In defense of Universal Jurisdiction[1]

A step backwards for democracy, a clear path towards impunity.

On May 19th, 2009, the PP (conservatives) and the PSOE (socialists) agreed to limit the exercise of justice or universal jurisdiction. Said draft resolution, initially submitted by the PP, as proposal number 72, was approved in the terms of amendment 196 of the Socialist Group, with 339 votes in favor, eight against and one abstention.

We cannot ignore that said modification was proposed by the Popular Party in the measures drafted for the urgent reforms of the Judicial System, amended by the Socialist group by means of the "*Amendments to the Project of the Procedural Legislation Reform for the Establishment of the Judicial Office Act [Enmiendas al Proyecto de Ley de Reforma de la Legislación Procesal para la Implantación de la Oficinal Judicial]*", in other words, it lacked sufficient preparation and discussion in accordance with the seriousness and importance of the adopted measure (which was not included in their electoral programs).

In the terms in which it was approved, the idea is to reduce exercise of universal jurisdiction only to cases in which there is the so-called *national connection* (that there be Spanish victims, any relevant link or connection that the courts must satisfy or that the perpetrators be in Spain).

We have been observing for some time interference with appropriate jurisdictional bodies (Central Magistrates' Courts), with criticism by political leaders and different judicial bodies trying to place political and economic criteria as a priority in respect to the exercise of universal jurisdiction and the defense of human rights.

Thus, the week prior to the debate on the State of the Nation, in which the said resolution was approved, began with declarations by the President of the Supreme Court, Carlos Divar, requesting restrictive legislative modifications of the said institution, questioning that Spain become the "world's judicial gendarme".

Said phrase, uttered at an informative meeting, were reproduced in the media on Sunday May 10th 2009, with the majority of Spanish newspapers, either in editorials or in articles, reproduced the same arguments, the political and diplomatic problems that allegedly universal jurisdiction caused Spain, the lack of effectiveness of said proceedings, the principle of non-interference in the affairs of other countries and the situation of collapse of the judicial system.

We must respond to said reasoning, which try to convert into truths, through simple repetition, arguments which do not correspond to reality.

First of all, because of its seriousness, we cannot ignore that at this point of time the principle of non-interference in the internal affairs of other countries is upheld, when we are speaking of the most serious violations of human rights and of the action of prosecuting the perpetrators of said violations. In 2000[2], Roberto Garretón Merino, Rapporteur of the United Nations on Human Rights in the Democratic Republic of the Congo, stated

"(…) At present the discussion of the nature of the respect of human rights as a domestic affair has been overcome. It was debated for years – and some countries known for oppressing their peoples still insist on the discussion.…".

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[1] Antonio Segura and Raul Maillo, lawyers who participate in proceedings for war crimes and universal jurisdiction, Madrid, May 24th 2009.
Translation by: Catherine Germman Priest

So it is inadmissible that now their exists an attempt to avoid persecution and prosecution of persons guilty of acts of genocide and war criminals with the argument of national sovereignty of the states of which said criminals are nationals [3].

Furthermore, we cannot forget that Spain has subscribed certain international conventions and treaties which it cannot back away from and create a *de facto* reservation in respect to effective compliance with said treaties and conventions and prosecution of the persons responsible of the acts they pursue. We must remember that the Geneva Conventions and their protocols establish the obligation of the contracting parties to search for the persons responsible of committing or ordering the commission serious infractions of these conventions, and to make them appear before their own courts or hand them over to another contracting party to be tried.

War crimes, crimes against humanity and genocide are part of International Criminal Law, are of an imperative nature, *ius cogens*, are irrevocable and are binding *ergam* omnes[4] (with respect to everyone).

References to collapse of the judicial system cannot be upheld when we are dealing with about twelve proceedings, and there have been numerous strikes of both judicial civil servants, like the last strike of judges, certainly unusual, because of lack of resources, and in which universal jurisdiction has no connection with said collapse and lack of resources of courts and tribunals in Spain (of pending cases only 0.0005% are connected with universal jurisdiction).

Likewise, the diplomatic problems that it could generate do not seem to be reason to breach international rules which bind us, nor to allow protection from the action of justice persons guilty of crimes of genocide or war crimes. Neglect of the victims, refusing them access to universal jurisdiction, cannot be the price to pay in order to do business beyond our borders and thus avoid the alleged problems in connection with Spanish economic interests.

With the exception of the Judges' Association Francisco de Vitoria, which has been favorable, initially, to the approved restriction, both the Professional Association of Magistrates and the association Judges for Democracy have expressed their disagreement, on the grounds that it denatures the institution of universal jurisdiction and basically makes it disappear.

Lastly, we must reject the argument regarding the effectiveness of said proceedings because we are not dealing with a legal system in which it is possible to not pursue offenses if it is believed that the proceedings are not going to end in imposing sentences.

Furthermore, those arguments ignore that the effective exercise of universal jurisdiction has led to final sentences and that the objectives of general and special prevention are met if international treaties are not merely international texts with no practical application.

Such limitation of universal jurisdiction cannot be accepted and we must support the following words[5] "(…) *To demand another connection other than the one arising from the principle of universal jurisdiction inevitably leads to reject said principle*".

Universal jurisdiction depends on its effectiveness and making it disappear entails violating its own essence; thus "(…) *Universal jurisdiction entails declaring that certain violations of fundamental rights are so serious that it does not matter where they were committed the nationality of who perpetrated them or of the victims. They are relevant because they are serious acts against human beings and in this sense, they are the competence of each and every state*"[6].

As the Supreme Court had previously held"(…) *in these cases it is legitimate that a State assume the defense of the interest of the international community and criminally pursue individuals by virtue of the principle of individual responsibility.*"

In respect to the so-called *national connection*, we cannot forget that the Public Prosecutor's office has opposed the active prosecution and has defended that Spanish courts are not competent to try numerous proceedings in which said connection existed, like in Chile, Argentina, the assassination of the Spanish journalist José Couso or the proceedings followed in respect to Guantanamo.

The figure of covering up consists of avoiding judicial investigation, of avoiding the action of justice, and it is certainly surprising that Spanish lawmakers seek to aid those who in the face of proceedings for war crimes or crimes against humanity do not deny the facts, do not argue that they are not responsible for said acts, but simply try to avoid the action of justice which at this moment the state seems to be allowing them to do.

In conclusion we must point out that we face a moral and legal obligation to defend universal jurisdiction and its effective exercise, when in the midst of criminal expansionism, when minor slander between individuals has not yet been decriminalized, when more offenses entailing abstract risks are regulated as a solution to multiple matters, such as road safety infractions, an attempt is made to renounce to the exercise of universal jurisdiction in respect to the most serious acts against the international community.

If the rule is finally amended in the sense approved a few days ago, those who approve it and those who defend it will have to look straight to the victims and tell them that their justice has been forsaken in favor of diplomatic relations, of international business or to lighten a judicial system historically collapsed.

Universal jurisdiction only harms criminals who remain unpunished, or those who plan to continue violating human rights in the future.

No one can defend this modification without becoming accessory to some and accomplices of others.

Antonio Segura Hernández and Raúl Maíllo, lawyers who participate in proceedings for war crimes and universal jurisdiction, Madrid, May 24th 2009.

1 In this sense, the newspaper El Mundo defended its restriction in an editorial, reproducing the same arguments in the interview of Ángel Juanes (Pres. of the National High Court) and in the same sense, the other newspapers El Periódico, La Razón and ABC. Even though the headline of El País echoed the arguments in favor of restriction, alternated arguments in favor and against and editorials in both directions. The newspaper La Vanguardia, in an editorial, raised both arguments and the newspaper Público, as an exeception, maintained a line of defense of universal jurisdiction.

2 PLecture given at the 12th Seminar Duque de Ahumada, organized by the School of Law of the Distance Education University and the Academy of Officers of the Civil Guard, published in AAVV, "Crímenes contra la Humanidad y Genocidio", ed. Ministerio del Interior, 2001.

This quote is made irrespective of whether its author agrees or not with its use or with the contents of this text, precaution which must be interpreted to apply to all the quotes in this paper, in order to omit constant notes with this same content.

3 Serrano Piedecasas, José Ramón, pages 194 and 195, AAVV, "Crímenes contra la Humanidad y Genocidio", ed. Ministerio del Interior, 2001, upholds, in connection with intervention in the sovereignty of any state, "(…) *This type of reasoning is based on a totalitarian concept of national sovereignty. The concepts of borders, territory and sovereignty can never be used as obstacles to a criminal investigation. It is ridiculous that the same rulers who on one hand strongly defend the unrestricted circulation of capital and goods on the other invoke sovereign intangibility when it comes to protecting those from State bodies planned and executed the extermination of large sectors of the population*".

4 In this sense, AAVV, "Derechos Humanos Y Desarrollo", ed. Icaria, Hormazábal Malareé, Hernán,

“Notes on the principle of criminal legality in criminal international laws, on the crime of genocide and the appropriationg of natural resources and humanitarian aid”.

[5] García Arán, Mercedes, page 150, AAVV, “Crímenes contra la Humanidad y Genocidio”, ed. Ministerio del Interior, 2001.

[6] Fernández-Pacheco Estrada, Cristina, Información y Debate, nº 61, marzo/2008, edita, Jueces para la democracia, páginas 101 a 116