

The advance of universal justice - by Manuel Ollé Sesé

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The road map for limiting the practice of universal justice in Spain is a sad reality. The Spanish Congress has just approved a proposal to reduce universal justice to cases where the people presumed responsible are on Spanish soil or there are Spanish victims, and either way, only when an international court or the country where the crime was committed are not "effectively persecuting" these crimes. This is the formal culmination of the recent criticisms made against the Audiencia Nacional: why is it judging torture in Guantánamo, the CIA flights, the Gaza massacre, the repression in Tibet or of members of Falun Gong, the genocide of the Guatemalan or Sahara peoples, the assassination of the journalist, Couso, or the Jesuits in El Salvador, or the crimes in Mauthausen?

The arguments put forward in an attempt to prevent this principle of international criminal justice from being applied vary enormously and some lack any serious foundation: legal, economic or political technicalities, the Spanish courts' inability to assume such a burden of work without detriment to national justice, and even accusations that some judges are egocentric and attention seeking.

The paradox is amazing. The principle of universal justice was applied in Spain with no controversy whatsoever until the Pinochet and Argentina cases were lodged in 1996. Everyone applauded the judges of the Audiencia Nacional for persecuting drug-running ships in international waters, even when Spain was not the destination of the cargo nor had any connection with the events, the ship or the crew. However, this applause for the judges and the public prosecution for persecuting drug-dealing turned quite unfairly into criticism when the crimes were against humanity and the core of all human rights.

The reason for this is none other than the undoubted political component of the circumstances in which these heinous crimes are committed, the majority of which are from de iure or de facto power structures. And it is precisely in the countries where these acts were committed that all manner of strategies are implemented to guarantee the unacceptable impunity of their authors and accomplices. At a national level these countries pass laws of self impunity, while at an international level they implement unacceptable political and diplomatic strategies that are ultimately successful, especially when

involving powerful states, at the cost of human rights.

Good examples of this are the current Israeli and American pressure on the Spanish Government to find a way to put an end to the cases affecting them, and the unacceptable attacks on the judges Garzón, Pedraz and Andreu.

The self-interested devaluation of this international principle corresponds to a mistaken approach from internal law, when analysis should be based on international law and specifically on the commitment acquired by Spain in various conventions (such as the Conventions on Genocide and Torture or the Geneva Conventions). On one hand, these have formed for a long time the basis for this universal principle regarding the nature of the crimes, their extreme severity, and, as a result, the international commitment to persecute them. Every time an international crime of the first magnitude is committed, the victim is harmed, but so, too, is the international community. And on the other hand, for this concept of jurisdiction to apply it is not necessary, according to International Law - as our Constitutional Court reminded us (STC 237/05) - for there to be any connection such as the accused being on Spanish soil or the victims being Spanish.

In the Eichmann case, Israel's Supreme Court, which today disparages universal justice, based itself on the principle of universal jurisdiction when it declared that "the State of Israel's right to punish the accused derives from a universal source - patrimony of all humanity - that grants any state within the family of nations the right to try and punish crimes of this nature, as they affect the international community, and any state that acts judicially does so on behalf of the international community".

The consensus for trying these crimes, established after the horrors of the Second World War in the Nuremberg Law though frozen during the Cold War, was recuperated with the creation of the special International Criminal Courts (former Yugoslavia or Rwanda), the mixed courts (such as Sierra Leone or Lebanon) and particularly the International Criminal Court (ICC). The latter has become the truly universal body for trying crimes of genocide, crimes against humanity, war crimes and crimes of aggression.

These supranational courts, however, do not meet all the demands for justice. The limitations they were born with - the nature of the acts and when and where they were committed - have given rise to insoluble obstacles for bringing to trial those responsible for such heinous crimes. The International Court, for example, can only try acts committed after 1st July 2002 and acts affecting situations in countries that have ratified its statutes.

This unsatisfactory international legal scenario has, due to imperatives of international law, transferred the duty to fight impunity and human rights violations to the national courts. This has been demonstrated by the legal bodies of France, Belgium, Germany, Canada, Senegal or Spain, among others.

The development and application of the principle of universal jurisdiction by the Spanish courts has been, perhaps, this country's

greatest contribution to the international community in the defense of human rights.

If there is consent on the part of states to judge the worst criminals, why don't they fulfill their duty to judge the international crimes (*ius cogens*) committed by their citizens? The answer, if they do not want to accept trials in third countries or supranational courts, is simple: they should not only initiate legal proceedings but also demonstrate - not merely pretend or go through the movements of an open case - that an authentic and effective legal investigation is being carried out by the courts. Otherwise, either the international courts or the national courts of third countries will intervene and apply the principle of universal justice.

However, these premises of international law are sidestepped by states that wish to perpetuate unacceptable impunity. They do not try [these cases], or do not do so according to due procedural standards, they oppose the "meddling" of universal justice, and they neither sign the Statutes of the International Criminal Court nor accept its competence.

This deficit cannot be borne by the victims. These are entitled to justice, and the international community is obliged to provide it. Given the absence of a truly effective international criminal court, the principle of universal justice exercised in any country, not only Spain, is today the obligatory instrument for persecuting the most serious international crimes that destroy human dignity.

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