On Universal Jurisdiction—Birth, Life and a Near-Death Experience?

Helena Gluzman
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ABSTRACT

This paper investigates the topic of universal jurisdiction, i.e. the supranational prosecution and repression—without the necessity of a link between the accused and the prosecuting state—of crimes of such gravity and magnitude as to collide with certain core values accepted by the international community and transcending the peculiarity of national interests. The focus of the chapter is exactly to try and discern the scope of universal jurisdiction, distinguishing between the two different versions of universality theorized by contemporary authors: ‘conditional universal jurisdiction’, which requires the presence of the accused in the prosecuting state, and ‘absolute universal jurisdiction’, according to which the accused does not have to be present in order to make the exercise of universal jurisdiction possible. As a matter of fact, only a handful of states currently possesses national legislation covering the exercise of ‘absolute universal jurisdiction’, as a confirmation that, notwithstanding the general scholarly consent in recognizing the existence of a universality principle, no agreement actually exists about this principle’s content. By means of an historical overview of the most noteworthy examples of implementation of universal jurisdiction, Helena Gluzman displays various arguments against it—e.g. its administrative costs, the local concern connected to its enforcement and the related risk of political manipulations, the criticalities related to the need of granting the accused a due process of law—showing the shortcomings of such jurisdiction with particular regard to its less well accepted form (the ‘absolute’ one), whose theoretical foundations seem to have been historically undermined by the Nuremberg and Eichmann experiences. Prominent exercises of absolute universal jurisdiction, however, also illustrate its practical pitfalls, as the associated political and administrative costs seem to widely outweigh the benefits of universality.
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I. INTRODUCTION

Certain crimes are of such gravity and magnitude as to warrant universal prosecution and repression, requiring no link between an accused and a prosecuting state beyond the heinous nature of the crime. Bassiouni writes that this ‘universalist position recognizes certain core values and the existence of overriding international interests as being commonly shared and accepted by the international community and thus transcending the singularity of national interests’.\(^\text{1}\) Therefore, any State is authorized to substitute itself for the natural jurisdictional forum if justice has not otherwise been served, in order to ‘produce deterrence, prevention, and retribution, and ultimately … enhance world order, justice, and peace outcomes’\(^\text{2}\).

Arbour writes that it is ‘generally accepted that universal jurisdiction may be exercised over a wide range of international crimes, such as … war crimes and crimes against humanity, as well as genocide’\(^\text{3}\). Thus, she expects a continued growth within the scope of universal jurisdiction exercised by national courts over international crimes, a growth that will be undertaken in addition to the work of the International Criminal Court (ICC)\(^\text{4}\). However, Cassese, a fellow proponent, acknowledges the continued debate regarding universal jurisdiction:

> It is clear that … we are witnessing a confrontation between two different conceptions of the international community. The first is an archaic conception, under which non-interference in the internal affairs of other States constitutes an essential pillar of international relations. The second is a modern view, based on the need to further universal values; it implies that national judges are authorized to circumvent, if not remove, the shield of sovereignty\(^\text{5}\).

In light of this debate, it is not surprising that ‘very few’\(^\text{6}\) states have national legislation authorizing the exercise of absolute universal jurisdiction. Further, Bassiouni writes that no state practice currently exists with regard to exercising universal jurisdiction. However, as Reydams writes, ‘[n]early all contemporary authors recognize the existence of a universality principle. The

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\(^2\) Ibid 97. A general limit to universal jurisdiction is that

> [W]hen a state relies upon universal jurisdiction for its power to enforce, a state necessarily has to be ... subordinated to the jurisdictional claims of other states seeking to exercise their criminal jurisdiction when such claims are based on weightier interests and are sought to be exercised effectively and in good faith.


\(^4\) Arbour also speculates that ‘a consensus could develop that it is cheaper and more efficient to encourage the widespread exercise of universal jurisdiction by member states, than to fund to its fullest the default jurisdiction of the ICC’ (Arbour (nt 3) 587). However, it is also possible that ‘[i]n the future, … states may fail to exercise universal jurisdiction themselves … because the ICC, to which they now make regular budgetary contributions, exists and can itself prosecute’ (WW Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2008) 49 Harvard Journal of International Law [HJIL] 53, 64).


\(^6\) Bassiouni (nt 1) 105.
issue is therefore not its existence, but its content or scope’. Discerning the scope of universal jurisdiction will be the focus of this paper.

To clarify its scope, it is useful to separate two different versions of universality that have emerged. The first and more widespread form is conditional universal jurisdiction, which requires the presence of the accused in the prosecuting state to trigger the exercise of universal jurisdiction. The second is absolute universal jurisdiction—the accused does not have to be in custody or present in the state in order to be prosecuted. However, trials in absentia are often prohibited by national legislation, so the state may only be able to go so far as to initiate the criminal investigation in absence of the accused and issue a warrant for his arrest. Nevertheless, it is apparent that, due to the presence requirement, conditional universal jurisdiction is less far-reaching than the absolute form. Keeping the two forms of universal jurisdiction distinct goes some lengths towards identifying why some exercises of conditional universal jurisdiction have succeeded with little backlash (the Rwandan case, below), while others (ie exercises of absolute universality) have produced high political costs (the complaint against President Bush, below).

Moreover, it will be argued that the exercise of universal jurisdiction (in either form) has tentative roots. Piracy, which is heralded as an established crime capable of supporting universal jurisdiction, was significantly different from the modern crimes falling under the net of universal jurisdiction. Also, the two most commonly cited instances of universal jurisdiction in the 20th century—the Nuremberg tribunals and the Eichmann trial—may have only employed it as a secondary basis of jurisdiction, relying primarily on more traditional bases for jurisdiction. In addition, this paper will examine the theoretical criticisms of universal jurisdiction, many of which have been borne out by practice through the turbulent experiences of Belgium and, to a lesser extent, Spain, indicating that the costs of universality may outweigh its benefits. Seen in this light, these somewhat uncertain roots may prove sufficient to support the growth of the less politically volatile conditional universal jurisdiction but not that of absolute universal jurisdiction.

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8 Cassese (nt 5) 285. Bottini writes that ‘[m]uch of the confusion and controversy surrounding this jurisdictional ground derive from the frequent use of the term to describe concepts that are quite different’ (G Bottini, ‘Universal Jurisdiction after the Creation of the International Criminal Court’ (2004) 36 International Law & Politics 503, 510).

9 A common formulation of conditional universal jurisdiction is that ‘the exercise of universal jurisdiction for acts performed abroad by foreigners against foreigners would necessitate the presence of the suspects on [the] territory’ of the prosecuting state (H Ascensio, ‘Are Spanish Courts Backing Down on Universality? The Supreme Tribunal’s Decision in Guatemalan Generals’ (2003) 1 JICJ 690, 693 (original emphasis)).

II. THE ROOTS OF MODERN UNIVERSAL JURISDICTION: PIRACY, NUREMBERG AND EICHMANN

A. Piracy

Most writers cite piracy as the first crime of universal jurisdiction recognized by the international community. In his seminal article, Randall rooted the rationale for contemporary universal jurisdiction in piracy:

A[n] … accurate rationale for not limiting jurisdiction over pirates to their state nationality relies on the fundamental nature of piratical offenses. Piracy may compromise particularly heinous and wicked acts of violence or depredation, which are often committed indiscriminately against the vessels and nationals of numerous states …. [P]irates are the enemies of all people and are punishable by every state because of the threatening acts they commit ….12

Thus, in order to allay fears of inappropriate encroachment on state sovereignty, universal jurisdiction with regard to other international crimes is depicted not as a new departure, but rather an application of the well-settled principle that the most heinous offenses invoke universal enforcement. For instance, Randall drew comparisons between piracy and the exercise of universal jurisdiction over Nazi war crimes: ‘Like piracy, the Axis’ offences involved ‘violent and predatory action’, which descended to the level of bestiality …. [B]ecause the universality principle applies to piracy, it must a fortiori apply to the more serious crimes committed by the Axis powers. While piracy was often committed indiscriminately against the nationals of all states, the Nazi offenses ‘imperilled civilization’.13

There is doubt, however, about the utility of comparing piracy to the Nuremberg trials. Scharf and Fischer write that ‘there has never been a successful prosecution in any country for piracy without the prosecuting state’s jurisdiction being based on the nationality of the offender, the nationality of the victims, the nationality of the victim ship, or the territory where the act occurred’.14 Moreover, Kontorovich writes that modern universal jurisdiction cannot be rooted in the same rationale as that underlying ‘piracy’s unique jurisdictional status’.15 That is, the rationale for piracy could not have been based on the heinousness of the offence since past generations did not consider piracy to be heinous, unlike the human rights violations at which modern universal jurisdiction is aimed.16 Thus, modern universal jurisdiction must turn elsewhere for justification.

Similarly, Sammons argues that

[W]ithout an analysis of sovereignty and a finding of terra nullius, the justification for asserting jurisdiction over a crime solely because it is ‘heinous’ is erroneous and suffers from circular reasoning …. The basis for the assertion of universal

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13 Ibid 803-04.
14 Scharf & Fischer (nt 11) 228.
16 Ibid 185-6.
jurisdiction does not rest on the … ‘heinous’ nature of the crimes committed ….
Though appealing in its vindication of the interests of justice, this rationale does not
acknowledge the original justification for asserting jurisdiction over pirates, ie states
prosecuted them wherever found because they operated in *terra nullius* ....¹⁷

This observation also serves to distinguish universal jurisdiction for such offences as war crimes
from that of piracy. That is, acts of piracy were considered to be committed outside the
jurisdiction of any state,¹⁸ therefore not impinging on the sovereignty of any state. Universal
jurisdiction for piracy therefore avoids the spectre of encroachment on state sovereignty that
seems to underlie criticisms levied against universal jurisdiction, that is, its potential for political
manipulation and the attendant consequences for the justice system of the territorial state
(discussed below). Not only was the rationale for universal jurisdiction over piracy not as simple
as Randall asserts, but its exercise avoided a key pitfall of modern universal jurisdiction. Thus, it
appears that universal jurisdiction in the 20th century is much more of a departure than
proponents might admit.

B. Nuremberg

Proponents might respond to the above observation regarding piracy that even if this older
foundation is somewhat shaky, the events of World War II and the subsequent trials provide firm
ground for universal jurisdiction’s legitimacy. Surveying international texts for mention of
universal jurisdiction, Reydams writes that ‘[l]ittle pertinent data could be found in the period
before World War II. Only three out of some hundred multilateral conventions with penal
characteristics establish a form of universal repression’,¹⁹ each of the relevant offences involving
a transnational element. However, Teitel writes that the adjudication of Nazi war crimes by the
Nuremberg tribunals means that ‘violations of the ‘law of nations’ [can] be prosecuted by any
state, under universal jurisdiction .... Nuremberg has transformed our understanding of
jurisdiction’.²⁰ In the same vein, Simons writes that the goal of the tribunals was ‘bringing
accused war criminals to account on behalf of the entire world community of civilized nations’.²¹
Eser also relies on Nuremberg (as well as *Eichmann*, below) to assert that universal jurisdiction
was ‘welcome in former times’²² and therefore not easily rebuttable in the present.

However, universal jurisdiction was not the only basis for jurisdiction available to the Allied
powers. The Allies ‘exercised *de facto* sovereign prerogatives over the occupied territories where
these tribunals were established’,²³ enabling them to enforce international criminal law as if in
the shoes of the territorial state. Thus, Morris writes that

¹⁷ A Sammons, ‘The ‘Under-Theorization’ of Universal Jurisdiction: Implications for Legitimacy on Trials of
¹⁸ MA Summers, ‘The International Court of Justice’s Decision in *Congo v. Belgium*: How has it affected the
development of a principle of universal jurisdiction that would obligate all states to prosecute war criminals?’ (2003)
21 Boston University Journal of International Law 63.
¹⁹ Reydams (nt 7) 79.
²⁰ R Teitel, ‘Nuremberg and its Legacy: Fifty Years Later’ in B Cooper (ed), *War Crimes: the Legacy of
²¹ WB Simons, ‘The Jurisdictional Bases of the International Military Tribunal at Nuremberg’ in G Ginsburgs &
52.
²³ Bassiouni (nt 1) 91.
While the view that the Nuremberg tribunal exercised universal jurisdiction has gained considerable currency, the alternative hypothesis, that the Nuremberg tribunal’s jurisdiction was based on the Allies’ governmental authority within post-war Germany, comports more consistently with the historical evidence. The Allies exercised judicial and all other powers of sovereignty over Germany. At a minimum, the Allies, acting in their capacity as the effective German sovereign, consented to the prosecutions of German nationals at the Nuremberg tribunal. A maximalist reading would be that the Nuremberg prosecutions were actually an exercise of national jurisdiction by the effective German sovereign, the Allies.

The reliance of the Nuremberg tribunals themselves on universal jurisdiction, as evidenced by their judgements, is not clear-cut. It is interesting to note that the judges addressed the issue of jurisdiction only very generally. Allusions to universal jurisdiction appear vague, and judgements often referenced other bases of jurisdiction. The clearest invocation of universality is as follows: ‘The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law.’ As Randall comments, this is far from ‘conclusive’ evidence with regard to any primary role that universal jurisdiction may have played, indicating instead that it played only a secondary or ‘auxiliary’ role. Thus, although it is fair to say that universal jurisdiction played a role, it is equally fair to say that any assertion that the Nuremberg tribunals provide a ringing endorsement (and precedent) of universal jurisdiction is an oversimplification.

C. Eichmann

Israel’s prosecution of the Nazi leader Eichmann, a member of the Gestapo who was in charge of administering the ‘final solution’, is generally cited as the first exercise of universal jurisdiction post-Nuremberg. In Attorney General of the Government of Israel v. Eichmann, the District Court did recognize universal jurisdiction:

The[se] abhorrent crimes … are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself. Therefore, far from international law negating or limiting the jurisdiction of countries with respect to such crimes … the international law is in need of the judicial and legislative authorities of every country,

25 Randall (nt 12).
27 Randall (nt 12) 806.
28 Eser (nt 22) 956. Simons writes that ‘[w]e are still left without any clear or convincing answers as to why the IMT Judges failed to address the subject of jurisdiction more fully than they did ... and to at least reference if not assert this broadest of jurisdictional bases’ (Simons (nt 21) 58-9).

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to give effect to its penal injunctions and bring criminals to trial. The jurisdiction to try crimes under international law is universal.

The Supreme Court of Israel agreed that ‘the peculiarly universal character of these crimes … vests in every State’\textsuperscript{30} the right to try and punish the accused. In \textit{Demjanjuk v. Petrovsky},\textsuperscript{31} a U.S. circuit court, in allowing the extradition of Demjanjuk, also relied on Israel’s right to exercise universal jurisdiction over the crimes allegedly committed. Lively C.J. wrote that

Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial …. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations ….\textsuperscript{32}

However, it is arguable that universal jurisdiction was only secondary in \textit{Eichmann}. Since Israel is the Jewish state and the victims of the crimes in this case were Jewish, passive personality seems to give a stronger basis for Israel’s jurisdiction. The District Court wrote as follows:

The State of Israel’s ‘right to punish’ the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assaults its existence. This second foundation of criminal jurisdiction conforms … to the protective principle …. The ‘linking point’ between Israel and the accused is striking in the case of ‘crime against the Jewish people’ [under the Israeli Nazi and Nazi Collaborators (Punishment) Law], a crime that postulates an intention to exterminate the Jewish people in whole or in part ….\textsuperscript{33}

Thus, Bassiouni does not believe that \textit{Eichmann} provides strong support for universal jurisdiction. Although the reach of Israel’s law is universal with regard to crimes against the Jewish people, its exercise is based ‘on a nationality connection to the victim that places such jurisdictional basis under the “passive personality” theory’.\textsuperscript{34} Kontorovich agrees that even if universal jurisdiction did exist for Eichmann’s crimes, the jurisdiction actually used by Israel was not universal. Israel’s jurisdiction relied on ‘particular, rather than universal, grounds because of its unique connection to the offense. Israel was the sole sovereign representative of the Jewish people, as well as the nation where many of the victims took refuge … [providing a] parochial Jewish jurisdiction’.\textsuperscript{35}

\textsuperscript{30} \textit{Attorney General of Israel v. Eichmann}, Israel, Supreme Court 1962, 36 ILR 277.
\textsuperscript{31} 776 F.2d 571 (6th Cir. 1985).
\textsuperscript{32} \textit{Ibid} 582-83.
\textsuperscript{34} Bassiouni (nt 1) 137.
\textsuperscript{35} Kontorovich (nt 15) 197. See also Fletcher, below, on parochial versus universal crimes. Becker states that ‘[t]he Eichmann case was not, strictly speaking, a case of universal jurisdiction. Jurisdiction there was founded essentially on the passive personality principle …. [T]he link between the prosecution and the State of Israel was
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In sum, universal jurisdiction played at most a supporting role in these cases stemming from World War II, and was confined to a very unique set of circumstances that threatened all of civilization. As Orentlicher concludes, even ‘if universal jurisdiction for certain atrocious crimes was well established at law, it was just as well understood that it had scant relevance to the practice of states outside the special context of Nazi-era crimes’. The roots of universal jurisdiction therefore do not seem to run as deeply or widely as proponents might like.

III. CRITICISMS (AND RESPONSES) OF UNIVERSAL JURISDICTION

Bottini writes that ‘[a]llegations that universal jurisdiction would lead to chaos have proven to be unfounded thus far. Yet the absence of widespread problems in its operation may be attributed to the following: the doctrine was only recently extended to crimes other than piracy; its application remains negligible; and many states still reject its validity altogether’. Thus, it is useful to consider various strands of argument against universal jurisdiction, including: administrative costs, political manipulation, neo-colonialism, due process, and local concern.

A. Costs

International law reduces transaction costs by avoiding the need for the potentially large costs associated with broad, multilateral treaties. However, Kontorovich writes that absolute universal jurisdiction’s ‘broad distribution of prosecutorial entitlements increases the cost of settling disputes. Sometimes the increase in cost is significant enough to scuttle arrangements that would result in a net increase in global welfare’. Cassese identifies one such cost: ‘if the accused never enters the country where the court is located, or is not extradited to that country, a situation that appears most likely, the judge will end up investigating hundreds of complaints about which he can do nothing’. The administrative burden to the national system may be high, while the only benefit may be a temporary increase in public scrutiny with regard to the impugned individual’s actions.


37 Bottini (nt 8) 549-50.


39 Ibid. Cockayne also notes that ‘territoriality remains the central basis for criminal jurisdiction ... [in part because] most other forms of jurisdiction are relatively impractical and inefficient. The administrative costs and the probative uncertainties that arise in extra-territorial prosecutions ... make them the least-preferred option of national prosecutorial authorities’ (J Cockayne, ‘Review Essay: On the Cosmopolitization of Criminal Jurisdiction’ (2005) 3 JICJ 515, 522).

40 Cassese (nt 5) 290.

41 One illustration is provided by Germany’s experience. Ambos writes that

[T]he jurisdiction of German Courts rests—indeed of the place of commission and other statutory links for the exercise of jurisdiction—on the genuine or ‘true’ principle of universal jurisdiction, ie universal jurisdiction in a broad sense.... From the entry into force of the German Code of Crimes against International Law, up until September 2006, there had been 57 petitions filed for alleged crimes codified in this law. Most of the petitions relate to the conflict in the Middle East, as well as the war in Iraq and its aftermath .... So far, the initiation of the proceedings in 49 cases has

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Conditional universal jurisdiction circumvents the above problem since it presupposes the presence of the accused. However, it is not clear what would satisfy the criterion of ‘presence’ (merely a short presence as for a vacation?), adding a different set of costs. In addition, as Roht-Arriaza writes, presence of the accused is required for the judicial process to begin, but ‘at what point does the defendant have to be present?’\(^\text{42}\) Can a court investigate and issue an arrest warrant, and only later satisfy the presence requirement via extradition? Extradition is likely to be denied in such scenarios; moreover, surveying state practice, Reydams suggests that the presence of the accused must be voluntary, striking out the possibility of extradition as satisfying this condition.\(^\text{44}\) Thus, making an arrest would seem impossible because ‘ex-dictators and torturers are unlikely to linger somewhere long enough for a conscientious judge to put a dossier together, at least once they get wind of an investigation’.\(^\text{45}\) In such cases, conditional universal jurisdiction may not increase administrative costs, but it also will not have the envisioned effect of bringing an accused to justice; instead, it will cause such individuals to stay in their home countries.

**B. Politics**

As Becker notes, ‘[w]e should … not pretend that the pursuit of universal jurisdiction in countries such as Belgium … is purely altruistic’.\(^\text{46}\) Rather, such prosecutions may become a tool for furthering the political agenda of the prosecuting nation, or, where investigations can be initiated by private parties, of particular interest groups.\(^\text{47}\) The political bias inherent in universal jurisdiction is compounded by its potential for deep interference with state sovereignty. That is, exercises of universal jurisdiction may require subpoenas to be issued with effect in foreign jurisdictions, or require the government of the territorial state—a government that has chosen not to prosecute these offences—to allow a foreign jurisdiction to use its legal processes to gather

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\(^{42}\) Roht-Arriaza notes that Congo’s Inspector General of the Army ‘had a house in France that he visited regularly, which allowed a local French magistrate to open a criminal investigation’ for crimes against humanity and torture. (N Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, Philadelphia 2005) 188). The fact of owning a residence which one visits regularly suggests that a short, one-time vacation would be insufficient to meet a presence requirement.

\(^{43}\) \textit{Ibid} 192.

\(^{44}\) Reydams (nt 7) 187.

\(^{45}\) Roht-Arriaza (nt 42) 192.

\(^{46}\) Becker (nt 35) 482.

\(^{47}\) Kissinger expresses concern that universal jurisdiction could be used as a

[W]eapon ... to settle political scores .... To be sure, human rights violations, war crimes, genocide, and torture have so disgraced the modern age ... that the efforts to interpose legal norms to prevent or punish such outrages does credit to its advocates. The danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts.

evidence, presenting potential for significant interference in that nation’s domestic affairs. As Rubin writes, ‘the likelihood of serious disagreement seems obvious’. Eser acknowledges that assertions of universal jurisdiction may be motivated only by political bias or factionalism. However, he responds that this problem is not unique to universal jurisdiction, but rather inheres in exercises of jurisdiction based on nationality or territoriality to similar degrees. Moreover, he emphasizes that—because universal jurisdiction is generally asserted with regard to international crimes, which are ‘classic examples of ... ‘state-supported crimes’—political bias should be of greater concern with regard to the reasons underlying the unwillingness of the territorial or national state to prosecute. Therefore, in his view, the problem of political bias instead helps to show ‘why we need impartial and neutral jurisdiction by countries that are not directly involved’ and therefore better able to uphold universal values.

The implication of Eser’s argument is that the political bias—upon which opponents of universal jurisdiction heavily rely—is perhaps less troubling for this form of jurisdiction as opposed to other forms. Indeed, Ratner and Abrams write that ‘[t]rials by outside states can avoid many of the political tensions of proceedings where the crime occurred and represent a promising avenue for enforcing international criminal law’. However, such minimization of the political bias problem does not offer a solution to the degree of political bias that both sides do acknowledge. Moreover, the experience of Belgium (discussed below), which has pulled back considerably from its initially broad stance on absolute universal jurisdiction, shows the dangers of political bias in action. Indeed, ‘Belgium’s Foreign Minister … acknowledged that ‘the noble cause that prompted the parliament to adopt this law [on universal jurisdiction] was hit with abuse and manipulated for political ends’, ultimately leading to significant reforms.

C. Neo-colonialism

Politics appears in a different guise when one considers that the pattern of exercises of universal jurisdiction appears to be that of Western (often ex-colonial) nations using it as a tool to prosecute non-Western nationals and leaders. Thus, Rabinovitch writes that universal jurisdiction may be ‘a means of imposing Western values on weaker developing nations’.

In response, Colangelo emphasizes the caveat that universal jurisdiction is ‘a last resort option’ in case the national or territorial state does not prosecute, minimizing the potential for colonialism. Roht-Ariaza also hopes that this imbalance is only a temporary one that will

49 Ibid 270.
50 Ibid (nt 22).
51 Ibid 962.
52 Ibid.
53 Eser also writes: ‘the principle of universality must not totally be abolished, but rather be ‘tamed’.... For otherwise, crimes against universally recognized values—particularly if committed or supported by a state’s agents against own co-citizens and therefore not prosecuted by the state concerned—would remain unpunished’. To reinforce this claim, Eser tugs at the conscience of opponents: ‘[t]his category [of unpunished crimes] would include the terrible crimes of Eichmann and the war criminals of Nuremberg—a result hardly reconcilable with true justice’ (ibid 958).
55 Bottini (nt 8) 555. Bottini adds that the likelihood of such abuse is high.

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disappear as democracy and the rule of law spread, removing the opportunity for established democracies to meddle in the affairs of emergent states while they are caught in a volatile transitional period during which the mechanisms and expertise necessary for domestic prosecution may not be sufficiently developed.  

However, Rubin writes that

[I]t can be predicted that states that dominate in economic, military, political, and other areas will continue to regard their moral insights as binding on their neighbours (as they always have), while smaller or weaker states will resent the imposition of ‘foreign’ values … . [I]t is doubtful that these attempts to expand municipal jurisdiction to prescribe or adjudicate, even in the guise of purporting to speak for the ‘international community’, will be successful for long or achieve the results sought.

D. Due Process, and the Conflict of Interest Between Accused and Victims

Universal jurisdiction presents concerns about due process since it potentially subjects an accused to prosecution in any country. Of concern is that the accused ‘may have no connection with the vast majority of competent countries and may not possess any knowledge of their laws, penalties, or criminal procedures’, raising the spectre of trial unfairness.

Focusing on the problem of due process, Fletcher writes that ‘universal jurisdiction is both unwise and unjust’. He begins his critique with ‘an obvious point, easily forgotten’, namely that there are at least two sides to every criminal case, the ‘first and foremost [being …] the side of the accused … [who] has the most to lose from an unfair prosecution’. However, claims of universal jurisdiction demonstrate that priority is given to the interest of the victims.

58 Roht-Arriaza writes:

This imbalance may necessarily be a fact of life, at least for now—after all, it is easier to keep track of dictators who travel to rich countries, where the exile and activist networks that sustain investigations tend to be strongest—but it is an uncomfortable fact. A truly universal system of justice would be more balanced.

Roht-Arriaza (nt 42) 181.


On the other hand, Brown writes that

[s]tate interests are no longer the be-all and end-all of international law. That law rises above the narrow interests of any state in recognizing the universal jurisdiction of all to prosecute those responsible for certain special crimes of concern to the entire international community. It follows that no state has a legitimate interest shielding its nationals from criminal responsibility for genocide, crimes against humanity or the most serious war crimes. Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights, which has little relevance to modern practice.


60 Bottini (nt 8) 551.


62 Ibid.

63 Ibid. Becker shares this view:

[The fact that some scholars and judges are willing to entertain the idea that universal jurisdiction allows for prosecutions in absentia and does not respect traditional immunities is testimony to the precedence given by some to combating impunity. In the view of these advocates, preventing impunity is more important than guaranteeing the rights of the accused to be present at trial or
Of particular concern to Fletcher is the guarantee against double jeopardy, which may have the consequence ‘that we deliberately let some guilty offenders go free. A commitment to the decent treatment of every accused means that justice is imperfect. There will be gaps, injustice, and some regrettable outcomes’ 64 which thwart the victims’ claim to justice. When the interests of the accused and the victims do conflict in this manner, domestic criminal law usually maintains that the interest of the accused will trump. However, the victims’ interests take precedence in universal jurisdiction. Thus, ‘[t]here is no guarantee whatsoever against hounding an accused in one court after another until the victims are satisfied that justice has been done’.65 Bottini adds that the problems of due process are exacerbated by the lack of agreement as to what crimes are subject to universal jurisdiction, potentially leading a state to invoke universality when it is not warranted. This would violate the principle that the criminal law be ‘non-vague, specific, and prospective in its application’,66 and erode the protection afforded to the accused.

Eser acknowledges concerns about ensuring a fair trial for the accused as opposed to merely justice for the victims, but emphasizes that such deficiencies are not uniquely attributable to universal jurisdiction. Further, Eser minimizes the problem of double jeopardy by noting that such inter-jurisdiction problems are not unique to universal jurisdiction.67 He writes as follows:

Should Fletcher’s concerns mandate distrust of all justice systems that do not live up to the fair trial standards of the United States (or comparable countries cherishing the rule of law), then all countries that do not meet these standards would have to be excluded from concurrent extraterritorial jurisdiction, regardless of whether it is founded on the principle of universality or on any other connection with the case …. This, however, would necessarily lead to discrimination between reliable and

protecting the immunity granted to state officials for the orderly and smooth conduct of international relations.

Becker (nt 35) 479.

64 Fletcher (nt 61) 581.

65 Ibid. Bottini agrees that ‘[t]he great number of competent fora also increases the possibility of the accused being tried more than once for the same offense, in violation of Article 14.7 of the International Covenant on Civil and Political Rights, if a state does not recognize the former proceedings as valid’ (Bottini (nt 8) 551). Ratner points to a further problem stemming from universal jurisdiction’s focus on victims, in particular laws allowing victims to initiate complaints: a ‘tension between the pleas of victims for justice and the worries of governmental officials about the monetary and diplomatic price of trials’ (SR Ratner, ‘Belgium’s War Crimes Statute: a Postmortem’ (2003) 97 American Journal of International Law 888, 892).

66 Bottini (nt 8) 551.

67 Eser (nt 22). Eser writes that

[p]erhaps ... the competition between different national jurisdictions to try a case may be even more uncompromising if ‘classical’ connections are in concurrence with each other. If, for example, a German terrorist bombed an American tour bus in Madrid and fled to Paris, why should not each of the countries concerned attempt to get the perpetrator extradited: to Spain based on the territory of commission, to Germany based on the nationality of the defendant, or to the United States based on the nationality of the victims? ... Would it not then be wiser to conduct the trial in France, a ‘disconnected’... jurisdiction, according to the principle of universality (for fighting international terrorism)?

Ibid 965.
unreliable countries [which] would hardly be reconcilable with the principal equality of sovereign nations.68

His argument implies that it would be a greater impingement on national sovereignty to forbid universal jurisdiction than to allow its free exercise, so that the overall benefits of a flourishing system of universal jurisdiction outweigh its costs, including due process concerns.

Abi-Saab argues that the hierarchy underlying Fletcher’s due process concerns (between justice for victims and due process for accused) leaves out a third party: ‘the interests of society at large in defending the integrity and credibility of its legal order and what it considers its essential interests and values’.69 Thus, the ‘struggle against impunity is not so much in the name of the victims as in that of social defence’,70 which implies that accused’s interests is correctly placed at a lower rung in this hierarchy. However, societal interests may also sometimes conflict with those of the victims, bringing the analysis back to Fletcher’s concerns about the repercussions of making the interest of the victims the first and foremost concern of universal jurisdiction. As Kontorovich writes, ‘[n]onprosecution is sometimes socially optimal, that is, it increases the net global welfare’71 by, for instance, bringing to a close an intractable conflict. However, universal jurisdiction and a hierarchy wherein justice for the victims stands at the top ‘make … it much harder for efficient nonprosecutorial outcomes to be reached’.72

Eser does not discuss any remedies for the problem of double jeopardy within universal jurisdiction other than noting that international cooperation will be necessary. Colangelo does argue that universal jurisdiction prescribes legal limits that minimize due process concerns, which are enforced by the national or territorial state rather than by the state exercising universal jurisdiction, for instance, by refusing to extradite the accused.73 However, the case against Ariel Sharon in Belgium (discussed below), which followed a full investigation in Israel absolving him, and perhaps also that of the Guatemalan Generals in Spain (discussed below), which followed a Truth Committee in Guatemala itself, do illustrate that double jeopardy and due process continue to present a problem.

E. Local Concern

Fletcher believes that it would be impossible to incorporate the guarantee against double jeopardy within universal jurisdiction due to the principle of local concern. This principle holds that the community which knows both the victims and the accused has an overriding interest in resolving the conflict by reaching ‘a nuanced resolution that they can live with’.74 ‘The very exercise of this form of ‘disconnected’ jurisdiction makes it impossible for other courts, more closely connected to the occurrence of the crime, to accept the judgement of the court—particularly a finding of not guilty—as final and conclusive’.75 This argument was important to

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68 Ibid 961.
70 Ibid.
71 Kontorovich (nt 38) 392. South Africa’s Truth and Reconciliation Commission comes to mind.
72 Ibid.
74 Fletcher (nt 61) 583.
75 Ibid 582-3. Orentlicher describes this criticism as a ‘claim that bystander justice challenges democratic principles because a court that exercises universal jurisdiction is not nested in the political and legal culture of the country most directly affected by its rulings’; although significant, this challenge is not insurmountable. According
Chile’s expressed opposition to a prosecution of General Pinochet by Spain: it argued that ‘extra-
territorial adjudication of crimes committed within Chile … would upset a delicate political
consensus regarding the proper balance between truth, justice and amnesty’.\textsuperscript{76}

Eser writes that Fletcher’s principle of local concern is premised upon crimes which are truly
local, impacting only those people or interests in the territorial state. However, these are not the
kinds of crimes which concern universal jurisdiction. Rather, Eser focuses on a ‘qualitative
difference between ‘normal’ crimes of merely local scope and crimes against universally
recognized values’\textsuperscript{77}—a difference which he claims ‘Fletcher is not taking seriously enough’.\textsuperscript{78}
Further, Eser argues that if the territorial jurisdiction does not take meaningful steps towards
prosecuting the accused, a local concern is no longer cognizable and therefore cannot stand in the
way of a jurisdiction acting ‘at the silent behest of “global justice”’.\textsuperscript{79}

Fletcher has responded to Eser’s dichotomy with regard to local (parochial) crimes and
universal crimes, writing that ‘[t]hough not cultivated in the literature of criminal law, the
distinction … has great value’.\textsuperscript{80} However, Fletcher argues that the distinction is more intricate,
for not every crime that is universal in nature (of a heinous magnitude and severity) necessarily
triggers universal jurisdiction.\textsuperscript{81} An act may rise to the level of condemnation akin to that of the
heinous crimes to which universal jurisdiction is intended to apply, while nevertheless remaining
a local crime. For instance, ‘though it is condemned by all nations, espionage is a parochial
rather than a universal crime. Spies are traditionally executed when caught and tried, but they
might indeed be honoured in the country for which they spied’.\textsuperscript{82} Therefore, problems of local
concern may remain even for a crime that is condemned by all nations.

However, Orentlicher argues that exercises of universal jurisdiction can have a positive effect
on the local community. She uses the Pinochet case as an illustration: after the European
proceedings, Chile formally charged Pinochet with the kidnapping of political opponents
following the coup in which he seized power.\textsuperscript{83} Orentlicher writes:

To be sure, even before Pinochet was arrested in England, Chilean society had made
significant progress in its national process of reckoning with his crimes. Even so, proceeding
against Pinochet in Spain, England and other countries had a catalytic effect on Chile …. Far from displacing Chile’s internal project of addressing its past … the arrest abroad of General Pinochet re-energized Chile’s process of recovering from dictatorship, fortifying its democratic transition. The possibility that Pinochet could be prosecuted outside Chile did not diminish or circumvent that country’s
democratic deliberations, but rather enlarged the space within which Chilean society
could address its past.\textsuperscript{84}

to Orentlicher, rulings by foreign courts are more likely to be accepted by the local community if transparency in the
court’s decision making process is ensured; ‘[f]or example, a transnational professional community of jurists
disciplines decision-making by courts exercising universal jurisdiction in much the same way that domestic judges
constraint each other’s interpretive performance’ (Orentlicher (nt 36) 1065-66).

\textsuperscript{77} Eser (nt 22) 973-74.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid 974, 976.
\textsuperscript{80} GP Fletcher, ‘Parochial versus Universal Criminal Law’ (2005) 3 JICJ 20, 23.
\textsuperscript{81} ‘There is nothing … that requires universal jurisdiction to attach to universal crimes’ (ibid 24).
\textsuperscript{82} Ibid 23.
\textsuperscript{83} Orentlicher (nt 36).
\textsuperscript{84} Ibid 1126-27.
Yet, Power suggests that such an analysis of the ultimate impact of the Pinochet saga provides only cold comfort: ‘The attempts to prosecute Pinochet in Spain led Chile to reopen investigations of the crimes committed by the Pinochet government, yet almost all state criminals of the period [of Pinochet’s dictatorship] remain free. The minor successes of Chilean national criminal justice should not be allowed to obscure the fact that the international law aspect of the case failed’. 85 This position supports Fletcher’s conclusion that ‘claims of universal jurisdiction are dubious and those that favour this problematic doctrine have a greater burden than they have accepted to date to provide good reasons for their position’. 86

IV. DOES ABSOLUTE UNIVERSAL JURISDICTION (STILL) EXIST?

A. The Trend Identified in the Academic Literature

Consistent with the above discussion of the roots and criticisms of universal jurisdiction, Bassiouni writes that ‘[u]niversal jurisdiction is not as well established in conventional and customary international law as its ardent proponents … profess it to be’. 87 Bykhovsky also writes that ‘the fact that numerous states forgo assertion of universal jurisdiction undermines the doctrine’s status as customary international law’. 88 Of particular importance to the infirm state of this jurisdiction is that national legislation generally encompasses only conditional universal jurisdiction—a distinction to which scholars do not give sufficient weight. 89 As Colangelo writes, absolute universal jurisdiction ‘is presently caught in a customary twilight that will witness either the development or the dismissal of the practice depending on the actions and reactions of states in the next part of this century. State practice has not yet worn into the fabric of international law an affirmative custom of [absolute] universal jurisdiction’. 90

Colangelo does note that a permissive view may be to respond that neither is absolute universal jurisdiction explicitly prohibited by custom. 91 Referring to Germany, Spain and Belgium, Cassese has written that such state practice, ‘in addition to showing that states tend increasingly to resort to absolute universal jurisdiction for the purpose of safeguarding universal values, also point[s] to the gradually increasing diffusion and acceptance of the notion that this form of jurisdiction is regarded as admissible under international law’. 92 However, Cassese’s use of the words ‘gradual’ and ‘increasing’ acknowledges that state practice had not yet reached the level of customary international law. The title of a subsequent article is illuminating: Cassese

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86 Fletcher (nt 61) 584.
87 Bassiouni (nt 1) 83. Bassiouni continues that proponents ‘[f]requently ... rely on certain judicial opinions and legal writings as support for the proposition that unbridled universal jurisdiction is not a mere desideratum, but established law. The relevance of such sources, however, is often unjustified or stretched too far’ (ibid 95).
89 Bassiouni (nt 1) 137. He cites Canada as an example of national legislation requiring a territorial connection for the exercise of universal jurisdiction.
90 Colangelo (nt 57) 545.
91 Ibid.
asks whether ‘... the Bell [is] Tolling’ for absolute universal jurisdiction and pleads for an answer to the contrary.

Reydams also notes that the permanent presence of the ICC may be incompatible with absolute universal jurisdiction by individual nations. He writes: ‘As first conceived, the notion of the [absolute] universality principle was a substitute for a non-existing international criminal court, an idealistic solution to the incomplete structure of the international legal order. Now that the ICC is established, it would seem illogical to hold on to it and attribute similar, if not broader, powers to a single State than to a treaty-based court.’ A discussion of some recent Spanish and Belgian cases reinforces the conclusion that the bell is indeed tolling for absolute universal jurisdiction.

B. Spain

1. The First Step: Pinochet

In 1996, a complaint was initiated against General Augusto Pinochet in Spain (which allows private individuals to initiate complaints) for alleged genocide, terrorism and torture in Chile. Although the public prosecutor had misgivings, popular support—both in Spain and elsewhere in Europe—was strong, counter-balancing any fears of the political repercussions of such a case. Following an investigation, a Spanish judge issued an arrest warrant for Pinochet in 1998, leading to his arrest in England and an extradition request by Spain. The warrant for Pinochet’s arrest was based on the assertion of absolute universal jurisdiction by Spain. Although the initial complaint against Pinochet had been confined to Spanish victims only (as in Guatemalan Generals, below) it was subsequently expanded to include non-Spanish citizens, ‘thus forcing the issue into the terrain of universal jurisdiction’. However, it is worthwhile to note that ‘[a]s the … case wore on, it … became increasingly focused on those instances in which Spanish citizens were murdered or disappeared’, weakening reliance on absolute universal jurisdiction.

In approving the assumption of jurisdiction, a full bench of the Criminal Appeals Chamber of the Audiencia Nacional held that Article 6 of the Genocide Convention (ratified by Chile and

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94 Reydams (nt 7) 40.
95 Roht-Arriaza (nt 42) 194.
96 Ibid.
97 The focus of this paper is on the Spanish side of the proceedings. However, with regard to the English adjudication stemming from the extradition request, Lord Millet’s opinion has been termed ‘the most progressive’ (M Ratner, ‘The Lords’ Decision in Pinochet III’ in R Brody and M Ratner (eds), The Pinochet Papers (Kluwer Law International, The Hague 2000) 49. Lord Millet wrote as follows with regard to the application of aut dedere aut judicare in conjunction with the Convention: ‘Chile insists on the exclusive right to prosecute. The Torture Convention, however, gives it only the primary right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself’. Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, 38 ILM 581, 651-652 (HL 1999).
98 Reydams (nt 7) 116; Union Progresista de Fiscales de Espana et al v Pinochet, Audiencia Nacional (central investigating tribunal no 5) 16 and 18 October and 3 November 1998, and Audiencia Nacional (criminal division) 5 November 1998.
99 Power (nt 85) 106.

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Spain), whereby parties are obligated to ensure that charges of genocide are brought to trial in the territorial state, did not preclude the exercise of absolute universal jurisdiction. The complaint also relied on Article 23.4 the Organic Law of the Judicial Branch, which ‘allows for prosecution of certain crimes committed by non-Spaniards outside Spain, including genocide, terrorism, and other crimes recognized in international treaties ratified by Spain’. In particular:

Article 6 of the Convention does not rule out the existence of judicial organs with jurisdiction other than the domestic courts of the country in whose territory the crime was committed, or an international tribunal …. [I]t would be contrary to the spirit of the Convention—which seeks a commitment on the part of the Contracting Parties to use their respective criminal justice systems to prosecute genocide as a crime under international law, and to prevent impunity in the case of such a grave crime—to interpret Article 6 as limiting the exercise of jurisdiction by excluding any jurisdiction not treated therein.

Reydams notes the Chamber was not alone in holding the Convention did not preclude universal jurisdiction, but suggests that such a construction should be confined to conditional rather than absolute jurisdiction. He writes that a right as broad as absolute universal jurisdiction ‘was never envisaged during the drafting of the Genocide Convention, not even by the proponents of universal jurisdiction. State practice so far … with the possible exception of Germany, requires an objective and material link consisting of the voluntary presence of the suspect in the forum state.’

The Pinochet case, in both its Spanish and English incarnations, provides ample fodder for the criticisms of absolute universal jurisdiction discussed above. For instance, with regard to universal jurisdiction as a tool of neo-colonialism, Rubin writes: ‘How Spain can assert the jurisdiction necessary to support such an adjudication while at the same time refusing to try Spaniards involved in the atrocities of the Franco administration in Spain itself requires a flexibility of mind of which I find myself incapable’. Echoing due process concerns, Kissinger notes that

The unprecedented and sweeping interpretation of international law in … Pinochet would arm any magistrate anywhere in the world with the power to demand extradition …. It would … subject the accused to the criminal procedures of the magistrates’ country, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from a long distance.

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103 Order of the Criminal Chamber of the Audiencia Nacional, Appeal 173/98 (nt 100) 98.
104 Reydams (nt 7) 187.
105 Rubin (nt 59) 371.
106 Ibid 90.
Pinochet also seems to provide a wide scope for political manipulation, as various geo-political conflicts can be thrust into national courts through extradition requests.  

2. After Pinochet: the Vacillations of Guatemalan Generals

A further significant step in Spain’s saga was the Guatemalan Generals case, which was brought by victims against Guatemalan officials allegedly responsible for the persecution and murder of members of the Mayan ethnic group during Guatemala’s civil war of the 1970s and 1980s. In addition, an assault had taken place against the Spanish embassy in 1980, which led to the death of the father of one of the complainants as well as other political dissidents and Spanish diplomats. The complaint relied on Article 23.4 the Organic Law for jurisdiction.

Initial adjudication espoused a restrictive interpretation of universality. The subsidiarity principle was emphasized, such that universal jurisdiction could only be exercised if the territorial or national state failed to act upon an offence, ‘and provided that there is a link between the foreign offence and Spain’. Ascensio writes that Guatemalan Generals interpreted ‘subsidiarity … as a presumption against extraterritorial jurisdiction’. Reydams also posits that the subsidiarity criterion can be seen as a substitute for the presence requirement.

Subsidiarity was not met in this case because a Guatemalan Truth Commission established facts in 1999 that could be used to bring a case domestically. Guatemala had also not granted amnesty for genocide, torture, or kidnappings, thus leaving open the possibility of prosecution. The Spanish court concluded ‘that the time elapsed since the issuing of the Truth Commission’s report had not been long enough to conclude that the Guatemalan judicial system had failed to operate’. Absolute universal jurisdiction was denied, but scope was left for conditional universal jurisdiction if the accused were present in Spain. Since the requirements of conditional universal jurisdiction could not be met, jurisdiction was affirmed only with respect to the Spanish victims, but not the Mayans who died in the same attack on the Spanish embassy. Thus, although this judgement reinforced conditional universal jurisdiction, it refuted the absolute form.

Two further cases followed this limited view of universal jurisdiction, reinforcing its jurisprudential value. Ascensio went so far as to hazard that these decisions were ‘clearly indicative of a new trend against what is politically perceived as the excesses of the universal jurisdiction doctrine’. However, in 2005, the lower court’s decision in Guatemalan Generals

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107 Ibid.
109 Ascensio (nt 9) 691-92.
110 Cassese (nt 93) 590.
111 Ascensio (nt 9) 693.
112 Reydams (nt 7) 191.
113 Ascensio (nt 9).
114 The court held that ‘[w]hile the Spanish courts remained open for cases involving victims of Spanish ancestry (and perhaps for refugees residing in Spain), as a situs for universal justice they were no longer an option’ (Roht-Arriaza (nt 42) 176).
115 Genocide in Peru, Judgement No. 712/2003 (Tribunal Supremo (Sala de lo Penal) May 20, 2003), and Caso Hernan Brady Roche, Judgement No. 319/2004 (Tribunal Supremo (Sala de lo Penal) March 8, 2004).
116 Ascensio (nt 9) 693.

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was overruled by the Spanish Constitutional Tribunal,\textsuperscript{117} reinvigorating Spain’s assertion of absolute universal jurisdiction. The Tribunal held that Article 23.4 the Organic Law contained no limitations with regard to jurisdiction, rather allowing Spain to exercise concurrent universal jurisdiction.\textsuperscript{118} Subsidiarity was rejected. The Tribunal instead held that ‘a legal obligation for a state to establish jurisdiction on a territorial basis is not equivalent to a prohibition for the other states to exercise their jurisdiction on other grounds’,\textsuperscript{119} although the territorial or national state may have some priority. Priority is a softer term than subsidiarity and Spain will be more easily able to establish the inaction of the natural forum under this standard than that of subsidiarity.\textsuperscript{120} 

Echoing the reasoning of the Pinochet case, ‘the Tribunal asserted that the Supreme Court’s restrictive interpretation of the Genocide Convention is incompatible with its goal of universally prosecuting genocide in order to avoid impunity’.\textsuperscript{121} No links were necessary between Spain and the alleged crimes—the Tribunal held that ‘it is highly debatable that the requirement of a link is to be found in customary international law’,\textsuperscript{122} noting in particular that \textit{Arrest Warrant} (below) was not decided on the basis of a lack of universal jurisdiction. The Tribunal wrote in the operative language used by those who advocate for absolute universal jurisdiction as a natural extension of its application to piracy (based on the heinousness of the crimes and therefore their impact on universal values). In particular, it held that such prosecutions ‘transcend the harm to the specific victims and affect the international community as a whole. Therefore, prosecution and punishment are not only a shared commitment, but a shared interest of all states’.\textsuperscript{123} The full case could go forward as an exercise of absolute universal jurisdiction.

3. After Guatemalan Generals: some conclusions

\textit{Guatemalan Generals} may ultimately be chalked up as a victory for the proponents of absolute universal jurisdiction. Nevertheless, the very least that can be deduced from the vacillation

\textsuperscript{117} Guatemala Genocide Case, Judgement No.STC 237/2005 (Constitutional Tribunal (Second Chamber), September 26, 2005).
\textsuperscript{118} Roht-Arriaza (nt 102).
\textsuperscript{119} Ascensio (nt 10) 590.
\textsuperscript{120} Ascensio writes that Priority is probably a principle much more than a rule .... It is reasonable on grounds of procedural practicability and criminal policy, both reasons being more sociological than legal. It is also reasonable in order to find a common compromise between states permitting the prosecution of the gravest crimes affecting the international community as a whole. With much pragmatism, the Tribunal refuses to give more details about the principle itself .... Priority is thus clearly accepted as a modulating element which forms part of the general objectives of universality. If universal jurisdiction is aimed at fighting impunity, some kind of organization between states in cases of competing jurisdictions is also needed in order to reach that objective
\textsuperscript{121} Ibid 590-91.
\textsuperscript{122} M Jouet, ‘Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond’ (2006-07) 35 Georgia Journal of International and Comparative Law 495, 509.
\textsuperscript{123} Ibid 211. Note also that the Constitutional Tribunal reaffirmed its holding regarding absolute universal jurisdiction in a case that alleged crimes of genocide and torture by Chinese officials against members of the \textit{Falun Gong}: Tribunal Constitucional, Sala Segunda STC 227/2007, 22 October 2007.

\textbf{LAST MODIFIED: 21/08/2009}
displayed by this case is that judges do feel some discomfort in applying absolute universal jurisdiction, which therefore has not become firmly entrenched in Spain. In addition, Power comments that this approval of absolute universal jurisdiction with respect to genocide ‘was a close decision in a legal system in which precedential effect is limited’, indicating that this ruling is far from the last word on universal jurisdiction’s reach.

It is also worthwhile to trace the story of Guatemalan Generals further. In 2006, six international arrest warrants were issued by the Spanish investigating judge after meeting with victims in Guatemala. Four of the warrants were executed by Guatemala, leading to four extradition requests by Spain. In 2007, a Guatemalan court of appeal held that Spain had proper jurisdiction and that the alleged crimes fell under those contemplated by its extradition treaty with Guatemala due to their gravity, even though they had not been listed as extraditable crimes.

However, the Guatemalan Constitutional Court ultimately decided that the arrest warrants were unconstitutional and also overruled the previous interpretation of the extradition treaty. As the court of appeals had noted, the Constitutional Court also pointed out that the treaty made no reference (and thus placed no limitation in regard) to extraterritoriality, but wrote that the focus of the treaty was on nationals other than Guatemalans seeking refuge from Spain in Guatemala. The Court interpreted this to mean that the treaty was not intended to apply to crimes committed within Guatemala. Moreover, the Court concluded that ‘universal jurisdiction [could …] not be maintained because it affront[ed] Guatemalan sovereignty. While Guatemala might recognize an international tribunal, the [Constitutional Court …] stated, it will not recognize the extraterritorial jurisdiction of another national court. Otherwise, it argued, one state would be judging another’s gravity or willingness to prosecute’.

The Court did hold that having denied extradition, Guatemala is now under an obligation to investigate and prosecute under aut dedere aut judicare. Yet as Roht-Arriaza notes, ‘[t]his is a bit disingenuous, since the judges know perfectly well that charges on these crimes have long been filed with the prosecutor and have gone nowhere’ (precisely why Spain stepped in). If the charges continue to languish, Spain’s foray into absolute universal jurisdiction in Guatemalan Generals will prove to be fruitless. Having begun an investigation without the presence of the accused, it has not been able to successfully exercise international arrest warrants or extradite the accused to Spain. Although in 2008 Spain resumed its investigation into these allegations (with witnesses being interviewed in both Spain and Guatemala), it has not brought any of the perpetrators to justice. Nor has the presumed pressure of international scrutiny or censure brought by this case (including a strong condemnation of the Constitutional Court’s ruling by the Spanish investigating judge) changed the legal prospects for the victims and relatives of the Guatemalan civil war in their own nation.

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124 Jouet notes the following limits on Spain’s universal jurisdiction: Spanish law ‘precludes prosecuting incumbent government officials, trying defendants in absentia, circumventing international courts’ jurisdiction, and infringing on the territorial state’s proceedings’ (Jouet (nt 121) 514).
125 Power (nt 85) 117.
126 See Roht-Arriaza (nt 102).
127 Ibid.
128 Ibid 95.
129 Ibid 96.
130 Ibid.
C. Belgium: ‘[t]he life and death of … universal jurisdiction’

1. The Early Days

In 1993, Belgium adopted a universal jurisdiction law for genocide, crimes against humanity and war crimes; the Act Regarding Grave Breaches of International Humanitarian Law (hereafter ‘the Act’). A prominent early attempt at absolute universal jurisdiction also involved Pinochet. In 1998, a Belgian magistrate issued an arrest warrant for Pinochet while he was detained in Britain pending the outcome of Spain’s extradition request. Belgium’s community of Chilean exiles was the only link between this forum, Pinochet, and his alleged crimes. After Britain made the decision that Pinochet was to be returned to Chile, Spain did not pursue the matter. However, Belgium did attempt to achieve extradition (by means of contesting the evidence as to Pinochet’s health), indicating that its commitment to absolute universal jurisdiction was even greater than Spain’s at the time.

Partly as an outgrowth of the Pinochet experience, the Belgian law was further broadened in 1999, to include not only grave breaches of the Geneva Conventions but also genocide and crimes against humanity. Article 7 also granted that ‘[t]he Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed’. As Roth-Arriaza writes, ‘[t]he 1999 Belgian law went farther than any other to date’ by allowing investigations to be launched without the presence of the accused. Together, these developments led ‘[v]ictims of human rights violations from all over the world [to] flood … the Belgian authorities with complaints. Hardly a month went by without some international outcast being indicted’.

The exercise of absolute universal jurisdiction that followed this flood of complaints should be contrasted to Belgium’s first (and successful) utilization of the 1993 law, which involved an exercise of conditional universal jurisdiction with regard to four Rwandan defendants accused of genocide and massacres of civilians. The Rwandan defendants all resided in Belgium and were physically present on Belgian territory at the time of their arrest. Although the case was broadly aimed, there were several additional links between the Rwandan genocide and Belgium that reduced the need to rely upon universal jurisdiction (much as in the Nuremberg and Eichmann discussion, above). These links included, first, that, in the early days of the genocide, ten Belgian peacekeepers, three aid workers and a dozen civilians were murdered solely because of their nationality, providing jurisdiction through passive personality. Second, one of the individuals who had incited the genocide was Belgian. ‘[L]ast but not least, it was the Belgian colonizer who in the early 1930’s officially divided the Rwandan population into ethnic

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131 Ratner (nt 65) 888.
132 38 ILM 918, 921 (1999).
133 Reydams (nt 7).
134 Roht-Arriaza (nt 42) 62-3.
136 Ibid.
137 Roht-Arriaza (nt 42) 186.
138 Reydams (nt 7) 116.
139 The case came to a close in 2001: Public Prosecutor v. the ‘Butare Four’, Assize Court of Brussels, 8 June 2001; appeal in cassation rejected, 9 January 2002.
140 Bassiouni (nt 1).
groups’, making the targets for genocide easily identifiable. Reydams concludes that ‘it is unlikely that in the future there will be more links with any conflict abroad’. Subsequent cases indeed had few or no such links. In addition, Belgium could not extradite the suspects to Rwanda since it had no extradition treaty with Rwanda, indicating that prosecution was warranted.

2. Arrest Warrant: the ICJ Clumsily Thwarts Absolute Universal Jurisdiction

In Case Concerning the Arrest Warrant of 11 April 2000, Congo challenged Belgium’s issuance of a warrant for the arrest of its foreign minister, Yerodia Ndombasi, on allegations of war crimes. The allegations were based on broadcasts of speeches during which he incited racial hatred, leading to widespread killings of Tutsi people in Congo. The case was initiated by fourteen individuals resident in Belgium. The broadened Belgian law of 1999 facilitated this warrant with the following provision in Article 5: ‘Immunity attaching to the official status of a person shall not prevent the application of the present Law’. The alleged acts were committed outside of Belgium, Yerodia was not in Belgium at the time the warrant was issued, and none of the victims were Belgian—an obvious attempt at the assertion of absolute universal jurisdiction.

The International Court of Justice (ICJ) proved unable to articulate a clear understanding of universal jurisdiction, resting its decision in favour of Congo on the ground of sovereign immunity. Three judges held that ‘if the Court had addressed these questions [regarding universal jurisdiction] ... it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law’. Three other judges held that the acts alleged ‘would be within the small category in respect of which an exercise of universal jurisdiction is not precluded under international law’.

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142 Ibid 201.
143 Vandermeersch (nt 10). Reydams writes that ‘because of the presence of many culprits outside Rwandan territory, foreign governments were forced to play a role either in providing refuge to them, in facilitating their extradition to Rwanda or the ICTR [International Criminal Tribunal for Rwanda], or in prosecuting them before their courts’. Thus, although it could have extradited the accused to the ICTR, Belgium chose to exercise universal jurisdiction. (L. Reydams, ‘Universal Criminal Jurisdiction: The Belgian State of Affairs’ (2000) 11 Criminal Law Forum 183, 201).
145 Zuppi (nt 135) 313.
146 Summers comments: ‘Because the judges on the ICJ clashed over whether the territorial integrity of another state was violated by the issuance of an international arrest warrant predicated on ‘pure’ [absolute] universal jurisdiction, their opinions may well foreshadow the future of a customary principle of ‘pure’ universal jurisdiction’ (Summers (nt 18) 92).
147 Bottini notes that ‘the success the ICJ has had establishing rules on international immunity strongly suggests that the ICJ’s analysis concerning the validity and scope of the universality principle could have contributed to greater international legal certainty by shaping how and when this principle is applied’ (Bottini (nt 8) 509).
148 Arrest Warrant (nt 144) para 17 (Separate Opinion of President Guillaume).
149 Ibid para 65 (Joint Separate Opinion of Higgins). However, the various opinions did a poor job of distinguishing between conditional and absolute universal jurisdiction:

The marked terminological inconsistency ... is frustrating, and leaves the reader scarcely able to tell whether reference to ‘universal jurisdiction’ at any given point is to universal prescriptive jurisdiction, as such, or to universal prescriptive jurisdiction enforced without the offender’s being present within the territory of the prescribing state.

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Following the ruling, Belgium rescinded the illegal arrest warrant. Moreover, an appeals court held that the proceedings were inadmissible from the beginning because the accused was not present in Belgium—apparently narrowing the scope of the Act to conditional universal jurisdiction only.\textsuperscript{150} Reydams comments that ‘it is bizarre for a country to issue an international arrest warrant and insist on its international legality before the ICJ, only to have a domestic court decide two years later that the warrant contravenes municipal law. The ruling also implies that the proceedings against Pinochet were ill founded under domestic law.’\textsuperscript{151} Therefore, although it is impossible to reconcile the varying positions of the ICJ regarding universal jurisdiction, the effect of the ICJ’s decision was nevertheless to negate Belgium’s attempt to assert absolute universal jurisdiction.\textsuperscript{152}

3. The case of Ariel Sharon: a Temporary Affirmation of Absolute Universal Jurisdiction

Following the failure of universal jurisdiction in \textit{Arrest Warrant}, the case of former Israeli Prime Minister Ariel Sharon\textsuperscript{153} did provide some respite for the proponents of the Act. In 2003, Belgium’s highest court held that the 1993/1999 law did not require ‘any link between Belgium, the offence, and the offender’.\textsuperscript{154} ‘There was indeed no link at all between Belgium and the events, except that the plaintiffs were briefly in Belgium to file the complaint.’\textsuperscript{155} The implication is that an assertion of absolute universal jurisdiction would have been permissible in this case. Thus, while the case against Sharon could not go forward due to immunity under customary international law, the same did not hold for his co-defendant (an army general).\textsuperscript{156}

It is also interesting to return to Fletcher’s argument regarding the difficulties of due process in universal jurisdiction. He writes:

\begin{quote}
Belgian courts were willing to proceed against Ariel Sharon even though the … Kahan Commission in Israel had determined, after a complete and impartial investigation, that Sharon was not criminally liable for the murders committed … in the detention camps of Sabra and Shatila. No criminal lawyer can fail to be shocked
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{150} R O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 JICJ 735, 754.
\item\textsuperscript{151} Ibid (nt 7) 116.
\item\textsuperscript{152} However, Vandermeersch writes:

[T]he Court should first have addressed the issue of jurisdiction, as a prelude to that of immunity. Can one assert that in [not] doing so, the Court implicitly upheld the validity of the principle of universal jurisdiction as recognized by Belgian law? In this respect, it is worth mentioning that in the operative part of the decision, the Court only orders Belgium to quash the arrest warrant, without referring to the other procedural acts which nevertheless signal the exercise of universal jurisdiction.

Vandermeersch (nt 10) 407.

\item\textsuperscript{155} Ibid.
\item\textsuperscript{156} Halberstam writes: ‘[w]hatever the merits of the Belgian [absolute universal jurisdiction] law in general, its application to Ariel Sharon was inappropriate’ (M Halberstam, ‘Belgium’s Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?’ (2003-04) 25 Cardozo Law Review 247, 255).
\end{itemize}
\end{footnotesize}
by this contemptuous attitude toward a legal proceeding in another democratic society where the rule of law enjoys the stature it does in Belgium.\footnote{157}

In support of this proposition, Halberstam notes that \textquote{[e]ven the [ICC], established to ensure that those responsible for the most serious crimes against humanity are brought to justice, does not have jurisdiction in a case that was investigated by the state concerned absent a showing of bad faith …. A contrary approach would seriously interfere with national systems of justice}.\footnote{158}

In addition, the criticism of political manipulation through universal jurisdiction seems to have been borne out in this case. Halberstam emphasizes the fact that the prosecution was not commenced in 1993 when the law regarding universal jurisdiction was adopted, but only once Sharon became Prime Minister. In addition, the complaint named only Sharon and an Israeli army general rather than those who actually ordered, permitted, or executed the massacre. Thus, any justice or vindication of universal values that would have been achieved by this prosecution would have left the true perpetrators of the massacres unscathed, prosecuting only those actors whose democratic home state had already provided due process. Halberstam concludes that \textquote{Belgium has an obligation not to permit its laws and courts to be misused for political purposes}.\footnote{159}

4. \textit{Confrontation with the U.S.A.: Pulling Away from Absolute Universal Jurisdiction}

The political undertones of the Sharon case do not seem to have played a role in preventing his prosecution. However, the affirmation of absolute universal jurisdiction in that case proved to be only temporary, with the final blow indeed coming through the misuse of Belgium’s absolute universal jurisdiction law for political ends.

Political tension escalated in 2003, when 17 Iraqis filed a complaint regarding the present Iraq war against US General Tommy Franks, alleging ‘bombing of civilian targets, indiscriminate shooting by US troops, ordering troops to fire on ambulances, and failure to prevent looting of hospitals’.\footnote{160} At the same time, a complaint was launched against former President George H. Bush, Vice-President Dick Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf for alleged war crimes during the 1991 Gulf War. In response, the U.S. went so far as to threaten to move the headquarters of NATO out of Belgium.\footnote{161} Reydams writes that a \textquote{political confrontation with the USA about the possible application of the [Act …] to alleged US war crimes in Iraq dealt the final blow. At the heart of the controversy [was …] the\ldots}
[absolute] universal jurisdiction of Belgian courts’, leading to the repeal of the Act in August 2003. Thus, Halberstam comments that ‘[a]lthough the Belgian government rejected Israel’s claim that its universal jurisdiction law was being misused for political purposes, it recognized the problem when the complaint against former President Bush was filed and it amended the law’.

Prior to this political confrontation, the Act had been amended (in April 2003) in an attempt to limit, and thereby preserve, absolute universal jurisdiction. In particular, the amended law provided a *forum non conveniens* exception to the assumption of absolute universal jurisdiction, to be determined either by the federal prosecutor or a court of appeal. However, the amendment quickly proved to be insufficient. Reydams notes that ‘[a]s the criteria for determining that a foreign forum was more convenient included the fairness and independence of its criminal justice system, Belgian authorities could have been required to pass judgement on another state’s democratic character’, a deep intrusion of state sovereignty that did not placate opponents.

Also, ‘an important departure from the principle of separation of powers’ was instituted—if a case had no link to Belgium, the Minister of Justice could refer it instead to the ICC, the territorial state, the national state, or the state where the accused was present. This amendment did affirm the universal jurisdiction of Belgian courts, but also created copious ‘procedural filters and political exits to thwart ‘abuses’. However, the overall procedure involved so many actors and considerations as to seem ‘hardly workable. Long drawn-out litigation on admissibility and jurisdiction was to be expected. Furthermore, the exercise of universal jurisdiction was likely to be less principled and therefore more arbitrary (read political), than before’ due to the discretion provided to the Minister. The convoluted procedural aspects of the Belgian law could only have given more cause for concern to U.S. officials.

Following the repeal of the Act (in August 2003), the three core ICC crimes have been incorporated into Belgium’s criminal code, along with a broader scope for immunities. Conditional universal jurisdiction (in place of absolute universal jurisdiction) is incorporated by allowing victims to bring complaints of international crimes only against an accused whose principal residence is in Belgium. Otherwise, the decision to proceed with an investigation lies wholly with the state prosecutor, who can decline to proceed with a case if, *inter alia*, ‘in the interests of justice and in keeping with Belgium’s international obligations, the case should instead be brought in another jurisdiction, where the administration of justice is independent and fair’.  

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163 Halberstam (nt 156) 262.
164 Reydams (nt 154) 682. Becker notes that ‘[i]t is important to appreciate that any exercise of universal jurisdiction does not only involve passing judgement on the alleged perpetrator, it involves passing judgement on the judicial system of the State that is deemed to have failed to prosecute the offender’ (Becker (nt 35) 482).
165 Reydams (nt 154) 682.
166 *Ibid* 683.
167 *Ibid*.
168 As Vandermeersch delicately puts it, ‘[s]everal countries whose leaders had been targeted by complaints filed in Belgium deemed [the] 2003 legislative amendment to be unsatisfactory .... Considerable diplomatic pressure admittedly caused these 2003 laws to be adopted in a hasty and improvised manner, which is regrettable’ (Vandermeersch (nt 10) 402-03).
169 Desai (nt 161).
impartial. The decision not to proceed cannot be challenged’. As a result, pending cases without a meaningful link to Belgium were dropped, including those against Sharon and Bush.

In sum, Belgium eliminated ‘the true universality of the jurisdiction—that is, the absence of a nexus of territoriality, nationality, or passive personality’ with regard to complaints initiated by victims. Ratner predicts that, therefore, ‘[t]he number of cases under the new law is likely to be exceedingly small’. Thus, it will be less likely that cases resembling that of Sharon, which was arguably motivated by politics rather than the goal of giving force to universal values, will be brought as easily in Belgium in the future.

D. Conclusions Regarding Belgium and Spain

Belgium, once an ardent proponent of absolute universal jurisdiction, has determined that its experiment in using this particular tool to uphold universal values on behalf of the international community has failed. Thus, Reydams concludes that the story of universal jurisdiction in Belgium

[Has been one of poorly drafted legislation, unrealistic ambitions, prolonged litigation, conflicting decisions, adverse international judgements, party politics, ad hoc legislative amendments, frivolous complaints, diplomatic incidents, media headlines and, not to forget, a successful prosecution [based on conditional universal jurisdiction]. With the Act’s repeal peace can return to the Belgian courts, as well as to Belgian embassies.

Following Arrest Warrant, Cassese was already able to see that ‘the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes’. In particular, the ICJ held that foreign ministers can only be prosecuted for acts performed in their private capacity, even after having left office. Cassese writes that, as a consequence, the reach of universal jurisdiction is proportionately reduced. He also notes the recent weakening of Belgian law regarding absolute universality as part of this trend of reducing the reach of universal jurisdiction. Yet Cassese concludes that these developments ‘only sound the death knell for absolute universal jurisdiction. Things do not go bad for conditional universality’.

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170 Roht-Arriaza (nt 42) 190.
171 Vandermeersch (nt 10).
172 Ratner (nt 65) 896.
173 Ibid.
174 Vandermeersch notes that, by vesting this new level of control over investigations in the public prosecutor, ‘Belgian lawmakers sought to instill a certain control or tutelage with the executive branch over prosecutions in this field, as the Federal Prosecutor is under the sole and direct authority of the Minister of Justice (under Article 143(3) of the ... Judicial Code) ...’. Moreover, by limiting the scope of civil petitioners’ action, the law bestows the opportunity to map out a criminal policy in this field upon the Federal Prosecutor’ (Vandermeersch (nt 10) 409).
175 Reydams (nt 154) 689. Kontorovich writes that ‘the recent retreat by Belgium may mark the beginning of a reaction against national prosecutions. Or it may simply suggest that European countries are unwilling to press universal jurisdiction cases against nationals of more powerful states’ (Kontorovich (nt 15) 198-9).
176 Cassese (nt 93) 589.
177 Ibid.
178 Ibid 595.
However, Roht-Arriaza writes that Belgium has ‘in effect superimposed a nationality tie (or at least something close to it) on something [it is …] still calling universal jurisdiction’.\textsuperscript{179} The implication is that jurisdiction will now be based on a more classic link of nationality, rather than on universality. Her analysis undermines Cassese’s view that although absolute universal jurisdiction may be on the verge of disappearing, one may find consolation in the continued good health of conditional universal jurisdiction. Roht-Arriza comments as follows:

The practical effect on existing cases may not be great …. [T]he ongoing Rwandan and Chadian cases, among others, involve Belgian citizens and long-time residents. But the conceptual effect is much more serious. The re-imposition of a nationality tie in effect negates the whole point of universal jurisdiction, reducing it to a simple variant on passive personality jurisdiction …. But if universal jurisdiction exists at all because these crimes are of concern to all states, why should any additional tie be necessary as a jurisdictional prerequisite?\textsuperscript{180}

Perhaps the Belgian experience has borne out the following observation made by Rubin:

\begin{quote}
[C]urrent legal theories resting on an asserted universal jurisdiction ... are the products of good-hearted thinking but cannot work as expected in the world of affairs .... [To assert] that lawyers’ and judges’ views of ‘law’ can overrule the political decisions of the leaders of the various communities that compose the international community today, is much more than can be accepted by anybody truly concerned with peace and justice.\textsuperscript{181}
\end{quote}

Although the experience in Spain has not fallen as persuasively within the above prediction, \textit{Guatemalan Generals} indicates that the trend in Spain is far from being unequivocally towards the entrenchment of universal jurisdiction, and of absolute universal jurisdiction in particular. Although a further appeal once again set Spain on the track of asserting absolute universal jurisdiction, it is quite plausible to entertain the possibility that just one political fiasco of the sort encountered by Belgium in 2003 (when allegations were brought in its courts against American officials), could bring politicians to push Spain’s vacillating position back towards the lower court’s opinion in \textit{Guatemalan Generals}.\textsuperscript{182}

\section*{V. Conclusion}

This survey lends support to Fletcher’s assertion that universal jurisdiction is unjust and unwise, particularly with regard to absolute universal jurisdiction. Absolute, as opposed to conditional,
universal jurisdiction is even further removed from the more traditional modes of jurisdiction. Its position is correspondingly more tentative. The importance of other bases of jurisdiction in the often cited examples of Nuremberg and *Eichmann* serves to undermine the foundations of universal jurisdiction, as does the lack of similarity to piracy, making a greater dent in the legitimacy of the less well-accepted form of universal jurisdiction. Prominent exercises of absolute universal jurisdiction, such as the cases of Pinochet and Sharon, only serve to illustrate the pitfalls of universal jurisdiction in sharp relief. The associated political and administrative costs appear to outweigh the benefits of this broad form of universality. In particular, the potential for the manipulation of universal jurisdiction to meet political ends was crucial to Belgium’s decision to backtrack on absolute universal jurisdiction. With Belgium out of the running, Spain is perhaps the top destination for complaints relying upon such jurisdiction. Yet its vacillating position shows a deep discomfort that could easily lead it to follow Belgium’s example.