

University of Miami International and Comparative Law Review

Volume 9

Issue 1 *THE FIRST ANNUAL LATCRIT SUMMER COLLOQUIUM: SPAIN, THE AMERICAS AND LATINO/AS: International and Comparative Law in Triangular Perspective*

Article 11

1-1-2001

Introduction: *Hispanismo* as Leverage: LatCrit Questions Spain's Motives

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Recommended Citation

Angelia Padin, *Introduction: Hispanismo as Leverage: LatCrit Questions Spain's Motives*, 9 U. Miami Int'l & Comp. L. Rev. 165 (2001)

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Hispanismo As Leverage: LatCrit Questions Spain's Motives

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Mister Cornelio came to see me and brought with him a pair of two and a half year-old girls, born of one single "litter", as he says...both as blond as wheat grass, white and rosy like a ripened peach and pretty as if they were "sacred images", according to Mister Cornelio. Their youthful beauty made a remarkable contrast with the unadulterated irreparability of Mister Cornelio's physical characteristics...colored he was and coarse up to the filth of his nails and the cracks in his heels.

Naturally, it occurred to me to inquire about the happy progenitor of that pair of blondes. The old man swelled up with pride...and responded: You know it was three years ago this March that there was a solar eclipse...well about twenty days before, my woman became pregnant with those little ones.... She always has a lot of cravings during her pregnancies...[but this time] she craved to see the sky day and night and even on the day of the eclipse... She continued with this until these girls were born. I won't deny that I hit the roof at seeing them so rosy and blonde, but since then it seems as though they brought with them God's Blessing.

*The teacher loves them and even sews their clothes, the in-law gives them coins, and the Priest asks for them so that he can dress them up in linen and beads and display them on the altar... and for Easter, they are taken out in a procession holding on to the Nazarene and the Holy Sepulcher; for Christmas Eve, they change them into pretty dresses and place them in the vestibule next to the Three Divine ones. And all the expenses are paid for out of donations...Praise be to God who saw fit to create them for his service out of a daddy as ugly as I!*¹

I. Introduction

Being a shade or two removed from white one feels a sort of resentment for having been born in a land scarred by the incessant colonization of indigenous peoples by imperials first showing up under the guise of sacred duty and now, under

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¹ MANUEL GONZÁLEZ ZELEDÓN, EL CLIS DE SOL (1897), reprinted in SEYMOUR MENTON, EL CUENTO HISPANOAMERICANO 108, 109-10 (4th ed. 1991). My translation.

the guise of progress and democratization. At least, that is what outsider jurisprudence picks up on as it seeks to understand a community's frustrations and limitations in an Anglo world.

The particular outsider jurisprudence of interest here, borne out of marginalized communities forever shaped by their fateful encounter with Spain and others, touches on the experiences of Latinos² living in the United States and strives to correct the *injusticias* of the past and present through dialogue and critical introspection. That is how the next two articles are juxtaposed. One searches for the expansion of international jurisdiction as a means of deterrence for crimes against humanity and the other searches for answers to questions as to how a progressive State might effectively disgorge itself of past imperial abuses and lead by example through its promotion of "transnational social justice."³ This, against the backdrop of Spain's order for arrest and extradition of former Chilean dictator, Augusto Pinochet, for crimes against humanity and the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court.⁴

II. Universality as the Future

It is a standard of International Public law that, with the exception of diplomatic and sovereign immunity, the exercise of jurisdiction is unfettered⁵ in a civil court, but it is significantly limited if a court's *raison d'être* is the prosecution or extradition for criminal acts committed within and outside a State's borders.⁶

The limitations or principles, vaguely fashioned over a post-*Lotus* precedent, are given a transitory analysis by University of Malaga law professor, Magdalena Martínez, in *Jurisdicción Universal y Crímenes Internacionales*. The analysis then proceeds to the discussion of universality as an expansion of the territorial, nationality and protective principles. Under universality a State may choose to "claim jurisdiction over *all* crimes, including all crimes (or at least serious crimes) committed by foreigners abroad."⁷ Or, it may restrict its jurisdiction to acts committed against its subjects.⁸ The universality principle, however, is seen by

² LatCrit writings use Latinas/os, for simplicity "Latino(s)" is utilized.

³ Francisco Valdes, *PostColonial Encounters in the PostPinochet Era: A LatCrit Perspective on Spain, Latinas/os and "Hispanismo" in the Development of International Human Rights*, 9 U. MIAMI INT'L & COMP. L. REV. 189 (2001).

⁴ Rome hosted the month-long Conference ending July 17, 1998. As of February 2001, only 29 out of the 139 countries present have ratified. See The Rome Treaty website at <http://www.un.org/law/icc/statute/status.htm> (visited April 27, 2001).

⁵ See Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 536 (2001). A clear and express rule establishing limits on sovereign rights or freedoms would be helpful for "national and international courts where the international rules that are being applied are vague or ambiguous... In the absence of such a rule, courts [are] expected to apply an assumption that the international community of states had not intended to fetter sovereign freedom."

⁶ See MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 103 (4th ed. 1982).

⁷ *Id.* at 104.

⁸ See *id.* at 104 n.1. (stating that "this is known as the *passive personality principle*").

many as a deviation of international law, especially English-speaking countries that consider such a basis for jurisdiction as generally forbidden.⁹

Nevertheless, there are crimes of such a heinous and vile nature that the call for a universal criminal jurisdictional basis is supported by the objective of prevention and punishment of illicit acts that go against fundamental interests of the international community as a whole.¹⁰ It is here where the author illustrates how universal jurisdiction has been applied in the past: through a series of international treaties that contain such diverse normative prohibitions and lack guidance with respect to priority in jurisdiction, that, as the author laments, makes difficult the task of elaborating general rules relative to the *application* of universal jurisdiction.¹¹

As Bassiouni writes, "The connection between international protection of human rights and the international criminalization of its most serious breaches is evident, but . . . there still must be criteria . . . which distinguish between crimes that are within the national criminal jurisdiction of states and those that supercede and override national law in their applicability."¹² This is further hindered, not only because the basis for universal jurisdiction by a State is dependent on its recognition by another State in a treaty, but because drafting an expansive treaty that recognizes particular crimes for the application of universal jurisdiction merely subjects signatories to the *obligation to aut dedere aut iudicare*¹³, while leaving States outside of the treaties with the *option*¹⁴ to exercise universal jurisdiction.¹⁵

⁹ *Id.* Akehurst explains that the danger, as seen by English-speaking countries, with the application of this principle is that an individual could be punished for doing something perfectly lawful under the laws of the place of commission. A journalist writing about corruption in State A, for example, could be arrested and tried for sedition in that State, even though it is not considered to have a seditious intention in State B.

¹⁰ Such as war crimes, genocide, apartheid, and other crimes against humanity.

¹¹ For example, Spain's legislature, in adopting the principle of universal jurisdiction, attributed to judicial power the ability to try such assorted crimes as genocide, drug trafficking, counterfeiting and prostitution or "any other that, pursuant to international treaties or conventions, ought to be persecuted in Spain." See Magdalena Martín Martínez, *Jurisdicción Universal y Crímenes Internacionales*, 9 U. MIAMI INT'L & COMP. L. REV. 171, 180 (2001). (citing to Article 23.4 L.O.P.J.) (emphasis added).

¹² See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 499 (1992). Mr. Bassiouni (Egypt) is President of the International Institute of Higher Studies in Criminal Sciences, in Siracusa, Italy, and Chairman of the Drafting Committee of the Diplomatic Conference on the Establishment of an International Criminal Court.

¹³ "Either extradite or try." The original maxim, *aut dedere aut punire* mandated extradition or punishment but "in keeping with the presumption of innocence which is a 'general principle of law,'" Bassiouni, changed the maxim to reflect a mandate of prosecution. *Id.* at 500. Spanish Magistrate Baltasar Garzón's decision to provide British authorities with Pinochet's medical examination records was a strategy to obligate the U.K. to try Pinochet in the likelihood that due to his medical condition, he would not be extradited. *Caso Pinochet: Garzón Pide Nuevo Examen Médico*, BBC MUNDO, Jan. 14, 2000 at <http://www.bbc.co.uk/spanish/news000114pinochet.shtml> (April 12, 2001).

¹⁴ Martínez, *supra* note 11, at 183 (citing to Akehurst's designation of "an offer of jurisdiction" in validating that without more, the principle of universal jurisdiction is "merely an intellectual exercise.")

¹⁵ *Id.* at 183-84.

It is this flaw that the Rome Treaty attempts to correct through the establishment of an International Criminal Court [ICC]. While there exist other supranational courts such as the International Court of Justice,¹⁶ the Treaty endeavors to create a system whereby signatories delegate prosecutorial power to the ICC, thereby eradicating the differences of procedure and crimes categorization between the signatory States.¹⁷ While non-signatories are not obligated to the ICC however, “this does not mean that the nationals of *non-States Parties* are immune from the ICC’s jurisdiction. If such nationals are accused of committing an offense in the territory of a State Party, the ICC can issue an indictment and initiate proceedings against them.”¹⁸ This seems relatively straightforward. After all, the core crimes spelled out in the Treaty are crimes of universal jurisdiction to which any State may assert jurisdiction without consent of another. But its largest critic, the United States, argues that such an exercise of jurisdiction would run amiss one of the most fundamental principles of treaty law.¹⁹ Its fear being that, even if the U.S. decides to opt out of the Treaty, an ICC prosecutor, acting under the Treaty’s mandate, could well “turn out to be an ‘international Ken Starr’ who would bedevil U.S. military personnel and officials.”²⁰

III. *Hispanismo* as the Present

Although the triggering event for the first “LatCrit in Spain Colloquium” could not be credited to Spain’s prosecution of Pinochet, it does provide insight to Spain’s repositioning itself as a dominant player in world affairs. It may be however, that such insight could expose an underlying effort by Spain to capitalize on its link with its former colonies by endeavoring to create a paternalistic relationship wherein, as Professor Francisco Valdes writes in *PostColonial Encounters in the PostPinochet Era: A LatCrit Perspective on Spain, Latinas/os and “Hispanismo” in the Development of International Human Rights*, Spain can attain both “*presencia* and *prestigio*.”²¹

¹⁶ For general information, visit their website at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (May 12, 2001).

¹⁷ The obligation to extradite indicted persons, provide evidence, and fund the ICC belongs to signatories only. With respect to this international tribunal, the “only difference here is that rather than prosecuting in domestic courts the state has delegated its authority to prosecute to an international body. This is exactly what was done at Nuremberg 50 years ago. In addressing the propriety of this arrangement, the Nuremberg Tribunal held: ‘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 only one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.’” Michael P. Scharf, *The Politics Behind the U.S. Opposition to the International Criminal Court* para. IV. at <http://www.nesl.edu/annual/vol15/scharf.htm>.

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

²⁰ *Id.* While the proponents of the Treaty maintain that recognition with respect to jurisdiction is generally limited to signatories, such hair splitting tends to alienate the United States who has yet to ratify the Treaty, even with considerable amendments such as a two-track system of jurisdiction.

²¹ See Valdes, *supra* note 3, at 210.

This paternalistic relationship manifests itself as “hispanismo” and it places Spain at the forefront of Latin America, much to the chagrin of some Latinos who fear that hispanismo is simply “nothing more than an updated reproduction of colonial scripts.”²² Nevertheless, Valdes celebrates Spain’s pivotal role in bringing some closure to Chile’s turbulent and painful past and Spain’s pivotal role in catapulting the expansion of democratic values and the prosecution for human rights abuses worldwide. “This prosecution . . . will force dictators to act with less than total impunity . . . This prosecution makes life personally more dangerous . . . for dictators . . . seeking to live comfortably on . . . stolen power and loot.”²³

IV. Conclusion

Both authors give credit to Spain’s actions: one understands the difficulty in creating the ICC and the other understands the difficulty that Spain and her former colonies continue to face in bringing finality to past abuses. Still, the events that have led to an open dialogue between LatCrit and Spanish legal scholars is an important step in building a relationship which understands the beauty and bounty of Latin America and respects and dignifies her progeny.

²² *Id.* at 193.

²³ *Id.* at 213.