisdiction.

Secondly, the Pinochet case had a significant consequence for the Chilean judicial system because it indirectly empowered Chilean judges to carry out judicial proceedings which seemed impossible before. Chilean judge Victor Montiglio subsequently prosecuted Pinochet in 2005, as well as the leadership of his secret police, DINA, (the Dirección de Inteligencia Nacional). On September 1st, 2009, Montiglio indicted and issued arrest warrants against another 120 former DINA leading figures for violations of human rights in relation to operations Cóndor, Colombo and Calle Conferencia.<sup>35</sup>

Thirdly, the image of the vanquished Chilean dictator and his constant flight from the authorities amounts to a not inconsiderable deterrent for other authoritarian regimes. It is reasonable to imagine that the current pursuit of such crimes has made those holding power in various national regimes think again on the possibility of being indicted for whatever links they have had with the perpetration of crimes against humanity. One of the effects can be seen in the special care some indicted leaders take when planning their trips abroad.<sup>36</sup>

By the end of 2009, the number of countries which had invoked the principle of universal jurisdiction had risen to 27, be it directly or indirectly, including states as diverse as Australia, Denmark, Senegal and Mexico.<sup>37</sup> In Europe, more than 50 important trials and investigations have been recorded, and more than a dozen sentences handed down.<sup>38</sup>

A steady increase in the activity which universal jurisdiction has led to between 2006 and 2009 has been recorded in an increasing number of states. In this period, five sentences in line with the application of the principle have been recorded for cases of grave violations of international humanitarian law (Belgium), torture (Holland and France), war crimes (Norway) and genocide, crimes against humanity and war crimes (Canada). Similarly, the twenty five year prison sentence of Alberto Fujimori, former president of Peru, was announced for human rights abuses committed in that country. In addition, another 34 new investigations have been undertaken since January 2006.<sup>39</sup>

In contrast with these positive figures, universal jurisdiction faces a number of obstacles in Europe. The Secretary General of the European Centre for Constitutional & Human Rights (or the ECCHR), Wolfgang Kaleck, identifies four big problems in this regard. First of all, the absence of the suitable implementation of the principle in domestic and EU legislation detailing when and with regards to which crimes it can be applied. Secondly, laws and the interpretation given to the prerequisite of physical presence, as well as complementarity, by the authorities in question. Thirdly, problems of a technical and organisational nature. And finally, difficulties in relation to the use of discretionary prosecution, and the wide interpretation of the principle of immunity for political actors.<sup>40</sup>

In light of events in some European democracies, such as Belgium or Spain, political interference in the judiciary and the direct consequence it leads to in the incompletion of international human rights treaties is also an alarming problem.

<sup>35</sup> Clarín de Santiago de Chile, *Juez Montiglio procesa a 120 ex agentes de la DINA: hay cinco altos oficiales en retiro*, 1st of September, 2009. [http://www.elclarin.cl/index.php?option=com\\_content&task=view&id=18173&Itemid=44#](http://www.elclarin.cl/index.php?option=com_content&task=view&id=18173&Itemid=44#)

<sup>36</sup> A good example of this is the cancellation of their trip to the United Kingdom by four high ranking Israeli military officials for fear of arrest. Haaretz, *Deputy FM: Arrest warrants harming Britain-Israel ties*, the 5th of January, 2010, <http://www.haaretz.com/hasen/spages/1140096.html>

<sup>37</sup> The 27 countries which have used universal jurisdiction are, in alphabetical order, Argentina, Australia, Austria, Belgium, Canada, Chile, Denmark, East Timor, Finland, France, Germany, Guatemala, Holland, Iceland, Israel, Norway, New Zealand, Peru, Rwanda, Senegal, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

<sup>38</sup> Kaleck, Wolfgang, op. cit., p. 931.

<sup>39</sup> According to the report by IFHR & REDRESS, published on June 2nd, 2009: International Federation for Human Rights, *Universal Jurisdiction Developments: January 2006- May 2009*. <http://www.redress.org/news/09-06-01Universal%20Jurisdiction%20Developments%202006-09.pdf>

<sup>40</sup> Kaleck, Wolfgang, op. cit., p. 958.

## 4. Universal justice in Spain: Tensions between the political and judiciary

### A. Origin and development

Since the Pinochet case mentioned above, many cases have been brought before Spain's High Court, the Audiencia Nacional (or AN hereafter), based on the principle of universal jurisdiction, especially after the Constitutional Court's sentence in relation to the Guatemala case in 2005.<sup>41</sup> For more than a decade, Spain has applied universal jurisdiction both directly and indirectly, for example in the case of Jorge Alberto Sosa, linked to the Guerra Sucia (dirty war) in Argentina and wanted by the authorities of that country. After his arrest in Valencia, the cabinet gave the green light for extradition proceedings to Argentina in September 2009.<sup>42</sup>

There are currently twelve open cases before the Audiencia.<sup>43</sup> However, owing to the recent cases brought against high ranking officials from Israeli (attacks on Gaza in 2008), the US (Guantánamo and CIA flights) and China (Falun Gong and Tibet), the main political parties have repealed the progressive legislation on international justice allowing lawsuits in Spain to be brought against those responsible for mass human rights violations or genocide of citizens of other countries.

On the 19th of May, 2009, the Spanish parliament voted to cut back the principle of universal jurisdiction, as per art. 23.4 of Organic Law of the Judiciary (article 23.4 of the Organic Law of Judicial Power, or LOPJ in Spanish initials).<sup>44</sup> Through this article, Spain assumed article 146 of the Geneva Conventions (1949) and the Convention against Genocide (1948) amongst others, and with it "the obligation to search for and prosecute those suspected of crimes, committed by Spanish nationals or foreigners outside national territory, that might be categorised as genocide, terrorism (...) and any other which, according to the treaties or international conventions, must be prosecuted in Spain."

In the last half hour of the annual debate on the state of the nation, the said reform was forced through the Spanish parliament in a shoddy manner with the two main parties in the house cutting a secret deal. At the beginning of October, the amendment reached the Senate – where it was partially amended – and on the 15th of the same month it was sent back to the Congress and article 23.4 LOPJ was successfully altered.

Human rights organisations in and outside of Spain raised their voice in protest against the amendment throughout the process to no avail, rebutting the Spanish government's arguments justifying the reform.<sup>45</sup> This was based on the need for Spain's long suffering justice system to devote itself to national cases; the pernicious effect on Spanish economic interests; and the negative diplomatic repercussion which universal jurisdiction had led to for Spain.

<sup>41</sup> Sentence of the *Tribunal Constitucional* (constitutional court) regarding the Guatemala case through which it granted the protection requested by Ms. Rigoberta Menchú, understanding that her right to effective legal tutelage had been violated and recognising the principle of universal jurisdiction for cases involving crimes against humanity; <http://www.tribunalconstitucional.es/ES/JURISPRUDENCIA/Paginas/Sentencia.aspx?cod=8691>

<sup>42</sup> Several media outlets reported the detention of suspects. See, for example, how the story was reported by Pittsburgh University's law website, Jurist, *Spain police arrest Argentina 'Dirty War' fugitive accused of torture*, the 24th of July, 2009: <http://jurist.law.pitt.edu/paperchase/2009/07/spain-police-arrest-argentina-dirty-war.php> and by Spanish newspaper El País, *Argentina juzga a sus torturadores*, the 10th of January, 2010: [http://www.elpais.com/articulo/domingo/Argentina/juzga/torturadores/elppor/20100110elpdmg\\_3/Tes](http://www.elpais.com/articulo/domingo/Argentina/juzga/torturadores/elppor/20100110elpdmg_3/Tes)

<sup>43</sup> Detailed information about all of the cases currently open before Spain's *Audiencia Nacional* can be found at Amnesty International's database on universal justice in Spain, <http://www.es.amnesty.org/jurisdiccion-universal-espana/casos-tribunales-espanoles/>

<sup>44</sup> Chinchón Álvarez, Javier. "A propósito del proceso de reforma del artículo 23.4 de la Ley Orgánica del Poder Judicial (mayo-noviembre de 2009): De los motivos a las consecuencias para el principio de jurisdicción universal", in *Revista de Derecho de Extremadura*, nº 6, 2009, p. 13-31.

<sup>45</sup> Many human rights organisations came together under the Platform against Impunity & for Universal Justice. This platform created a manifesto with the same name in July 2009 with more than one hundred and seventy institutions and five hundred experts in the field trying to prevent article 23.4 of the LOPJ being cut back. The whole text and those who backed it can be found at: [http://apdhe.org/Comunicados/MANIFIESTO\\_CONTRA\\_LA\\_IMPUNIDAD.pdf](http://apdhe.org/Comunicados/MANIFIESTO_CONTRA_LA_IMPUNIDAD.pdf) and [http://www.iecah.org/download\\_novedades.php?id=30](http://www.iecah.org/download_novedades.php?id=30). The same Platform subsequently presented a writ to the Ombudsman "requesting that he make an appeal of unconstitutionality against Organic Law 1/2009, of November 3rd, complementary to the Reform Law of Procedural Legislation for the Implantation of the New Judicial Office, by means of which Organic Law 6/1985 of July 1st, of the judiciary, is modified on the basis that it infringes amongst others the principles of legality and respect of the international regulation enshrined in articles 9.3, 10.2 & 96 of the Constitution, as well as the right to the effective judicial tutelage enshrined in article 24.1 of the Constitution in terms of access to justice."

The new text of article 23.4 features this new paragraph: "...Notwithstanding that which is stated in those international treaties and conventions signed by Spain, for the aforementioned offences to be tried by a Spanish court, it must be demonstrated that the alleged culprits are in Spain, or that there are Spanish victims, and in any event, that Spain is linked in some way with the case, and only then in the event that no other country or international tribunal has initiated proceedings amounting to an investigation, and effective prosecution, as may be the case, of the sanctionable actions. Criminal proceedings brought before Spanish justice will be provisionally closed when it can be established that another prosecution relating to the same offence in the country or by the court to which the previous paragraph refers has been brought before the courts."<sup>46</sup>

In line with the alteration, the Foreign Affairs spokesman of the Socialist Party emphasised that the curtailment of the law is aimed at making Spanish courts competent "when the crimes are not being investigated in the country where they took place" and that the other cases must be dealt with by "the international tribunals".<sup>47</sup>

Spain has been a reference within the international community in international justice matters for the victims, both in terms of the cases that began in the country, and also the effects which these have had in other countries. That is why this backward step amounts to a painful reverse for the protection of human rights at the global level.

The Audiencia Nacional is presented in the majority of cases with situations which cannot be brought before any of the international tribunals, and can only be tried in ordinary courts of the country where the crimes took place and where generally the local courts cannot or will not act<sup>48</sup> That is what is incongruent about the amendment of article 23.4 LOPJ, because it means that there are cases which cannot go before any other court, leading in consequence to impunity.

On the other hand, for all that it has amended its LOPJ, Spain will be consciously failing to comply with international treaties which it has ratified and, consequently, it continues to be obligated under the principle of universal jurisdiction, which does not require a direct link with Spain in each case. Moreover, Spain will lose the independence which was taken for granted because there was no national economic interest in the cases it started. In any case, in many of the cases brought before the AN there is a direct link with Spanish citizens or Spanish interests.

This step backwards creates the misconception that Spanish jurisdiction had previously not been respecting subsidiarity, when quite the opposite was the case. Spanish judges have worked together with their counterparts in countries which are the object of cases, such as Argentina, Chile or Mexico.

Even when the competence was being exercised, the workload the application of universal jurisdiction amounted to for the AN was a mere 0,035% of its total activity, thus ruling out another of the arguments used against universal jurisdiction, namely the extra work these cases caused the AN.

Besides, Spain is moving in the opposite direction to the international tendency in terms of accountability for crimes against humanity, and the reform in the law will nullify one of Spain's biggest contributions to international law, recognised as such by the international community.<sup>49</sup>

This political meddling by the judiciary will affect few of the cases already underway at the AN, though it will have an effect on cases brought in the future. In this regard, the rejection of the Gaza case in 2002 – later taken to the Tribunal Supremo by appeal - led to a swift response from the Israeli government.<sup>50</sup> Doubt is thus

<sup>46</sup> See the complete content of article 23.4 LOPJ in the publication of the B.O.E (Official State Bulletin) dated November 4th, 2009: <http://www.boe.es/boe/dias/2009/11/04/pdfs/BOE-A-2009-17492.pdf>

<sup>47</sup> El País, the 10th of May, 2009, "La Audiencia Universal" [http://www.elpais.com/articulo/sociedad/Audiencia/Universal/elpepiscoc/20090510elpepiscoc\\_2/Tes](http://www.elpais.com/articulo/sociedad/Audiencia/Universal/elpepiscoc/20090510elpepiscoc_2/Tes)

<sup>48</sup> To look into this aspect more deeply, see: Ollé, Manuel. *Justicia universal para crímenes internacionales*, La Ley, Madrid, 2008.

<sup>49</sup> Apparently the international community is tending to increasingly execute the principle of universal jurisdiction, as is made clear in the report previously quoted: International Federation for Human Rights, *Universal Jurisdiction Developments: January 2006- May 2009*, 2009. <http://www.redress.org/news/09-06-01/Universal%20Jurisdiction%20Developments%202006-09.pdf>

<sup>50</sup> Public expression of gratitude by Israeli president Simon Peres to J.L. Rodríguez Zapatero for bringing to a halt the ongoing case against Israeli officials in Spain. In Diaro ABC, the 15th of October, 2009. <http://www.abc.es/20091015/nacional-asuntos-exteriores/peres-bromea-zapatero-cometio-200910151242.html>

cast on the independence of the judiciary, and a basic principle of democracy.

## **B. The risk of confusing of democratic powers. The cases of Israel, China and the United States**

The U-turn described above mainly stems from the problems caused for Spanish diplomacy as a result of cases brought against other countries before Spanish justice. However, these conflicts have only become insurmountable when the big world powers are involved and not, in contrast, when the countries affected were Chile, Morocco or Rwanda.

Real pressure was also previously brought to bear which did not have the same effect. Following the onset of the Rwandan case in Spain, the Rwandan Justice Minister Tharcise Karugarama described the cases open in France and Spain as “judicial madness”.<sup>51</sup> However, the Spanish government only reacted when this kind of criticism came from Israeli, US or Chinese leaders.

### **Gaza**

On the 29th of January 2009, judge Fernando Andreu of the AN admitted to court the case promoted by the Palestine Centre for Human Rights against seven Israeli government and military officials for war crimes committed in 2002 in Gaza, when they launched a one ton bomb on a densely populated neighbourhood of the city, killing the leader of the military wing of Hamás, Salah Shehada, along with fourteen civilians, the majority of whom were children.<sup>52</sup> Then Israeli Prime Minister, Ariel Sharon, described the attack as one of the “most successful operations” of the Israeli Defence Forces.

Judge Andreu’s court order caused varying reactions, in particular from Israeli authorities who called it “an absurd act”, “ridiculous, because it is aimed at those who are really fighting the terrorists.” In the face of the Israeli protests, and on top of those received from the US for the Guantanamo case, Minister Moratinos announced the law would be curtailed.

In May 2009, judge Andreu decided to carry on with the investigations because he did not consider that a judicial process was under way in Israel and that, as a disproportionate attack (the premeditated murder of Shehada) affecting the civilian population of a territory which did not belong to Israel, the Spanish investigation was duty bound to carry on with the search for the truth of the events laid out in the case<sup>53</sup>

On the 9th of July 2009, the AN decided to grant the appeal presented by the Public Prosecutor’s Office on the understanding that – contrary to what judge Andreu said - Israel was indeed investigating events and consequently that no action should be taken.<sup>54</sup> Four magistrates argued in the private vote that under no circumstances would the investigation lead to a criminal trial and that consequently the principle of case tried could not be applied.<sup>55</sup> This negative ruling was made public a month and a half after the Spanish parliament

<sup>51</sup> See the complete story in the information website Rwanda Development Gateway, *Setback for Spanish indictments on Rwandan officials*, the 21st of May, 2009: [http://www.rwandagateway.org/article.php3?id\\_article=11269](http://www.rwandagateway.org/article.php3?id_article=11269)

<sup>52</sup> Ruling of the 29th of January 2009 promulgated by the Central Court of Instruction nº 4 of the Audiencia Nacional, Madrid. See at: <http://www.abc.es/gestordocumental/uploads/Internacional/gaza.pdf>

<sup>53</sup> It is interesting to check out some of the cases begun before the courts of Israel as well as the political perspective adopted in relation to them in the search for the “balance between Israeli national security and individual liberty”. Judgements of the Israel Supreme Court: fighting terrorism within the law, Volume 1, 2005, <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm>. See the opinions of the president of the Israeli Supreme court: Barak, Aharon. *Prologue to A judge on judging. The role of a Supreme Court in Democracy*, Harvard Law Review, 2002.

<sup>54</sup> Tel Aviv gave information on two judicial investigations, one military, the other civilian – through neither led to a court case – and an official commission. See Court Order of July 9th 2009 of the Chamber Plenary Session of the Audiencia Nacional, where the appeal presented by the Prosecutor was accepted and judge Andreu’s court order of May 4th 2009 was revoked: [http://portal.uclm.es/portal/pls/portal/PORtal\\_IDP.PROC\\_FICHERO.DOWNLOAD?p\\_cod\\_fichero=F956861066](http://portal.uclm.es/portal/pls/portal/PORtal_IDP.PROC_FICHERO.DOWNLOAD?p_cod_fichero=F956861066)

<sup>55</sup> The court order of July 9th 2009 recognised at that time –prior to the subsequent reform of universal justice in Spain – that the sentences of the Constitutional Tribunal 237/05 (from September 26th 2005, the Guatemala case) and 227/07 (of October 22nd 2007, Falun Gong case) established the principle of non bis in idem as a criteria, or in other words, “a very wide scope to the principle of universal justice, given that the only express limitation which it introduces with respect to it is that of ‘the thing tried’; which is to say, that the criminal has not been absolved, pardoned or sentenced abroad”

passed the reform of universal jurisdiction in Spain. Subsequently, an appeal was presented to the Spanish Supreme Court.

For all Israel was quick to reject all notion of accountability at the international level, it turns out that the Jewish state has also applied the principle of universal jurisdiction when it was convenient; the case of Eichmann, the German national extradited from Argentina in 1961 for crimes against humanity during the Second World War, is paradigmatic in this sense.

In September 2009, in response to the new Israeli offensive on Gaza in January 2008, the UN published a report which ordered a Commission of experts in relation to the said attacks, known as the Goldstone Report. In its conclusions and recommendations, Israel is accused of violating international human rights norms and international humanitarian norms in pursuit of its military objectives. Moreover, a call is made to the international community on the need to apply the principle of universal jurisdiction as per the Geneva Conventions of 1948.<sup>56</sup>

In response to the UN's demand for explanations, Israel sent a report in January 2010 where for the first time it acknowledged having used white phosphorous in attacks on Gaza city, though it put this down to a mistake and announced it had punished two high ranking military officials as a result.<sup>57</sup> Having confirmed the illegal use of this substance on densely populated areas, the matter could reach the Security Council and subsequently the International Court of Justice.

## Guantánamo and the CIA flights

The United States is another world power which has raised its voice in no uncertain terms on glimpsing the possibility that the Spanish judiciary might judge cases related to the US. In the first of the cases affecting it, relating to secret CIA flights, Spanish jurisdiction cannot be doubted given that the investigation centres on flights which landed at Spanish airports on their way to Guantánamo prison. According to Reprieve, thirty-six flights with one hundred and seventy prisoners on board crossed Spanish airspace and made stop-offs in Spain.<sup>58</sup>

Another case concerns the case brought against six of George W. Bush's advisors for creating and structuring the "legal scaffolding" of the prison. Judge Garzón has recently declared himself competent to investigate this case, and another referring to the alleged torture, abuse, and inhumane and degrading treatment suffered by four prisoners held in the illegal prison of Guantánamo. After seven months waiting for a response from the American authorities on the existence or not of an investigation in this regard in the origin country, Baltasar Garzón has assumed the competence to investigate, given that one of the four detainees is a Spanish national.<sup>59</sup>

While some other cases have been rejected, and others still are being studied at present, the American authorities and leading figures have been quick to call into question both the activities of the AN, and future relations between Spain and the US. President Barack Obama stated the "need to look towards the future rather than back at the past".<sup>60</sup>

<sup>56</sup> The Goldstone Report caused an almighty polemic. Many Israeli authorities disauthorised it because they thought it tendentious and false. See the Conclusions and Recommendations of the Report here, "Situación de los Derechos Humanos en Palestina y otros Territorios Árabes ocupados. Informe de la Misión de Investigación de las Naciones Unidas sobre el Conflicto de Gaza":

[http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48\\_ADVANCE2\\_sp.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48_ADVANCE2_sp.pdf)

A summary of the Report can be found here too:

[http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48\\_ADVANCE1\\_sp.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48_ADVANCE1_sp.pdf)

<sup>57</sup> BBC Mundo, February the 1st, 2010, "Israel sancionó militares por uso de fósforo blanco", [http://www.bbc.co.uk/mundo/internacional/2010/02/100201\\_0903\\_gaza\\_israel\\_fosforo\\_onu\\_pea.shtml](http://www.bbc.co.uk/mundo/internacional/2010/02/100201_0903_gaza_israel_fosforo_onu_pea.shtml)

<sup>58</sup> El País, 14th of September, 2008, "Un avión militar con escala en Rota llevó a dos menores a Guantánamo", [http://www.elpais.com/articulo/20080914elpepinac\\_11/Tes/](http://www.elpais.com/articulo/20080914elpepinac_11/Tes/)

<sup>59</sup> ABC, *Garzón se declara competente para investigar los crímenes de Guantánamo*, 30th of January, 2010: [http://www.abc.es/hemeroteca/historico-30-01-2010/abc/Nacional/garzon-se-declara-competente-para-investigar-los-crmenes-de-guantanamo\\_1133427405254.html](http://www.abc.es/hemeroteca/historico-30-01-2010/abc/Nacional/garzon-se-declara-competente-para-investigar-los-crmenes-de-guantanamo_1133427405254.html). Consult the complete court order here: [http://www.elpais.com/elpaismedia/diario/media/201001/30/espana/20100130elpepinac\\_1\\_Pes\\_PDF.pdf](http://www.elpais.com/elpaismedia/diario/media/201001/30/espana/20100130elpepinac_1_Pes_PDF.pdf)

<sup>60</sup> See declarations by Barack Obama in The New York Times, the 11th of January, 2009, "Obama Reluctant to Look Into Bush Programs", <http://www.nytimes.com/2009/01/12/us/politics/12inquire.html> or in ABC, the 16th of April, 2009, "Obama apuesta por 'mirar hacia delante y no hacia atrás' sobre Guantánamo", <http://www.abc.es/20090416/internacional-internacional/obama-guantanamo-cierre-fiscalia-200904161733.html>

The AN had previously rejected the case of the death of Spanish journalist Couso who died under US fire in Iraq.<sup>61</sup> Whilst a indictment was dictated against three military personnel in 2007, they were pardoned in 2009. Today, the case has gone to appeal to the Supreme Court, where a ruling is pending.

## Falun Gong y Tibet

Spain's relations with China have also been adversely affected by the AN's admission of two cases against the Chinese authorities.

The first is a case brought against the ex-president of the Chinese Communist Party, Jiang Zemin, and three other party members, Luo Gan, Jia Qinglin and Wu Guanzheng, for genocide, torture and persecution of the members of the Falun Gong religious movement dating back from 1990.<sup>62</sup>

Several victims have so far declared, such as Wei Jingsheng, "the father of democracy in China", winner of various international prizes for human rights, and nominated ten times for the Nobel Peace Prize. It is hoped that legal proceedings can be instituted soon and the testimonies of the accused requested.

The second case centres on Chinese Communist Party authorities and their activity in Tibet. First of all, a lawsuit relating to the repression which took place in the 80s and 90s was presented, (subsequently widened) and in 2008 a new case relating to events which occurred in March 2008, brought to the attention of the public thanks to the media, was admitted to court.<sup>63</sup>

The reaction of the Chinese authorities to these two cases has been one of manifest opposition. They have refused to assist judicial proceedings of the court and have obstructed the process so that there is no possibility of declaring before judges Moreno and Pedraz, the judges trying each respective case. The Chinese authorities have also demanded that the Spanish government close the cases. However, the good trade relations between Spain and China have not been affected, something which contradicts the stated aim of Spanish foreign policy of defending human rights. Indeed, the intention to lift the EU arms embargo on China, imposed after the slaughter of Tiananmen Square in 1989, has recently been announced during the Spanish presidency of the EU.<sup>64</sup>

## C. Reactions of other countries to universal jurisdiction

Putting the principle of universal jurisdiction into practice causes conflicts in the political terrain which should not go beyond the judicial domain, implying two possible readings: either the state being investigated has the intention of finding out the truth of events by taking the case to trial in its own courts, or it is aiming to avoid public embarrassment in the international arena for failing to comply with its obligations as a state.

An example prior to that of Spain took place in the case of Belgium, in 2003. Belgium was then another of the countries with ample recognition in its legislation of the "universality clause" acknowledged in international treaties. But in 2003, the Belgium government gave way to strong pressure exerted by the Bush Administration over a case brought against then US Defence Secretary, Donald Rumsfeld. The US deployed all of its far-reaching influence in response, even going so far as to threaten relocating NATO headquarters – as its main financial backer – to another country.

<sup>61</sup> More information in Jurist, the 14th of July, 2009, where the case and its rejection by the AN is explained: <http://jurist.law.pitt.edu/paper-chase/2009/07/spain-court-dismisses-charges-against.php>

<sup>62</sup> More information in La Gran Época, story of the 5th of May, 2009: <http://www.lagranepoca.com/articles/2009/05/05/3133.html>. Especially interesting is the Report written by David Kilgour, former Canadian Secretary of State, on the massive extirpation of organs of Falun Gong practitioners. In Kilgour, David, y Matas, David. *Bloody Harvest. 2007 Revised Report into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, 2009, consult at: <http://organharvestinvestigation.net/>

<sup>63</sup> National and international media outlets echoed the attacks of the Chinese security forces on Tibetan monks and civilians in March, 2008. See for example the BBC News, the 20th of March 2008, "Police 'shot a Tibet protesters'": <http://news.bbc.co.uk/2/hi/asia-pacific/7307382.stm> or El Mundo, "Tiendas en llamas en la capital tibetana, cientos de monjes marchan contra Peking", the 14th of March, 2008. <http://www.elmundo.es/elmundo/2008/03/14/internacional/1205487561.html>

<sup>64</sup> Europa Press, the 26th of January, 2010, "España estudiará levantar el embargo de armas a China", <http://www.europapress.es/presidencia-eu/noticia-espana-estudiara-levantar-embargo-armas-china-20100126122827.html>

The political pressure not only led to the case against Donald Rumsfeld being dropped, but also to the legislation of the country being amended.<sup>65</sup> This backward step had the knock-on effect of weakening the cases already underway against the former dictator of Chad, Hissène Habré, and the former president of Israel, Ariel Sharon.

## International judicial cooperation. The cases of El Salvador and Argentina

The cases brought before the AN have been received in various different ways in the home countries of origin, with the general tendency being negative. The obstacles placed in the way of the investigation process and witness declarations by some governments stand out (the case of China, the US, Israel, Rwanda and Guatemala), but there have also been cases where the authorities of the home country in question have offered close cooperation aimed at clearing up crimes and bringing them to trial. Cases worth mentioning in this regard are the experiences of judicial collaboration with El Salvador and Argentina.

In January 2009, the AN admitted the case which became known as the “the Jesuits massacre”, in El Salvador. It saw ex-president Cristiani and another 14 military personnel indicted of crimes against humanity and terrorist offences committed in 1989 in the University Centroamericana (UCA).

This case stands out from those previously mentioned for the excellent judicial cooperation recorded. This cooperation did not only exist between Spanish judges and their Salvadorian counterparts - certain US officials collaborated in the process too. The Salvadorian government has helped in the search for information, the gathering of witness evidence, and has even agreed to make a declaration in Spain.

A paucity of technological means has prevented trials taking place simultaneously in two or more countries through video conferencing, a resource a number of Argentinean cases have used.<sup>66</sup> The Scilingo case (condemned for crimes against humanity committed during the Argentinean military dictatorship between 1976 and 1983)<sup>67</sup> proved to be exemplarily in this regard, combining efforts in Spain and Argentina “in the practice of witness evidence and specialist evidence”,<sup>68</sup> basing itself for this end on article 10 of the Judicial Assistance Convention in criminal matters between member states of the European Union.<sup>69</sup> Besides, certain subsequent legal incidents between Spanish and Argentinean legislations were spared by the agreement of both courts.

## 5. Universal Justice for regional bodies: The European Union, Organisation of American States & The African Union

### The European Union

Up until now, EU backing for the fight against impunity and for extraterritorial jurisdiction has highlighted a commitment which in some ways could be seen as unconditional, but in others suffers from certain shadowy areas worth drawing attention to.

The actions of the ICC and the exercise of the principle of universal jurisdiction are often understood as a trial by Europe of the rest of the world, for a number of reasons. Whilst the EU has manifestly got behind the ICC since its creation,<sup>70</sup> the large financial contribution the EU has made in order to help make the Court a reality has caused parts of the international community to wonder whether there are ties - or even a dependant

<sup>65</sup> Gallagher, Katherine, *Universal Jurisdiction in Practice. Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture*, Journal of International Criminal Justice 7, Oxford University Press, 2009, p. 1087-1116 . Available at [http://www.globalpolicy.org/images/pdfs/universal\\_jurisdiction\\_in\\_practice.pdf](http://www.globalpolicy.org/images/pdfs/universal_jurisdiction_in_practice.pdf)

<sup>66</sup> BBC Mundo, *DD.HH: Scilingo condenado en España*, the 19th of April, 2005, [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_4460000/4460915.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_4460000/4460915.stm)

<sup>67</sup> See Galán Martín, José Luis, *El caso Scilingo: breve crónica judicial*, La Ley Penal nº 25, Madrid, 2006, p. 21-31

<sup>68</sup> A complete epigraph of this judicial collaboration can be found in Ollé, Manuel, *op.cit.*, p. 338-344.

<sup>69</sup> Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2000/C 197/01, the 29th of May, 2000.

<sup>70</sup> There are several cooperation agreements between both institutions amongst, notably, *Agreement between the ICC and EU on Cooperation and Assistance*, 10 April 2006

relationship - between the EU and the ICC.<sup>71</sup> The fact that the Court has still not investigated a case from Europe is another reason.

Furthermore, it is true that in recent years there has been a certain amount of progress vis-a-vis several member states (like the Czech Republic, Portugal, United Kingdom or Greece) and that clauses supporting the ICC in trade treaties must be signed by third party states. Yet still, the EU does not insist that some of its member countries ratify other existing treaties guaranteeing the protection of human rights, like the ICC Agreement on Privileges and Immunities<sup>72</sup> or the obligation to go after crimes against humanity, already enshrined in the Geneva Conventions.

The EU therefore seems to differentiate between support for the ICC and support for the application of universal jurisdiction. In some cases, the diplomatic problems which the defence of accountability at the extra territorial level amounts can take on more importance - for the EU and some of its member states – than the application of internationally ratified agreements.

On the other hand, the resolution passed by the European Parliament in February 2009 recognising that member states share part of the responsibility - political, moral and legal - for the transportation and detention of prisoners on the way to Guantánamo, in reference to the “CIA flights”, is worth highlighting.<sup>73</sup>

## Organisation of American States

Whilst it is true that the OAS has not taken a clear position on universal justice, it has done so in terms of the ICC. From the very outset it has offered support both for its creation and promotion, as well as for the universal ratification of the Rome Statute.<sup>74</sup> This is an issue on the agenda of its Inter-American Juridical Committee and in which the Committee on Juridical and Political affairs works “on the appropriate measures which states must take to cooperate with the International Criminal Court in the investigation, prosecution and sanctioning of those responsible for having committed crimes of war, crimes against humanity and genocide, and offences against the administration of justice by the International Criminal Court.”<sup>75</sup>

Through its human rights organisations, the OAS directly takes sides in relation to the principle of universal jurisdiction. This has been highlighted by the Inter-American Committee of Human Rights in several resolutions, such as 1/03 on the Trying International Crimes<sup>76</sup> or on specific situations, like the Report on the Carmelo Soria case, the Spanish diplomat who was kidnapped, tortured and assassinated, in connection with the ongoing trial of Augusto Pinochet in Spain.<sup>77</sup>

Likewise, the Inter-American Court of Human Rights has pronounced itself in repeated sentences in relation to cases of impunity where states have failed to judge appropriately, in line with the principle of universal jurisdiction and the universal protection of human rights. An example of this is *Almonacid Arellano vs. Chile* dating from September 2006, where the state of Chile was declared responsible for crimes against humanity and in compliance of its obligation to provide a fair trial and the obligation, in consequences, of offering

<sup>71</sup> The EU provides the following information on its web page: “The EU has devoted more than 20 million Euros to the European Initiative for Democracy and Human Rights (EIDHR) for projects whose aim is to support the ICC and international criminal justice.” More information at [ec.europa.eu/external\\_relations/human\\_rights/icc/index.htm#funding](http://ec.europa.eu/external_relations/human_rights/icc/index.htm#funding).

<sup>72</sup> Agreement on Privileges and Immunities of the International Criminal Court, the 9th of September 2002, <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Agreement+on+the+Privileges+and+immunities+of+the+ICC.htm>

<sup>73</sup> Press release of the European Parliament, Justice & Home Affairs, the 19th of February 2009: [http://www.europarl.europa.eu/news/expert/infopress\\_page/019-49769-047-02-08-902-20090218IPR49768-16-02-2009-2009-false/default\\_es.htm](http://www.europarl.europa.eu/news/expert/infopress_page/019-49769-047-02-08-902-20090218IPR49768-16-02-2009-2009-false/default_es.htm). The complete document is available at: *Resolución del Parlamento Europeo, de 19 de febrero de 2009, sobre la supuesta utilización de países europeos por la CIA para el transporte y la detención ilegal de presos*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0073+0+DOC+PDF+V0//ES>

<sup>74</sup> From 1999, the OAS has been supporting the Rome Statute and adopting different resolutions in favor of the promotion of the Court. See, for example, the Resolution of the General Assembly AG/RES. 2279 of the 5th of June, 2007 at [http://www.oas.org/dil/esp/AG-RES\\_2279\\_XXXVII-O-07\\_esp.pdf](http://www.oas.org/dil/esp/AG-RES_2279_XXXVII-O-07_esp.pdf) or the last Resolution, AG/RES. 2505 of 2009 at [http://www.oas.org/dil/esp/AG-RES\\_2505\\_09\\_esp.pdf](http://www.oas.org/dil/esp/AG-RES_2505_09_esp.pdf)

<sup>75</sup> See the web page of the OAS devoted to the Promotion of the ICC at [http://www.oas.org/dil/esp/corte\\_penal\\_internacional.htm](http://www.oas.org/dil/esp/corte_penal_internacional.htm)

<sup>76</sup> This document and others like it can be consulted at, [http://www.oas.org/DIL/esp/Re\\_1-03\\_Comisión\\_Interamericana\\_de\\_Derechos\\_Humanos.pdf](http://www.oas.org/DIL/esp/Re_1-03_Comisión_Interamericana_de_Derechos_Humanos.pdf)

<sup>77</sup> See Report 133/99 of the Interde la Comisión Interamericana de Derechos Humanos on the Carmelo Soria case at <http://www.derechos.org/nizkor/chile/doc/soria.html>

reparations for it.<sup>78</sup>

Even so, nobody should lose sight of the fact that the US is at one and the same time the biggest donor of the OAS whilst it has also failed so far to ratify the Statute of Rome, and establishes financial reserves in resolutions favourable to the ICC. At the internal level, the situation is uncomfortable, because whilst efforts are being taken to close Guantánamo, the national debate on the need to investigate the cases of torture and violations of international law during the Bush Administration, or forget them, goes on and on.

## African Union

There have been many voices and movements from the African Union and African member states defending the need to apply extra-territorial jurisdiction in the continent, given the deficiencies of the national courts and the inexistence of an international tribunal.

These initiatives were essential for the birth of the African Court on Human and Peoples' Rights, which came into being in 2004.<sup>79</sup> Prior to this, the ad hoc Tribunal For Ruanda (ICTR) had appeared in 1994 and the Special Tribunal for Sierra Leona in 2002, created to try two specific examples of human rights infringements on a massive scale in those countries.<sup>80</sup>

But in the wake of the diplomatic conflicts sparked simultaneously by the Rwandan and Sudanese cases, it seems that the African Union has reconsidered its position in relation to accountability.

In 1994, the genocide in Rwanda caused around 800,000 fatalities and a mass exodus of refugees to neighbouring countries. To date, various different jurisdictions have tried the events of 1994 with competences being shared out between national tribunals, traditional tribunals and the ICTR, which deals with only the very highest ranking culprits of crimes against humanity, genocide and violations of article 3 common to the four Geneva Conventions and the Additional Protocol II.<sup>81</sup>

Subsequently cases were opened in Belgium and French courts in relation to the Rwandan genocide under the principle of universal jurisdiction. Likewise, in February 2008 the Spanish AN admitted the case against 40 military officials of the Patriotic Rwandan Front (FPR) for crimes committed between 1990 and 2002<sup>82</sup> This decision prompted the president of Rwanda and the AU, Paul Kagame, to take the matter before the African Union.

Furthermore, the indictment by ICC prosecutor Luis Moreno Ocampo of the Sudanese president Omar al-Bashir on the 14th of July 2008, along with the different points of view as to the situation in Darfur, caused a deal to be thrashed out within the AU during the Assembly held in Egypt on July 1st, 2008, where eight resolutions against the proceedings underway against African countries were adopted.<sup>83</sup> On the 4th of March 2009, the preliminary court of the ICC made public the international arrest warrant against al-Bashir for war crimes and crimes against humanity,<sup>84</sup> later going on to include the charge of genocide which had been initially rejected.<sup>85</sup> AThe first head of state to be indicted by the ICC, a large number of voices called for

<sup>78</sup> "...the Court declared that Chile is responsible for the violation of the rights enshrined under article 8.1 and 25 of the American Convention, for in compliance of the obligations stemming from articles 1.1 and 2 of the same international instrument. The Court has established, on several occasions that every violation of an international obligation which has produced damage entails the duty of providing appropriate reparations." See complete sentence at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_154\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp.pdf)

<sup>79</sup> Makundi Wachira, Goerge is the author of an interesting report of the African Tribunal of Human Rights and of the People. *African Court on Human and Peoples' Rights: Ten years on and still no justice*, Minority Rights Group International, United Kingdom, 2008. <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf>

<sup>80</sup> All of the information relating to both tribunals can be found at their respective web pages, International Criminal Tribunal for Rwanda, <http://www.icttr.org> y *Special Court for Sierra Leone*, <http://www.sc-sl.org>

<sup>81</sup> Common Article 3 of the Geneva Articles of August 12th 1949 calls for the humane treatment in the event of armed conflict not of an international nature and the protection of people who are not participating directly in the hostilities, members of the armed forces who have handed in their weapons and those who are put out of action due to illness, injury, detention or any other other cause without any distinctions based on race, colour, religion or belief, sex, birth, fortune, or any other criteria.

<sup>82</sup> Court order of Central Court of Instruction number 4 of the Audiencia Nacional, the 6th of February, 2008, [http://www.veritasrwandaforum.org/dossier/resol\\_auto\\_esp\\_06022008.pdf](http://www.veritasrwandaforum.org/dossier/resol_auto_esp_06022008.pdf)

<sup>83</sup> Resolutions of the Assembly of the African Union on universal jurisdiction, the 3rd of July, 2008, Doc. Assembly/AU/14 (XI), p. 17-18, [http://www.africa-union.org/root/au/Conferences/2008/june/summit/dec/ASSEMBLY%20DECISIONS%20193%20-%20207%20\(XI\).pdf](http://www.africa-union.org/root/au/Conferences/2008/june/summit/dec/ASSEMBLY%20DECISIONS%20193%20-%20207%20(XI).pdf)

<sup>84</sup> International Criminal Court, arrest warrant of Omar Hassan Ahmad Al Bashir, 4th of March, 2009, <http://www.icc-cpi.int/iccdocs/doc/doc644487.pdf>

<sup>85</sup> International Criminal Court, Al Bashir case: *The Appeals Chamber directs Pre-Trial Chamber I to decide anew on the genocide charge*, the 3rd of February, 2010. <http://www.icc-cpi.int/NR/exeres/835A9BD1-217E-4695-B304-918B8B3F4793.htm>

a temporary suspension of proceedings in favour of al-Bashir. The argument put forward was that it was necessary for peace in Sudan, thus adding fuel to the fire of the never ending justice-peace debate.

Besides underlining that the abuse of the principle of universal jurisdiction puts law and order and international security in jeopardy, the AU accepted several of Kagame's petitions, asserting the political application of the principle, and highlighting the violation of sovereignty it amounts to, in particular for Rwanda.

Besides Ruanda and Sudan, international arrest warrants currently hang over Uganda, Djibouti, Senegal and the D.R Congo amongst others.

The African Union then announced that arrest warrants issued by European states would not be executed in AU member countries and requested that all others – especially those pertaining to the EU- imposed a moratorium on these warrants. Finally, the AU asked its president to take the matter to the UN General Assembly, with the aim of considering the different positions, and demanded urgent meetings between the two regional organisations.

The 12th meeting mentioned above met under the umbrella “European Union – African Union Ministerial Troika”. The 13th meeting was held in Addis Ababa (Ethiopia) on the 14th of October 2009 where the absence of agreement between both regional institutions on the matter became apparent. The EU called on the AU to raise its concerns in the 64th regular session of the UN General Assembly. So the UN assigned the matter to the UN Sixth Committee where the representative of Rwanda presented a draft resolution which will be examined and possibly included in the agenda of the following period of sessions with the aim of discussing the limits and scope of the principle of universal jurisdiction in the UN headquarters.<sup>86</sup>

In this regard, it is important to bear in mind that the principle of universal justice - which Rwanda and Sudan ratified in the Geneva Conventions – is the basis for both the extraterritorial cases and the ICC. So in taking a stand against universal justice, the AU has adopted a position which puts the thirty of its member states which have ratified the Geneva Conventions and the 1998 Rome Statute in a difficult situation. Likewise, alternative routes will have to be studied in the event that Europe demands compliance from African countries of international treaties, despite the risk of deteriorating relations with the EU.<sup>87</sup>

The concept of universal jurisdiction needs to be revised and unified, but only if that discussion is carried out in the context of the existing international treaties, and where the perspective required is that of the objective criteria for applying the principle for the sake of human rights and in detriment to other interests.<sup>88</sup>

## 6. Conclusions

International justice is going through a time in which it needs to carry out some self-criticism. The undeniable advances which the creation of tribunals for specific situations such as the case of ICC, the former Yugoslavia and Sierra Leone, have been coupled with problems which have arisen in the process: competence limitations (material, geographic and territorial), resource limitations (economic and personal), jurisdictional limitations, as well as not much support from civilian populations.<sup>89</sup>

These limitations have given rise to attempts by the international community to come up with temporary solutions for each problem. Hence the search for new jurisdictions mitigating the general ineffectivity of international justice and the impunity that many mass violations of human rights enjoyed.

For international justice to be efficient, effective implementation of the subsidiarity principle is needed;

<sup>86</sup> Draft Resolution entitled “Scope and application of the principle of universal jurisdiction”, document A/C.6/64/L.18. Available at, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N09/598/52/PDF/N0959852.pdf?OpenElement>

<sup>87</sup> For example, President Obama warned al-Bashir that he would exercise “greater pressure” and isolation if he did not take measures in favour of peace in Darfur. Global Post, *Too many handshakes?*, 22nd of October, 2009, <http://www.globalpost.com/dispatch/worldview/091022/obama-darfur-policy>.

<sup>88</sup> Kaleck, Wolfgang, op. cit., p. 929.

<sup>89</sup> An example of this was seen in the former Yugoslavia where the population deposited its confidence in its own judicial institutions once they had been reformed with the help of international judges, instead of supporting the International Criminal Tribunal for the former Yugoslavia (ICTY).

effective accountability requires the adequate promotion of national tribunals of origin, which would minimise the volume of cases international tribunals have to deal with.

Effective implementation such as this requires a threefold effort at one and the same time. In first place, the restructuring of those national judicial institutions which do not meet minimum internationally accepted standards. Secondly, close collaboration between international tribunals and national state courts in transition processes; and thirdly, the wholesale application of all international agreements related to universal jurisdiction (enshrined since the Geneva Conventions), allowing judicial state structures to be used for global accountability, as one more element of transitional justice.

That threefold effort has to be carried out based on two essential principles: judicial independence in all jurisdictional areas; and the active participation of the victims in settling scores. As things stand, there are serious contradictions in the representation of the victims, the impossibility of reparations in many legal systems, gaps in moral rehabilitation, in the social founding of truth, as well as a lack of resources in many cases in vital efforts to prevent mass murder, slaughter or torture, maintaining the protection and reparation of victims as the fundamental objective at all times. In Rwanda, it is calculated that around 800,000 people died, but it is important not to forget that as many as two and a half million people were displaced. Both the families as well as the indirect victims of conflict need all kinds of support to recover from the consequences of war. To alleviate their suffering, the international community and national authorities have the joint obligation of quickly putting all the necessary means at their disposal, finding out the truth, and trying to the extent possible to restore both materially and morally all of the victims' violated rights.

The international community must intensify its work together with local organisations in human rights and state building. Besides, both in the national and international arena, the agenda of transitional justice must be coordinated with that of cooperation, development aid and peacebuilding and strengthening, given that in many aspects there is overlap in these agendas.

In precarious systems of justice, the reconstruction of justice administrations need to be backed up with economic and personnel resources, through incentives. The national judiciary of a country is the most valid scenario wherein to carry out a process of accountability in the long term, but minimum conditions are essential for justice to be done and for the norms of due process to be complied with.

At the same time, outside technical support in the short and medium terms is fundamental for an effective reconstruction of the justice system. Whilst this reconstruction is being carried out, the international community has the duty to back both politically and economically every attempt aimed at achieving peace, without that meaning that the instruments needed to fight impunity are put to one side, encouraging the empowerment of national institutions such as took place, for example, in the case of Chile. The South and the North must work together in the fight against impunity.

The judgements handed down to some countries from international tribunals have sparked a polemic concerning the concept of sovereignty once more. Certain currents of opinion have questioned the tendency developed in the international community over recent years of ceding sovereign powers to regional institutions.<sup>90</sup>

For this reason, there is a need for a close inter-judicial collaboration between the national and international spheres in this kind of tribunal especially. At the same time, problems experienced in internationalised tribunals should be sorted out, the main focus being to provide them with the adequate economic resources required to ensure judicial independence and the correct implementation of the guarantees of due process.

<sup>90</sup> Especially interesting is the reflection between the concepts of sovereignty and the ICC found in Broomhall, Bruce. *International Justice & the International Criminal Court*. Between the sovereignty and the rule of law, Oxford University Press, New York, 2003.

This would guarantee that the same mistakes will not take place in tribunals created in the future, as could be the case of the World Court of Human Rights. Still at the project stage, this tribunal will aim to safeguard human rights in a wider sense, also in a subsidiary manner vis-a-vis national courts.<sup>91</sup>

For its part, the ICC faces the challenge of consolidating as the global tribunal it is called on to be, one whose independence and criteria are beyond any kind of doubt. Simultaneously, it needs to revise its internal workings as the number of states which ratified the Rome Statute continues to grow. The unconditional support garnered in all regional organisations will have great importance in this sense.

Countries which are institutionally stable have the obligation, in the first place, to provide accountability for their own past. Hence countries like Spain or the USA have work to do. With this aim in mind, they should implement appropriate measures with special attention paid to the victims. In second place, stable and democratic systems have the moral and legal responsibility of backing the processes geared to strengthening institutions in precarious states. By doing so, they will implement the agreements which almost all states crystallised sixty years ago in the Geneva Conventions; agreements which are necessary just as long as serious crimes exist in states which cannot or will not bring the offenders to justice, thus preventing those responsible from living comfortably in the impunity offered to them.

Over the last two decades, many countries decided take a step forward in international justice questions and not go back to allowing these kinds of crimes which by their very nature cannot prescribe; they also dragged along the regional organisations in their wake.

Today in Europe it is paradoxical to see how the EU promotes the reform of justice in countries of the South while, in some cases, failing to demand that they comply in practice with the legal principles of the protection of human rights and “good government” which are reflected in bilateral economic agreements. Defending universal values beyond national borders implies not allowing human rights abuses in one’s own territory.<sup>92</sup>

Moreover, the active support which the EU and the OAS have offered the ICC and its advances do not square with the backward steps taken by Belgium and Spain in universal justice. Both organisations could have played a more prominent role in the conflict which sprang up between Belgium and the US, as well as Spain’s confrontation with Israel, China and the US; in the same way as previously occurred in relation to the situations in Burma or Zimbabwe<sup>93</sup> - for the sake of the European principle of “promoting human rights throughout the world”. Such double moral standards delegitimizes actions which institutions like the OAS, the EU or the ICC might take, and brings memories of the colonial past to mind. The AU, for its part, has adopted a double standard of its very own on a different plane; while publicly committing to fighting against impunity, it closes ranks around member states when one of its ruling governments is affected.

These three big regional organisations are called on to move forward in the coherence of their foreign policies and human rights, banking once and for all on a culture of accountability, no matter the individual or state in question, and always with the victims of massive human rights violations first and foremost in mind; providing them with the representation they deserve throughout legal proceedings, and promoting the appropriate reparations for the sake of social reconciliation.

<sup>91</sup> This is an initiative which the Swiss government has been backing for more than 10 years, promoted by Manfred Nowak and Martin Scheinin (UN court reporters against torture and human rights and terrorism respectively), and which now is gaining strength in response, mainly, of transnational crimes in matters of social corporate responsibility and nonstarter agents. See Nowak, Manfred y Kozma, Julia, *A World Court of Human Rights*, University of Vienna, 2009, <http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf>

<sup>92</sup> Speech by the European Commissioner of External and Neighborhood policy, Benita Ferrero-Waldner, “The ICC, Transatlantic Relations and Co-operation with Third Parties to Promote the Rule of Law”, the 14th of April, 2005, [http://www.europa-eu-un.org/articles/en/article\\_4569\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4569_en.htm)

<sup>93</sup> One of the European Union’s consecrated objectives in its human rights policy. See [http://europa.eu/pol/rights/index\\_es.htm](http://europa.eu/pol/rights/index_es.htm). More information can be found on the sanctions imposed on Zimbabwe at Afrol News, “Europa aumenta sus sanciones contra Zimbabwe”, 20th of February, 2004, <http://www.afrol.com/es/articles/11331>

FRIDE project reports offer an in-depth analysis of fieldwork conducted along with the most significant conclusions drawn from this research. All FRIDE publications are available at [www.fride.org](http://www.fride.org)

The ideas expressed by the authors of documents available on the website do not necessarily reflect the opinions of FRIDE. If you have any comments or suggestions regarding the articles, please contact us at [fride@fride.org](mailto:fride@fride.org)

FRIDE-A European Think Tank for Global Action  
C/ Goya, 5-7 pasaje 2ª - 28001 Madrid - Telf: 91 244 47 40 - Fax: 91 244 47 41 - E-mail : [fride@fride.org](mailto:fride@fride.org)  
[www.fride.org](http://www.fride.org)

Universal Justice: Vidal Martín  
The new dimension of Transitional Justice