**Spain’s Welcome Retreat on Universal Jurisdiction**

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By [Stewart M. Patrick](http://blogs.cfr.org/patrick/author/spatrick)

Council on Foreign Relations

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By [voting Tuesday to curb its judges](http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses)’ authority to exercise universal jurisdiction, Spain’s national parliament has once again thrust the international legal doctrine of universal jurisdiction into the spotlight. The vote came after a [Spanish judge issued arrest warrants](http://www.nytimes.com/2014/02/11/world/europe/spanish-legislators-seek-new-limits-on-universal-jurisdiction-law.html?_r=0) for former Chinese president Jiang Zemin and four senior Chinese officials over alleged human rights abuses committed decades ago in Tibet. The shift in Spain’s stance is an opportunity to reflect on why universal jurisdiction rose to prominence, and whether it is an effective means of furthering the goal of ending impunity for egregious human rights violations.

The legal concept of universal jurisdiction allows a state to prosecute the most heinous international crimes in its national courts, even if the accused is a foreign national, lives on foreign soil, and has committed a crime that did not affect the prosecuting state or its citizens. It is based on the idea that some crimes—such as crimes against piracy, humanity, war crimes, and torture—are inherently of global concern or are so beyond the pale that their perpetrators should be held accountable regardless of jurisdiction.

The idea of universal jurisdiction gained momentum in the aftermath of atrocities committed during the Second World War, [most notably the Holocaust](http://www.ushmm.org/wlc/en/article.php?ModuleId=10005179), as a tool to prevent war criminals from slipping through the gaps between national jurisdictions. Broadening over time, it evolved into a mechanism to investigate and prosecute violations of international criminal law, whenever and wherever they are suspected of taking place—an especially useful mechanism in the absence of a world criminal court similar to the [International Court of Justice](http://www.icj-cij.org/homepage/index.php?lang=en). From its inception, however, universal jurisdiction has been a controversial doctrine. Concerns surround the challenge it presents to state sovereignty, the inevitable selectivity of its use, and the danger of politically motivated prosecution.

Indeed, [universal jurisdiction](http://www.un.org/News/Press/docs/2009/gal3372.doc.htm) has always been contentious, raising hackles not only in authoritarian states but also democracies.  The [debates](http://www.foreignaffairs.com/articles/57245/kenneth-roth/the-case-for-universal-jurisdiction) within the United States have [focused](http://www.globalpolicy.org/component/content/article/163/28174.html) [on the risks of trials targeting Americans](http://www.globalpolicy.org/component/content/article/163/28174.html), especially political officials, such as former secretary of state Henry Kissinger, and members of the U.S. Armed Forces. Such fears seemed close to being be borne out in 2003, when seven Iraqi families in Belgium requested an investigation of former president George H. W. Bush, vice-president Dick Cheney, secretary of state Colin Powell, and retired general Norman Schwarzkopf for war crimes allegedly committed during the first Gulf War. In response to U.S. pressure, the Belgian Prime Minister proposed amendments to Belgium’s war crimes law that were [subsequently passed](http://www.nytimes.com/2003/08/02/world/belgium-scales-back-its-war-crimes-law-under-us-pressure.html) and the investigation did not proceed. A case was also filed in Germany against former secretary of defense Donald Rumsfeld and eleven other high-ranking U.S. officials for war crimes and torture allegedly committed in Iraq, Afghanistan, and at the U.S. prison in Guantanamo Bay, but was ultimately dropped by the German Federal Prosecutor.

Efforts launched by foreign nationals and public interest groups in Belgium, Germany, and other states have received less public attention than those undertaken by Spanish judges, most notably [Baltazar Garzon](http://www.nytimes.com/1998/10/19/world/pinochet-s-spanish-pursuer-magistrate-of-explosive-cases.html?ref=baltasargarzon). Judge Garzon famously indicted Chilean president Augosto Pinochet in 1998 for crimes against humanity, requesting his extradition from the United Kingdom, which he was visiting at the time. While Pinochet was never prosecuted in Spain, Garzon’s actions helped to pressure a Chilean court to strip Pinochet of immunity.

It is because of Spain’s formerly pioneering role in promoting the doctrine that human rights advocates are so alarmed by Tuesday’s vote. Many howl that Spain is kowtowing to pressure from Beijing out of economic self-interest. Others are denouncing it as blatantly hypocritical, since [Argentina is currently seeking justice](http://www.nytimes.com/2013/10/01/world/europe/argentine-judge-seeks-to-put-franco-officials-on-trial.htmlhttp%3A/www.nytimes.com/2013/10/01/world/europe/argentine-judge-seeks-to-put-franco-officials-on-trial.html?_r=0) for victims of crimes committed by the dictator Francisco Franco. Strong statements are being made by both detractors and supporters of universal jurisdiction, despite the fact that Spain has retreated from the doctrine once before—parliament [passed an earlier amendment in 2009](http://www.csmonitor.com/World/Europe/2009/0626/p06s02-woeu.html) to narrow its application.

Whatever the motivation for this latest step, Spain has done the world a favor by reminding it of the need for a coherent international criminal law regime, anchored by strong international institutions. When national judges turn to universal jurisdiction, they cannot help creating diplomatic frictions, not to mention politicizing—and thereby delegitimizing—the pursuit of international criminal justice. Spain’s decision highlights both the domestic political obstacles that confront individual states seeking to enforce international norms and the damage they can do to those norms when they adopt (as they inevitably must) a selective attitude towards their enforcement. More generally, Spain’s experience strengthens the case for limiting the exercise of universal jurisdiction to the [International Criminal Court](http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx) (ICC).

The ICC has now been operating for more than a decade, and although it has struggled at every step to fulfill its mandate of ending international impunity, it retains several advantages over individual activist states such as Spain when it comes to the effective pursuit of international justice. Firstly, when the Court launches an investigation or carries out a prosecution, the threat of diplomatic or economic retaliation does not (or at least should not) weigh as heavily upon it. Nor need it fear domestic political backlash. Secondly, and more importantly, it does not risk the discrediting or dilution of internationally accepted definitions of international crimes, for the ICC’s actions are directed by the language of the Rome Statute, as agreed to by the states parties.

When individual states pursue cases with no direct ties to their interests, they must leap over higher diplomatic hurdles and land more softly than the ICC. Thus they run the risk of using the universal jurisdiction tool only selectively, undermining the legitimacy of their efforts, however well-intentioned. Moreover, divergent national criminal procedures, standards of evidence, accepted forms of punishment and the like may contribute to the fragmentation of international criminal law—and make miscarriages of justice more likely. It is worth recalling that the ICC was created  in part to address the inefficient, double-standard-ridden international criminal justice regime that was emerging from the patchwork of tribunals created in the 1990s. It was intended as the first universal institution for enforcing international criminal law.

The ICC is of course not immune to criticisms of inefficiency or selectivity. The African Union, for instance, [has criticized](http://www.reuters.com/article/2011/01/30/ozatp-africa-icc-idAFJOE70T01R20110130) the court’s overwhelming focus on African cases, and Kenya [has repudiated](http://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court) the Rome Statute on these grounds. But the ICC is less exposed, thanks to its broad (though not universal) membership and global mandate, and it cannot comb the distant past for potential cases. It thus runs fewer risks than the typical nation-state of delegitimizing international criminal law and procedure.

Rather than lamenting Spain’s decision, human rights activists should redouble their efforts to strengthen the ICC, which remains the most promising institution for meeting the objectives of universal jurisdiction. This should include encouraging the United States and other major nations that have not yet ratified the Rome Statute to do so or—in the absence of becoming members—to agree to cooperate with the Court in myriad practical ways. It should also include [monitoring legislation](https://www.amnesty.org/fr/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf) that seeks to incorporate the language of the Rome Statute to ensure that states are consistent in their definition and application of international norms.

The evolving position of the United States is instructive in this regard. Although it profoundly shaped the Rome Statute, the Clinton administration ultimately chose not to submit it for Senate ratification, given misgivings that it could expose U.S. officials and servicemen and women to politically motivated prosecutions. The succeeding administration of George W. Bush then famously “un-signed” the Rome Statute, as well as negotiating more than one hundred “Article 98” agreements to protect U.S. citizens from the ICC’s jurisdiction. And yet, by the end of its second term in office, the Bush administration had developed a cautiously pragmatic working relationship with the Court, including voting on the UN Security Council to [refer the case of Sudanese President Omar al-Bashir](http://www.cfr.org/international-law/dilemma-international-justice/p16867) to the ICC. The Obama administration has expanded cooperation and engagement between the United States and the ICC.

The not-quite-universal ICC is assuredly an imperfect tool for exercising universal jurisdiction, but single states are at a much greater disadvantage when it comes to investigating and prosecuting complex criminal cases across state boundaries. Spain’s step back from universal jurisdiction deserves close attention because it raises the question of why Spanish judges felt compelled to pursue this avenue to justice. The answer—the  impunity gaps that persist between the ICC’s reach and national courts—should inspire continued efforts to construct a coherent international criminal justice regime.