# Windows on the World:
# Spanish Courts and the Location of Universal Jurisdiction

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ABSTRACT

Like international law in general, the principle of universal jurisdiction relies, in practice, upon the "domestication" of international norms through the incorporation of treaty obligations into national legal codes. But universal jurisdiction is perhaps the most controversial of these border-crossing acts of international law, as the national judiciary of signatory states becomes the location where universal jurisdiction is housed and enacted, often in cases in which the alleged perpetrators, victims and the crime itself are associated with another location entirely. Despite considerable political and diplomatic obstacles to this creative, sovereignty-jumping and yet sovereignty-enshrining design, there have been "windows" which have opened up for the advancement of universal jurisdiction over the past six decades. In this paper, I will analyze one such case – Spain, whose 1985 Organic Law of the Judiciary (LOPJ) opened such a window, and whose courts have since been a veritable magnet for such cases, from the Pinochet Case to more current cases in such far-flung places such as Tibet, Guatemala, Gaza, and Guantánamo. The paper will also analyze the partial closing of that window by legislative action in May 2009, thus specifying the international, domestic, and transnational mechanisms leading these windows to open and close.

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**Introduction:**
**Universal Jurisdiction: All The World's A Court?**

The principle of universal jurisdiction is, on one level, rather simple and straightforward: it claims that there are some crimes which are so extreme as to constitute affronts to all humankind, making it the right and, to some extent, the responsibility of every nation to prosecute individuals for these crimes.[1] The application of this principle in practice, however, is far more complex. While human rights activists and victims' relatives rejoice to see former dictators in the dock, stripped of the protection afforded by national laws and amnesties, the international system of states confront uncomfortable tensions. In contrast with the International Criminal Court, which is based upon the principle of complementarity, a claim to universal jurisdiction need not establish that the charges are being brought against the accused in the absence of a (preferred) nationally-based venue. The implication is that all the world becomes a potential arena for judgment as a means of shutting down the national-legal havens that have provided perpetrators with illegal – and immoral – zones of impunity. At the same time, exposing individuals to trial outside their national borders can run up against the realities of international politics, which are state-based and power-infused. For example, in the context of inter-state conflict, one country's adversary could mobilize a third-party jurisdiction as an extension of that conflict, as could be seen recently in the arrest warrant for war crimes pending in London for Israel's former foreign minister Tsipi Livni, who had to change her travel plans to avoid being taken into custody.[2] Power, strategy, and commitments clearly compromise the ability of states to fulfill their obligations under the principle of universal jurisdiction.

And yet, within these realistic parameters and against the negative expectations they generate, we have seen a veritable explosion of universal jurisdiction claims in the past decade and a half that has ostensibly transformed the landscape of international criminal accountability for atrocities, producing a new literature in international legal studies which has identified the broad contours, and moral quandaries, of the phenomenon.[3] As Diane Orentlicher points out, even as jurisdictional conflicts between

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[1] To be fair, this is an oversimplification, but I would argue that this is the essence of the principle. For a more nuanced view that presents fourteen principles of universal jurisdiction, see The Princeton Principles on Universal Jurisdiction, Program in Law and Public Affairs, Princeton University (2001), esp. pp. 28-36.

[2] "Israel Fury at UK Attempt to Arrest Tsipi Livni," BBC News online (December 15, 2009), at http://news.bbc.co.uk/2/hi/middle_east/8413234.stm. Livni had been foreign minister during Israel's incursion in to Gaza that summer, and a group of Palestinians brought the suit in a London court to hold her responsible for war crimes against the civilian population there. The warrant was subsequently revoked, but tensions have remained high between Israel and Britain in the absence of what Israeli officials termed "guarantees" that other Israeli government representatives will not face arrest. See "Israeli Officials Delay UK Visit Over Fears of Arrest," BBC News online (January 5, 2010), at http://news.bbc.co.uk/2/hi/middle_east/8441572.stm.

[3] See, for example, Hard Cases: Bringing Human Rights Violators to Justice Abroad (A Guide to Universal Jurisdiction) (Versoix, Switzerland: International Council on Human Rights, 1999); Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives (Oxford: Oxford University Press, 2003); Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law (Antwerp and Oxford: Intersentia,

states stoke tension, non-state actors have been taking the lead in shaping, promoting, and legitimating new global norms favoring universal jurisdiction claims, via demonstration effects and flows of new jurisprudence from international tribunals, communication between judges across borders, and media-savvy techniques of non-governmental human rights groups.[4] Non-state actors have also played a key role in the expansion of universal jurisdiction claims by bringing suits against individuals in third-party courtrooms, and by providing information, testimony, and physical evidence that can be used by prosecutors in constructing the *prima facie* case required to establish the extreme nature of the crime and its eligibility for being prosecuted anywhere by any national court.[5]

This fascinating story of international norm diffusion and propagation – located at and filtered through the intersection of transnational networks of norm entrepreneurs and national judicial institutions – helps explain the quasi-normalization of universal jurisdiction claims starting in the mid-1990s, despite the formidable structural obstacles presented by a competitive international system of territorially-based jurisdictions and an international legal architecture which remains firmly rooted in the principle of state sovereignty, understood as the right of self-determination and non-intervention. I would argue, however, that this contradiction between sovereignty and universal jurisdiction may be overdrawn. Universal jurisdiction, while it appears to be sovereignty-busting, is actually sovereignty-enshrining: first, it relies on the adoption by each domestic legal system of international legal norms embodied in treaties entered into freely by the sovereign state and, in some cases, in customary international law reflecting common practices of sovereign states; then, with international legal norms firmly and legitimately ensconced inside the domestic legal order, each national court is then empowered as a proxy international tribunal, with international law thus given added credibility (i.e., less uncertainty regarding who will enforce it and how). True, the accused is stripped of the 'hard shell' of his home state's sovereignty which protected his impunity; on the other hand, sovereignty now derives new content from the enforcement of international human rights norms: sovereignty entails advancement of community standards – responsibilities as well as rights. In an interesting twist the "home" country is often transformed through this process, with non-state actors (national and transnational) emboldened to make greater demands on their own state to live up to its full sovereign responsibilities and confront impunity.[6]

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2005); Chandra Lekha Sriram, Globalizing Justice for Mass Atrocities: A Revolution in Accountability (London and New York: Routledge, 2005); Steven R. Ratner, Jason S. Abrams, and James L. Bischoff, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy, 3rd Ed. (Oxford: Oxford University Press, 2009), esp. pp. 198-208.

[4] Diane Orentlicher, "The Future of Universal Jurisdiction in the New Architecture of Transitional Justice," in Stephen Macedo (ed.) Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law (Philadelphia: University of Pennsylvania Press, 2004), pp. 214-239, esp. pp. 227-237.

[5] The role of human rights lawyers in bringing the case against Argentine and Chilean leaders of Operation Condor into the Spanish Audencia Nacional is highlighted in Richard J. Wilson, "Prosecuting Pinochet: International Crimes in Spanish Domestic Law," Human Rights Quarterly vol. 22, no. 4 (1999): 927-79. I will return to this in my more detailed treatment of the Spanish case.

[6] I have made this argument regarding Chile and the Pinochet Case. See Stephanie R. Golob, "The Pinochet Case: Forced to Be Free, Abroad and at Home," Democratization, vol. 9, no. 4 (Winter 2002): 22-57. See also Orentlicher, "The Future of Universal Jurisdiction," p. 228.

All of these elements came together in the case of Spain, whose 1985 Organic Law of the Judiciary (LOPJ) opened such a window, and whose courts have since been a veritable magnet for cases based on universal jurisdiction, from the Pinochet Case to more current cases in such far-flung places such as Tibet, Guatemala, Gaza, and Guantánamo. The paper is constructed around two opposing and contrasting puzzles: first, how did the universal jurisdiction "window" open in Spain, and which international, domestic, and transnational mechanisms kept it open for a decade? And second, what in these three dynamics has changed to bring about a closing of the "window" in 2009, when the highly-contentious government and main opposition parties put down their respective cudgels long enough to cooperate on legislation to limit Spanish courts' criteria for accepting cases based upon universal jurisdiction. I conclude with some reflections on the new obstacles arising to constrain the practice of universal jurisdiction, chief among them the closed windows in places like the U.S., Israel and Spain, where a volatile combination of government insecurity, economic pressure, international defensiveness and right-wing agitation potentially will "shutter" the window and preclude the honest assessment of the past and of who is responsible for it. In these cases democracy itself – the exigencies of electoral politics, a vibrant (if polarlized) civil society, and the open (and often overwrought) media – may yet work in favor of impunity and against the expansion of human rights.

**Window on the World: Spain's *Audencia Nacional* (AN), 1998-2008**

At first glance, the Spanish judicial branch (*el Poder Judicial*) is an unlikely candidate for the vehicle which has opened the way to the innovative application of evolving international norms. As José Juan Toharia points out, Spain's civil law tradition meant that the transition to democracy did not bring about (or require) a wholesale reinvention of the legal system, but rather an adaptation of the same system which had been in use since the late 18th century, built upon a positivist legal philosophy which favored a strict application of the law as written reason and held judicial interpretation suspect.[7] In the Constitution of 1978, judicial "independence" was understood as "self-government," with the judicial corps 'governed' by a new body called the General Council of the Judiciary (Consejo General del Poder Judicial, CGPJ) rather than the Ministry of Justice (which manages the auxiliary machinery of the courts), and with individual judges administering the law without interference from higher courts. Furthermore, judges are insulated from politics and civil society by prohibitions against membership in political parties or unions.[8]

What opened the way towards the Spanish judiciary's protagonism in the international realm was a separate, post-Constitutional code reorganizing the judicial branch, known by its initials in Spanish LOPJ (*Ley Orgánica del Poder Judicial*, 6/1985,

[7] José Juan Toharia, "The Organization, Functioning, and Evaluation of the Spanish Judicial System, 1975-2000: A Case Study of Legal Culture," in Lawrence M. Friedman and Rogelio Pérez-Perdomo (eds.), Legal Culture in an Age of Globalization: Latin America and Latin Europe (Stanford, CA: Stanford University Press, 2003), p. 378.
[8] Ibid., pp. 379-80.

Organic Law of the Judicial Branch).[9] Approved by the Spanish parliament in July 1985, the LOPJ situates the judiciary firmly in the Constitution's institutional *and* normative order. In an explicatory preamble, the law establishes the pre-eminence of the new democratic Constitution in Spanish law, and declares that Spain is a "social democracy under rule of law," ostensibly to underscore a change in normative framework (even as some machinery of justice under the civil law tradition remains recognizable from the previous regime), and a shift in the objective of the administration of justice towards "effective provision of the means for citizens to enjoy their rights" as guaranteed by the Constitution.[10] This theme of judicial institutions (and, by extension, personnel) reconstituting and expanding their normative purview continues throughout this preamble, which argues that earlier configurations no longer served the needs of Spanish society nor could be compatible with new political realities such as regional autonomy and expanded individual rights.[11] It recalls, at numerous moments, the underlying values of the Constitution – liberty, justice, equality, and pluralism – and enjoins the judiciary to make its decisions in line with these values, which it equates with the letter of the law.[12] Its liberal underpinnings are perhaps most visible in the section describing new pathways into the judicial career, in which it is argued that by allowing highly-qualified lawyers to bypass the traditional entry contest and test in at a higher level,

> "…the judicial corps and the rest of the judicial field would achieve the kind of osmosis that, surely, will occur when those who have practiced Law in other professional modalities will bring with them new perspectives and will incorporate distinct sensibilities to enrich their judicial work, which will be characterized by conceptual richness and diversity of approaches."[13]

Similarly, Toharia notes that, at this time, more women began entering the judicial profession, and where previously the judiciary was solidly conservative, by the 1990s there was a much higher degree of ideological pluralism among judges.[14]

Against this background of normative and ideological remaking, two other innovations set the stage for the window to open on universal jurisdiction within Spanish domestic law. First, and most explicitly, Article 23, Section 4 of the LOPJ extends the jurisdiction of Spanish courts over certain crimes committed outside of the nation's borders, whether by nationals or non-nationals. The list of crimes includes: genocide, terrorism, piracy and hijacking, counterfeiting foreign currency, prostitution (human

[9] References to the text of the LOPJ are from José Francisco Valls Gombau (ed.), Ley Organica del Poder Judicial: Edición anotada con jurisprudencia (Barcelona: Bosch, Casa Editorial, 1987).
[10] LOPJ, p. 3.
[11] LOPJ, p. 4.
[12] LOPJ, e.g., p. 7, 9, 10, etc.
[13] LOPJ, p. 11, translation mine.
[14] Toharia, p. 379. Today, there are four main professional organizations of judges, each recognized as representing different ideological positions: the majority (conservative) Asociación Profesional de la Magistratura, APM), the progressive Jueces por la Democracia (JpD), and the smaller Francisco de Vitoria (AJFV)and Foro Judicial Independiente (FJI).

trafficking), and drug trafficking. What is more surprising is a somewhat elastic clause at the end of the list, giving Spanish judges competency to try cases of violations of "whichever other [crime] that, according to treaties and international covenants, should be actionable in Spain."[15] This would pave the way not only for the application of European Union law and of international human rights treaties signed by the new democratic government in the 1980s, but also the consideration of norms of *customary* international law which may not be codified but are still recognized as binding on states.[16]

The second innovation was the creation of a National Court (Audencia Nacional, or AN) with jurisdiction over transnational crimes such as terrorism, drug trafficking, and money laundering which were viewed as beyond the purview of regional or territorial courts, considered the courts of first instance in the new system. It should be noted that the AN was not created as a specialized body to hear cases claiming universal jurisdiction; moreover, it was governed by Spanish criminal procedure, which provides for Spanish citizens to bring criminal cases directly under the principle of *acción* or *acusación popular* established in the Constitution of 1978.[17] It was the very routine nature of access to the AN which provided a venue for a group of entrepreneurial human rights lawyers, led by Spaniard Joan Garcés, and a parallel effort by a professional association of progressive prosecutors on behalf of the family of a disappeared Spanish priest, who presented the first cases against both the junta in Argentina and Pinochet in 1996. As described by Richard Wilson, these lawyers established the competency of the AN for their cases by stressing the transnational context of the crimes: the cross-border conspiracy to assassinate opponents of the military regimes of South America known as Operation Condor. Similarly, they were careful at first to frame their cases in the most traditional way – by initially naming only Spanish victims, such that jurisdiction could be equally established under the principle of passive personality – but over time began to ground their cases more solidly in the principle of universal jurisdiction based upon the heinous nature of the crimes.[18] They were also wise to bring their own prosecution, as the AN's Public Prosecutor (Fiscal)'s office reports to the General State Prosecutor, a political appointee representing the government's interest, which for the Aznar government was weighed strongly against universal jurisdiction.[19] Thus, victims' groups were able to take advantage of judicial independence, the new structure of the judiciary, and the direct access to the courts of *acción popular*, and thus to bypass the objections of the Spanish state to the exercise of universal jurisdiction by the nation's courts.

[15] The Constitutional Court ruled in 2005 that it did not have a right to place limits on how these crimes were to be defined beyond what was already written into the 1985 LOPJ. See STC 237/05.

[16] For a thoughtful treatment of the debate regarding whether there is an obligation or duty to prosecute individuals for the crimes of a previous authoritarian regime under customary international law, see Steven R. Ratner, "Democracy and Accountability: The Criss-Crossing Paths of Two Emerging Norms," in Gregory H. Fox and Brad R. Roth, Democratic Governance and International Law (Cambridge: Cambridge University Press, 2000), pp. 449-490, esp. pp. 467-71.

[17] Confidential interview, Madrid (April 29, 2009).

[18] Wilson, "Prosecuting Pinochet," p. 931.

[19] Confidential interview, Madrid (April 29, 2009).

The final piece of the puzzle, ironically enough, was the persistence after the LOPJ of what was considered an outdated practice in the Spanish judicial system: the investigatory (inquisitorial) judge. Under the Spanish criminal code, rather than the public prosecutor, it is up to the investigatory judge to determine if there is sufficient evidence in a criminal case to bring it to trial. At the level of the AN, this gave tremendous autonomy to judges on the Criminal Bench to determine what constituted a "crime actionable in Spain." Moreover, the multiple cases brought in the mid-1990s landed on the desks of several judges at the AN who then achieved a level of expertise in evaluating the evidence of human rights abuses which was unknown previously, mainly because Spain had made its transition to democracy through a pact that sidestepped investigations and trials of previous regime officials. One of these judges was Baltasar Garzón, a charismatic career judge who had briefly considered a political career, but was best known for raking his erstwhile political collaborators in the PSOE government over the coals through a trial that exposed a secret network of death squads (identified widely as the GAL) aimed at the Basque terrorist group ETA. Garzón, who had been randomly assigned to the Argentina case, began investigating the Condor conspiracy, and through another random reassignment ended up on the Pinochet case, which in October 1998 burst onto the consciousness of the world as the judge's international arrest warrant found the former dictator recuperating back surgery in a London hospital. Though Garzón's bid to extradite Pinochet would not come to fruition, it served as a turning point in the process of opening the window on universal jurisdiction in Spain, and elsewhere. Pinochet's detention provided the physical and symbolic evidence that impunity could be confronted by the law of national courts in the absence of truly globalized justice; meanwhile the episode gave proponents of universal jurisdiction two new pieces of legal ammunition: the jurisprudence of the British Law Lords striking down Pinochet's sovereign immunity defense and Garzón's arguments that forced disappearance constituted ongoing crimes that are therefore not covered by any amnesties. It also solidified and transformed the role of the AN – and specifically the Juzgado No. 5 of Judge Garzón[20] -- as an ostensible site of universal jurisdiction, attracting cases from plaintiffs from other countries in Latin America and, by the end of the 00s, from around the world. While the *acusación popular* route was closed to them, these foreign victims had another means of recourse through the Spanish criminal code, known as *acusación particular*, which required additional consular and legal paperwork, and direct representation by a Spanish attorney.[21]

Among the more high-profile of these cases brought as of mid-2009 have been the following:

[20] While cases continued to be assigned randomly to one of the 6 'benches' from the point of view of the judges, it has been openly speculated that human rights lawyers have been able to strategically submit cases such that they are assigned to Garzón's 5th bench, or to those of other judges viewed as open to the universal jurisdiction principle, such as Santiago Pedraz and Ismael Moreno. Confidential interview, Madrid (May 20, 2009).

[21] Confidential interview, Madrid (April 29, 2009).

- Guatemala: charges of genocide against Guatemala's military rulers in the 1980s for a campaign of repression against the Maya.[22]
- China: three ministers accused of genocide for the repression ahead of the Beijing Olympics in August 2008[23]
- Israel: accusations of war crimes against seven Israeli officials, including the Israeli Infrastructure minister, for the deaths of civilians in a selective bombing in Gaza in 2002.[24]
- The United States: Garzón opens an investigation against the "intellectual authors" of Guantánamo prison (including former Attorney General Alberto Gonzales and former Justice Department official John Yoo) for torture at Guantánamo, in a case brought by Hamed Abderramán Ahmed, the only Spanish national to have been imprisoned there, and three others.[25]

**Closing the Spanish Window, 2009:**
**Pushed from the Outside, or Pulled from the Inside?**

By the late spring of 2009, the critical mass of cases being investigated or tried in the AN gave the impression, to both sympathizers and skeptics, that Spain had become the global capital of universal jurisdiction, and its court the equivalent of the ICC for victim-led justice. This ostensible achievement, however, came with a high price diplomatically for Spain in its relations with the three key target states, China, the U.S. and Israel. At first, China's response was simply to ignore the Spanish judge; but when he requested permission to interrogate three government ministers who stood accused, China launched a formal protest.[26] In an interview on CNN en Español, President Obama responded negatively to Garzón's initiative, stating that he had communicated his concern to officials from the Spanish government, and maintaining that in principle the U.S. was more interested in "looking forward than backward" regarding the crimes of the

[22] See Natalia Junquera, "Dos supervivientes del genocidio maya declaran ante el juez Pedraz," El País (February 5, 2008), at http://www.elpais.com/articulo/espana/supervivientes/genocidio/maya/declaran/juez/Pedraz/elpepinac/20080205elpepinac_14/Tes/

[23] M. Altozano, "Pedraz imputa 203 muertes en Tíbet a tres ministros chinos," El País (June 5, 2009), at http://www.elpais.com/articulo/espana/Pedraz/imputa/203/muertes/Tibet/ministros/chinos/elpepinac/20090506elpepinac_20/Tes/

[24] M. Altozano, "La Audiencia investiga a un ministro israelí por crímenes de guerra," El País (January 30, 2009), at http://www.elpais.com/articulo/espana/Audiencia/investiga/ministro/israeli/crimenes/guerra/elpepinac/20090130elpepinac_8/Tes/

[25] José Yoldi, "Garzón abre un nuevo proceso contra los torturadores e instigadores de Guantánamo," El País (April 30, 2009), at http://www.elpais.com/articulo/espana/Garzon/abre/nuevo/proceso/torturadores/instigadores/Guantanamo/elpepinac/20090430elpepinac_2/Tes/

[26] "China pide 'medidas efectivas' para que la Audencia abandone el caso sobre Tíbet," El País.com, (May 7, 2009), at http://www.elpais.com/articulo/espana/China/pide/medidas/efectivas/Audiencia/abandone/caso/Tibet/elpepuesp/20090507elpepunac_11/Tes

Bush administration.[27] And perhaps most contentiously, the Israeli government condemned the accusations against its officials, leading to the awkward moment when then-foreign minister Tsipi Livni announced to the media that she had gained assurances from her counterpart, Miguel Angel Moratinos, that the Spanish government would "change the law" to stop the court from proceeding, despite institutional safeguards against interference of the executive in substantive judicial matters.[28] Indeed, it appears that the confluence of these three protests served as a mighty push from the outside to close the window on Spain's universal jurisdiction, which was limited by a reform of the LOPJ passed in late June 2009 by the Spanish Parliament, sponsored by both the Socialist (PSOE) government of José Luis Rodríguez Zapatero and the center-right opposition Popular Party (PP), in an unprecedented cease fire in their sharply-polarized relationship. Under the re-written rules, it is now necessary to show a material link between Spain and either the accused perpetrator, the victim, or the location where the crime was committed.[29] Within days of this change, the Gaza case was closed by the AN,[30] and the other cases went under review.

While we might well be satisfied with the realist refrain that policy windows close internationally when the powerful states say they do, I would argue that there is more to this story than simply one of outside pressure. There were also pressures coming from within the Spanish domestic political realm which augured poorly for the continued expansion of AN's universal jurisdiction cases, making the abandonment of Spain's broadly-understood commitment a political winner at home as well as abroad. Here, I would like to highlight two intertwining political problems for the Zapatero government which made the "hands off" approach to the AN unsustainable.

*The Implosion of the Judiciary*

While it is true that, historically, Spaniards have tended to have a relatively low opinion of their judges and of the judicial system as a whole, in recent years there has

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[27] Yolanda Monge, "Obama rechaza la investigación de Guantánamo que estudia Garzón," El País (April 17, 2009), at http://www.elpais.com/articulo/espana/Obama/rechaza/investigacion/Guantanamo/estudia/Garzon/elpepinac/20090417elpepinac_10/Tes/

[28] J.M. Muñoz and M. González, "Moratinos promete cambiar la ley para frenar al juez, según la ministra israelí," El País (January 31, 2009), at http://www.elpais.com/articulo/espana/Moratinos/promete/cambiar/ley/frenar/juez/ministra/israeli/elpepinac/20090131elpepinac_13/Tes/

[29] Fernando Garea, "Pleno del Congreso: Los socialistas y la derecha limitan la justicia universal," El País (June 26, 2009), at http://www.elpais.com/articulo/espana/socialistas/derecha/limitan/justicia/universal/elpepinac/20090626elpepinac_6/Tes/ The final, full vote occurred later in the Fall: See José Yoldi, "Las Cortes recortan la jurisdicción universal," El País, Print edition, October 16, 2009, at http://www.elpais.com/articulo/espana/Cortes/recortan/jurisdiccion/universal/elpepinac/20091016elpepinac_9/Tes/

[30] Natalia Junquera, "La Audiencia Nacional cierra la causa contra Israel por la matanza de 14 civiles," El País (July 1, 2009), at http://www.elpais.com/articulo/espana/Audiencia/Nacional/cierra/causa/Israel/matanza/civiles/elpepinac/20090701elpepinac_6/Tes/

been a sharp increase in public outcry, even from within the judiciary and the auxiliary services.[31] On the one hand, there is outrage at the poor quality of the administration of justice, with judicial offices experiencing backlogs of months and even years due to lack of resources, lack of electronic record keeping, and other technical problems. Judges and judicial secretaries both threatened to go out on strike this year, and work stoppages occurred throughout the country to protest this state of affairs.[32] Under these circumstances, the promise of serving the public made in the preamble to the LOPJ rings hollow, and the lack of resources given to this aspect of government function is in sharp contrast to the excellent infrastructure (trains, roads, etc.) which Spaniards have come to expect. There has also been an attempt to "reform" the judiciary in response to concern that governing parties could stack the CGPJ and compromise its independence. Unfortunately, this resulted only in a grand bargain made by the two main political parties to divvy up the seats on the CGPJ so that there would be a balance, with each party seeking to veto the other's nominees and back-door deals resulting in a CGPJ led by an ultra-conservative judge, far from anyone's choice as a compromise candidate.[33] This procedure merely succeeded in politicizing and paralyzing the institution, and further contributing to the general cynicism about the judiciary.

On the other hand, judges have become the leading protagonists in some of the biggest news stories in Spanish politics this year, as issues as diverse as the illegalization of parties linked to Basque terrorism, the extensive corruption scandal rocking the PP, Catalunya's push for a new Estatuto to give it more autonomy vis a vis the center, along with several high-profile crime stories which scandalized the nation, brought judges and courts center-stage. Linking these two phenomena is the Spanish media, which has also contributed to the perception that "star judges" are getting too powerful and thus are further degrading the respect the average citizen can have for the justice system. In perhaps the apotheosis of this phenomenon, Garzón himself is now embroiled in his own courtroom drama, as right-wing groups have launched multiple lawsuits attempting to get him thrown out of the judiciary, one of which has been admitted to the Supreme Court despite the General Prosecutor's contention that it is without foundation.[34] Dueling editorials and "opinion journalism" in partisan news media on both sides of the political

[31] Some good data is found in Toharia, pp. 396-97.

[32] "Paralizada en Madrid la justicia por huelga de jueces y la de los funcionarios," ElPais.com (February 18, 2009), at http://www.elpais.com/articulo/espana/Paralizada/Justicia/Madrid/huelga/jueces/funcionarios/elpepuesp/20090218elpepunac_5/Tes

[33] One controversy stirred by this new leader, Carlos Dívar (who is also now the President of the Supreme Court, a position that is simultaneously held along with President of the CGPJ) was his vote against preparing a report to advise the parliament the government's draft law on abortion, because of his religious beliefs. See "Editorial: El Consejo no cumple: Dívar frena el informe sobre el aborto por sus creencias religiosas; no es una decisión acertada," El Pais (July 24, 2009), at http://www.elpais.com/articulo/opinion/Consejo/cumple/elpepiopi/20090724elpepiopi_2/Tes/

[34] Julio M. Lázaro, "El juez Garzón, imputado: El PP ensalza al Supremo por abrir una causa contra Garzón por prevaricación - El tribunal admite una querella del sindicato ultraderechista Manos Limpias," El País (May 28, 2009), at http://www.elpais.com/articulo/portada/Supremo/actua/Garzon/causa/abierta/franquismo/elpepipor/20090528elpepinac_3/Tes/.

divide see in Garzón (or in his legal troubles) what is wrong with the judiciary and, by extension, what is wrong with the country. With the judiciary at home operating so poorly, star judges distracted by high-profile cases, and economic crisis deepening, providing a site for universal jurisdiction prosecutions can easily appear like a luxury that Spain can do without.

*The Resurgence of the Right*

Related to this state of affairs in the judiciary is the success that right-wing groups in civil society have had in making their case in the public sphere that progressive judges – like their counterparts in the government, who are likewise targeted – are hijacking their positions of power to transform Spain in ways that are destabilizing and out of touch with the common citizen, ultimately hurting the country. These arguments have perhaps more appeal recently in the context of the hardships of the economic crisis, with youth unemployment hovering at 40%. But the right has focused its energies on not only traditional issues such as opposition to gay marriage and immigration, but also one which has implications for the question of universal justice: resistance to efforts to revive "retrospective justice" and come to terms with the past. Spain's own democratic transition has been held up as a paradigm of elite compromise, having been negotiated and sealed with a double amnesty that legalized the Communist Party while promising the generals and the officials of the Franco regime that they would not be put on trial. What critics have called a "pact of oblivion" others have lauded as a prudent and, ultimately, successful strategy to move Spain towards a peaceful and prosperous post-transition democracy.[35] However, starting in 2000, there has been a growing movement within civil society, led by younger generations and embraced by many Republican families who were victims of repression not only during the Civil War but in the post-war aftermath, to locate, exhume, identify, and rebury properly the remains of regime victims still in unmarked graves throughout the country.[36] These groups aim to raise awareness of the extent to which the division between victor and vanquished has persisted even after the transition, and to confront the democratic state with its responsibility to victims of human rights violations among its citizens. In mid-2006, the Zapatero government appeared to be heading in that direction, launching an initiative for a "Law of Historical Memory" to address the unfinished business of the transition.[37] The response on the right was immediate and outraged: the leader of the PP, Mariano Rajoy, accused Zapatero of "breaking Spain" and "re-opening the Transition," claiming that revisiting the past would

[35] For classic analyses in this vein, see Donald Share and Scott Mainwaring, "Transition Through Transaction: Democratization in Spain and Brazil," in Wayne A. Selcher (ed.), Political Liberalization in Brazil: Dynamics, Dilemmas, and Future Prospects (Boulder, CO: Westview Press, 1986), pp. 175-215; and Richard Gunther, "Spain: The Very Model of a Modern Elite Settlement," in John Higley and Richard Gunther (eds.), Elites and Democratic Consolidation in Latin America and Southern Europe (Cambridge: Cambridge University Press, 1992), pp. 38-80.

[36] The national umbrella group, which coordinates local membership groups, is the Asociación para la Recuperación de la Memoria Histórica, at http://www.memoriahistorica.org. See also Omar Encarnación, "Reconciliation after Democratization: Coping with the Past in Spain," Political Science Quarterly, vol. 123, no. 3 (2008): 435-459.

[37] See Stephanie R. Golob, *Volver*: The Return of/to Transitional Justice Politics in Spain, Journal of Spanish Cultural Studies vol. 9, no. 2 (July 2008): 127-141.

lead to the dissolution of the nation.[38] The law itself was then watered down, and was passed in late 2008 without a single PP vote, but pleasing no-one on the left; the debate, meanwhile, had taken an even more bitter turn that fall when Garzón announced his intention to investigate the crimes of the Franco regime,[39] which in turn set off the lawsuits which now stand him on the precipice of expulsion. For the government, the "historical memory" issue turned out to be political poison, and universal jurisdiction, backed by the same people who push uncomfortably for the same universalized view of rights at home, is equally not worth the fight.

**Concluding Thoughts about Windows Opened, Closed, and Shuttered**

In this paper I have sketched out the processes – international, domestic, and transnational – by which a window opened to allow Spain to serve as a site for the exercise of universal jurisdiction by its courts over the prosecution of heinous international crimes. At this writing, it appears that the window is quickly closing in Spain, brought on by both external pressure to close it and a lack of robust political incentives for domestic actors to fight to keep it open. If this is the end of an era, I would argue that there is more to the story than meets the eye. The Pinochet case had repercussions around the world, but aside from Chile itself, Spain emerged the most transformed. There were the contradictions that became visible: Garzón, invited to speak abroad as the champion of victims' rights, would find himself repeatedly confronted with young Spaniards asking what he planned to do about the unmarked graves and the impunity in his own country. Meanwhile the victims of state terror from all over the world flocked to its courts, setting off debates and raising popular awareness of anti-impunity ideas which had been off the table at the time of its own transition. In an earlier piece I wrote about the Pinochet case, I hypothesized that Chile faced a process of policy transfer – somewhat coercive, but still based on the adoption of new ideas, beliefs and practices – which helps explain the acceleration of justice in the domestic sphere in the realm of human rights and accountability for international crimes following the attempt by victims to seek justice abroad. Universal jurisdiction may now be limited in Spain's courts, but I would hypothesize that the judges of the AN who have participated in these cases have adopted new norms and perspectives which may yet have an impact on the domestic sphere similar to the impact seen in Chile. For example, even as Garzón struggles with his enemies, other judges might take future cases brought by victims of Franco, and the principles of universal jurisdiction – that certain crimes are offenses against all human beings and all nations and cannot remain unpunished or their victims unrecognized and uncompensated – may yet find their way into new rulings. Meanwhile, victims groups which had successfully (or nearly successfully) brought their cases to the AN may then also take an interest in the Spanish cases; already this year, the language of

[38] "Rajoy: 'Abrir heridas del pasado no conduce a nada,'" El Pais.com, Electronic Edition, September 2, 2008

[39] See Manuel Altozano, "Garzón lanza la mayor investigación sobre los desaparecidos del régimen de Franco," El País, September 2, 2008.
http://www.elpais.com/articulo/portada/Garzon/abre/mayor/investigacion/desaparecidos/Guerra/Civil/elpepipor/20080902elpepinac_1/Tes/

"the disappeared" as emerged as a new line of discourse for the historical memory movement in Spain, and over time it would be interesting to map how other terms and concepts from the international legal lexicon finding their way into the arguments and the approaches of a group which has been very focused thus far on maintaining a highly localized identity.

There are also other lessons to be learned about learning and policy transfer in asymmetrical international interactions from this analysis. It is clear from the responses of the U.S. and Israel that the "shaming" element which was effective in shifting perceptions within Chile towards a more accepting attitude towards retrospective justice was not operative in these two more settled and self-confident democracies. The shaming of Spain has been also been problematic, meaning that in spite of the gap between being the capital of universal justice and its own accountability deficits for Franco's crimes, a good portion of society (and elites in government) continue to believe that returning to the past would hurt democracy, and that impunity at the transition helped democracy. In the U.S. and in Israel, there is a similar reticence, particularly among government officials, to prosecute past offenses; in Israel particularly and in the U.S. under Bush, there was also the suspicion that accusations of 'war crimes' were subjective and meant to punish power as well as the crimes. The threat of a suit in the AN against former Bush administration officials did not lead President Obama to move ahead any quicker on a domestic investigation, in order to make the case that U.S. sovereignty would be adequate to enforce international law. If anything, his strategy was to stop the Spanish investigation. Israel did produce a domestic investigation as its evidence that its jurisdiction should prevail, but it has done little to advance a civilian investigation as asked by the Goldstone report, which was critical of the internal military investigation. In all three cases, leaders adopt a similar line that Chile's government did, but they can argue, with greater credibility, that they deserve their sovereignty and will exercise it properly. Whether it was sovereignty or power that produced this outcome, either way the relative institutional stability, legitimacy, and resources of the target state matter in policy transfer and in norm diffusion.

Finally, these processes advancing international legal norms across borders depend on how receptive the domestic environment is to them. And in the case of universal jurisdiction, if powerful countries do not accept the principle and are not willing to practice it, and citizens of smaller countries have nowhere to go, we may be looking at the shuttering of the window. In the U.S., Israel and Spain, a volatile combination of government insecurity, economic pressure, international defensiveness and right-wing agitation at home have precluded the honest assessment of the past and of who is responsible for it. In these cases democracy itself – the exigencies of electoral politics, a vibrant (if polarized) civil society, and the open (and often overwrought) media – may yet work in favor of impunity and against the recognition and protection of human rights. It will take a concerted effort by those favoring the expansion of these norms – civil society groups, academics, legal professionals, and judges who communicate across borders – to counteract these forces which, in the name of democracy, would make our world, and our claims to universal human dignity, that much more limited.