Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and Beyond

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Abstract
The article traces recent trends in the development of universal jurisdiction, focusing in particular on the emergence of “absolute universality” according to which exercise of jurisdiction is not dependent on the presence of the alleged perpetrator on the prosecuting State’s territory. Placing modern events in a historical context, the article documents the progression of “absolute” universal jurisdiction in Spain, culminating in an appraisal of proceedings initiated there against former Chinese government officials for their roles in an alleged genocide in Tibet. Key issues such as the principle’s relationship with the International Criminal Court, the perceived threat it poses to State sovereignty, the possibility of politicised prosecutions and the problem of maintaining a consistent definition of genocide are discussed. In conclusion the author argues that the right of a State to exercise “absolute” universal jurisdiction constitutes a crystallising norm of customary international law.

Keywords
universal jurisdiction; Customary International Law; genocide; Tibet; State sovereignty; international criminal court; complementarity

“It would be a travesty of the law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.”

International Criminal Tribunal for Yugoslavia, Prosecutor v Tadić

1. Introduction

In March 2008 rioting broke out across much of Tibet in protest at Chinese authority, provoking a wave of media interest and international responses. The
events raised concern over the tense situation in the region, the origins of which date back to May 1951 when Tibet was incorporated into China under threat of military force. The recent riots are only the latest manifestation of the unease felt amongst Tibetan people, fuelled by resentment at their apparent subjugation and the associated human rights violations documented to have occurred against them.

It is claimed that an estimated 1.2 million Tibetans, one sixth of the original population, have died since 1951 as a direct result of Chinese policies. Human rights violations have been documented by a series of UN General Assembly resolutions as well as resolutions by the European Parliament and national parliaments, demonstrating international concern at events.

Whilst modern debate has tended to focus on the issue of Tibet’s self-determination, it would be amiss to leave unaddressed the human rights violations that have allegedly occurred there, especially in the modern international legal climate of accountability stimulated largely by the creation of the ad hoc tribunals and the permanent International Criminal Court (ICC). Together these institutions have transcended national boundaries and asserted the supremacy of accountability over sovereignty.

The confidence inspired by these developments has also led to increasing consideration of the principle of universal jurisdiction, a principle that permits a state to prosecute certain heinous crimes committed anywhere, by anyone, against anyone. It is by using this principle that Spanish courts have opened an investigation against former Chinese President Jiang Zemin and six other former officials into charges of genocide, crimes against humanity, state terrorism and torture. This essay will examine the application of universal jurisdiction by Spain in the context of the traditional concept of the principle and in the light of recent developments. It will then go on to assess the potential hazards and benefits of the exercise, particularly in relation to: (i) the customary international law applicable;

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4) Figure quoted by the Tibetan Government in Exile: see www.tibet.com.
7) See Robert McCorquodale and Nicholas Orosz (eds), Tibet: The Position in International Law (London: Hansjörg Mayer & Serindia Publications, 1994), which concludes that Tibet is an independent state under occupation, and entitled to self-determination.
8) The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), established by Security Council Resolutions 827 (S/Res/827, 1993) and 955 (S/Res/955, 1994) respectively.
10) See ‘Spain to investigate genocide and other charges against China’ at www.phayul.com/news.