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Permanent Mission of Spain to the United Nations

No. 094 FP

The Permanent Mission of Spain to the United Nations presents its compliments to the Secretary-General of the United Nations and, in response to his note No. LA/COD/59/1 dated 31 December 2012 has the honour to transmit herewith a note containing the information submitted in that regard by the Government of Spain pursuant to paragraph 3 of General Assembly resolution 67/98 of 14 December 2012, entitled "The scope and application of the principle of universal jurisdiction".

The Permanent Mission of Spain to the United Nations takes this opportunity to convey to the Secretary-General of the United Nations the renewed assurances of its highest consideration.

New York, 29 April 2013

His Excellency the Secretary-General of the United Nations

New York

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Ministry of Foreign Affairs and Cooperation

Office of the Under-Secretary for Foreign Affairs and Cooperation

International Legal Advisory Office

Report

Scope and principle of international jurisdiction: information provided by the Kingdom of Spain

I. Universal jurisdiction in the Spanish legal system: an overview

1. The Spanish Constitution of 1978, which establishes the basis of the Spanish judicial system, does not contain any provision relating to the exercise of universal jurisdiction. Any exercise of such a power must therefore be based, within the Spanish legal system, on the general jurisdiction granted by the Constitution to Spanish judges and courts to issue and enforce judgements “*in accordance with the rules of jurisdiction and procedure established [by law]*” (art. 117.3 of the Spanish Constitution of 1978).

2. This constitutional provision was expanded in Judicial Power Organization Act No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July), which included universal jurisdiction, although without expressly referring to it, as one of the areas of jurisdiction of Spanish judges and courts. Thus, under article 23.4 of the aforementioned Judicial Power Organization Act (hereinafter referred to as Act No. 6/1985), universal jurisdiction is a form of extraterritorial exercise of criminal jurisdiction, which allows national criminal courts to prosecute certain categories of crimes,

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irrespective of the fact that those crimes were committed abroad and by persons who are not Spanish nationals. Attention should be drawn to the fact that article 23.4 of Act No. 6/1985 attributes to the Spanish courts both universal jurisdiction *stricto sensu*, defined in the terms mentioned above, and a special extraterritorial jurisdiction based on the principle of (Spanish) nationality (active personality) of the perpetrators of the crimes listed in it. Nevertheless, both Spanish doctrine and practice usually refer to article 23.4 of Act No. 6/1985 only as a basis for universal jurisdiction in Spain.

3. Competence to exercise universal jurisdiction has been attributed exclusively, at first instance, to the Criminal Chamber of the National High Court, the judicial body which has jurisdiction under Spanish law to prosecute certain crimes owing to their gravity, to the fact that they were committed throughout the national territory, or to the international connection or dimension of the crimes committed. The judgements of the National High Court are subject to appeal before the Supreme Court. As a result, universal jurisdiction in Spain is a concentrated jurisdiction.

4. Universal jurisdiction thus defined may be invoked through any of the procedural mechanisms provided for in Spanish legislation, although in practice the cases brought before the National High Court have been based on a complaint or dispute involving private individuals. The authors of the complaint or dispute have usually been either direct or indirect victims of the acts reported, or organizations or legal persons that in some way represent the public interest or whose principal activity is the defence of human rights.

5. Article 23.4 of Act No. 6/1985 has been amended on three occasions. On the first two occasions, the purpose of the amendments was to include new crimes in the list of crimes that could be prosecuted on the basis of universal jurisdiction.

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The main purpose of the third amendment to article 23.4 of Act No. 6/1985 was to redefine the scope of the principle of universal jurisdiction in the Spanish legal system. This amendment was made by Organization Act No. 1/2009 of 3 November, supplementing the procedural reform law for the introduction of the new Judicial Office, by which Judicial Power Organization Act No. 6/1985 of 1 July is amended (Official Gazette No. 266 of 4 November 2009). In addition to the reform mentioned, the aforementioned Organization Act No. 1/2009 also made a small amendment to the list of crimes subject to universal jurisdiction.

6. Lastly, reference should be made to Organization Act No. 18/2003 of 10 December on cooperation with the International Criminal Court (Official Gazette No. 296 of 11 December 2003), which also has an impact on the exercise of universal jurisdiction in the Spanish system although it does not specifically amend article 23.4 of Act No. 6/1985.

II. The general scope of universal jurisdiction in the Spanish legal system

7. The 2009 reform profoundly changed the principle of universal jurisdiction, which is no longer an absolute principle but rather one that is restricted in nature. The change has arisen from the way in which the National High Court sought to interpret the principle, as well as from the fact that an absolute application of the principle of universal justice is problematic for Spain.

Thus, while the National High Court initially took a literal interpretation of article 23.4 of Act No. 6/1985 — for example, in the *Pinochet* case or the *Argentina* case — it subsequently introduced conditions for the exercise of universal jurisdiction in the so-called *Guatemala* case, as a result of which it declined to exercise universal jurisdiction (Order issued at the plenary session of the Criminal Chamber of the National High Court, 13 December 2000). Its restrictive interpretation was supported by Supreme Court judgement No. 327/2003 (it rejected the idea of subsidiary universal jurisdiction, although it pointed out that universal jurisdiction could only be exercised in

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Spain if one of the following three conditions was fulfilled: the accused was present in Spain, the victim was Spanish, or there was a Spanish interest in the matter). However, the Constitutional Court, in *amparo* proceedings, through judgement No. 237/2005, returned to an absolute interpretation of the principle of universal jurisdiction in Spain. Accordingly, the Constitutional Court granted *amparo* to the appellants, declared that the National High Court order and Supreme Court judgement against which the appeal had been brought were invalid and ordered the legal proceedings to be resumed at the point at which the violation of article 24.1 of the Spanish Constitution, read jointly with article 23.4 of Act No. 6/1985, had occurred. As a result, the National High Court reopened the *Guatemala* case.

In short, a concept of absolute universal jurisdiction was retained, being restricted only (under article 23.5 of Act No. 6/1985) by the principle of *res judicata* covered by article 23.2 (c) of Act No. 6/1985, according to which Spanish judges and courts may not exercise jurisdiction if “*the perpetrator [has] been acquitted, pardoned or convicted abroad*”.

8. In both the aforementioned judgement and judgement No. 227/2007 of 22 November¹, also issued in *amparo* proceedings with regard to the *Falun Gong* case, the Constitutional Court did not refer to the “*constitutionality*” of universal jurisdiction, but rather to the obligation of judges and courts to exercise such jurisdiction in accordance with the law, thus respecting the constitutional right to effective judicial protection. As a result, the Constitutional Court did not close the door to a possible reform of Act No. 6/1985 that would introduce restrictions on and conditions for the exercise of universal jurisdiction. Such a reform took place in 2009.

9. Organization Act No. 18/2003 resulted in the inclusion of a requirement of subsidiary universal jurisdiction in cases where the crime prosecuted might fall within the jurisdiction of the International Criminal Court. Article 7 of the Act provides that no judicial body or body of the

¹ Translator's note: The correct date is 22 October.

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Office of the Public Prosecutor shall take action *ex officio* in relation to acts that have taken place in other States, the alleged perpetrators of which are not Spanish nationals and in the prosecution of which the International Criminal Court may have jurisdiction. In the event of a complaint or dispute, the Spanish bodies shall limit themselves to informing the author of the complaint or party to the dispute of the possibility of applying directly to the Prosecutor of the International Criminal Court. Only if the said Prosecutor does not open an investigation or the International Criminal Court decides that the matter is inadmissible would Spanish judges have jurisdiction pursuant to article 23.4 of Act No. 6/1985.

It is clear that this model of subsidiary jurisdiction applies to the exercise of universal jurisdiction understood *stricto sensu*; however, this may not be interpreted to mean that the Spanish courts lack competence to exercise universal jurisdiction in respect of crimes over which the International Criminal Court has jurisdiction. On the contrary, universal jurisdiction may be exercised in Spain for those crimes, with the sole restriction that the International Criminal Court has the first option to exercise its international jurisdiction.

This restriction on universal jurisdiction in cases where an international court has previously exercised jurisdiction or has priority of jurisdiction, which was subsequently taken into account by the Constitutional Court in its judgement No. 227/2007, was incorporated into the 2009 reform as a general rule.

10. Organization Act No. 3/2005, meanwhile, introduced a restriction on the scope of jurisdiction with regard to a particular category of crimes: those relating to female genital mutilation. In this case, universal jurisdiction may be exercised by Spanish courts only where “*the perpetrators are present in Spain*”. This restriction, which modifies the general model in force under Act No. 6/1985, has been maintained to some extent in the 2009 reform.

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11. However, the primary reform of the model of universal jurisdiction to be exercised by Spanish judicial bodies was brought about by the aforementioned Organization Act No. 1/2009, through the inclusion of the principle of subsidiarity. This reform also takes into account the two previous amendments to the scope of universal jurisdiction which were made in 2003 and 2005 under Organization Acts No. 18/2003 and No. 3/2005, respectively.

12. By virtue of article 1 of Act No. 1/2009, article 23.4 of Act No. 6/1985 is amended substantially. Under the new provision, the principle of universal jurisdiction is now restricted and depends on the existence of a number of elements:

(a) The existence of a link with Spain, which has three possible bases: the Spanish nationality of the victim (passive personality); the presence in national territory of the alleged perpetrator; or any other relevant link with Spain. The existence of these elements must be verified, in each case, by the competent court.

(b) The subsidiary nature of Spanish universal jurisdiction in relation to the jurisdictions of third States or of an international court, without restricting that subsidiarity to the mere application of res judicata.

Thus, the exercise of universal jurisdiction by Spanish judges and courts becomes a “*jurisdiction of last resort*”, which is the basis for the institution. Nevertheless, it should be noted that these restrictions and conditions should be applied “*without prejudice to the obligations of Spain under international treaties*”, which excludes the application of such restrictions where Spain has an obligation under an international treaty to prosecute certain crimes, regardless of the place where they were committed or the nationality of the alleged perpetrator.

III. Crimes subject to the exercise of universal jurisdiction in Spain

13. Act No. 6/1985 confined the exercise of universal jurisdiction to the prosecution of a set of crimes that are particularly serious and are international in scope. The list of these crimes has been expanded over the years, while the crime of counterfeiting foreign currency was removed in the 2009 reform.

14. According to the 2009 wording of article 23.4 of Act No. 6/1985, all of the most serious crimes of international scope have been placed under universal jurisdiction, namely: genocide, crimes against humanity and war crimes (included through the reference to international humanitarian law treaties). To these are added a set of crimes which are clearly international in scope and to which Spain attaches particular importance. Lastly, a new expansion clause allows the principle of universal jurisdiction to be applied to crimes that Spain has the obligation to prosecute under international treaties, even where they are not specifically mentioned.

It should be noted that, among other relevant instruments, Spain is party to the following international treaties:

- Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (instrument of accession deposited on 13 September 1968);
- the four Geneva Conventions of 12 August 1949, Additional Protocols I and II thereto of 8 June 1977 and Protocol III of 8 December 2005;
- European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;

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- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, done at New York on 14 September² 1973 (instrument of accession signed³ on 26 July 1985);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (instrument of accession⁴ deposited on 21 October 1987) and the Optional Protocol thereto, done at New York on 18 December 2002 (instrument of ratification promulgated⁵ on 6 June 2006);
- Rome Statute of the International Criminal Court, done at Rome on 17 July 1998 (instrument of ratification deposited on 19 October 2000⁶).

The legal content of these instruments has been transposed into the legislation in force, specifically the Penal Code. Furthermore, through its report No. 17,673 of 11 March 2013, this International Legal Advisory Office stated, as in its previous reports Nos. 15,397 and 16,827 on the same topic, that it found no impediment to the accession of Spain to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968. Through report No. 17,673, it has in fact completed the corresponding progress report, which means that Spain could accede to the Convention in the relatively near future.

IV. Spanish practice

15. Since the mid-1990s, the National High Court has had to deal with a significant number of cases based on the principle of universal jurisdiction and involving acts that had taken place in various regions and different categories of crimes, in particular genocide, torture and other crimes

² Translator's note: The Convention was actually opened for signature on 14 December 1973.

³ Translator's note: According to the United Nations Treaty Series, the date of accession by Spain was 8 August 1985. However, the instrument was signed on 26 July 1985, see http://www.boe.es/diario_boe/txt.php?id=BOE-A-1986-3248.

⁴ Translator's note: According to the United Nations Treaty Series, the date of ratification was 21 October 1987.

⁵ Translator's note: According to the United Nations Treaty Series, ratification by Spain took place on 4 April 2006. However, the instrument of ratification was promulgated on 6 June 2006, see <http://www.boe.es/boe/dias/2006/06/22/pdfs/A23537-23543.pdf>.

⁶ Translator's note: According to the United Nations Treaty Series, the Rome Statute was ratified by Spain on 24 October 2000.

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against humanity, and war crimes. In a number of those cases, the victims of the crimes reported were Spanish citizens. Thus, the principle of universal jurisdiction coincided with competence based on passive personality, which is not, however, specially and separately regulated in Act No. 6/1985.

16. However, following the 2009 reform of Act No. 6/1985, it is no longer possible to speak of an "*absolute principle of universal jurisdiction*" since, under the new paragraph 5⁷ of article 23, it is subject to the existence of "*a relevant link with Spain*" and some subordination of Spanish jurisdiction to another competent jurisdiction (concurrent jurisdiction), whether national or international, provided that proceedings for the effective investigation and prosecution of the offences in question have been initiated in that other jurisdiction.

In fact, the explanatory introduction to Organization Act No. 1/2009 of 3 November states that the Act provides for "*a change in the treatment of what has come to be called 'universal jurisdiction', through the amendment of article 23 of the Judicial Power Organization Act in order, firstly, to incorporate types of crimes that were not included and that are subject to prosecution under international conventions and customary law, such as crimes against humanity and war crimes. Secondly, the reform allows the precept to be adapted and clarified in accordance with the principle of subsidiarity and the doctrine established by the Constitutional Court and the jurisprudence of the Supreme Court*".

17. The following examples of recent Spanish jurisprudence relating to the principle of universal jurisdiction are of particular note:

- Order 1566/2011, of 6 October, of the Criminal Chamber, Section 1, of the Supreme Court, establishing the inadmissibility of the appeal brought against the Order issued at the plenary session of the Criminal Chamber of the National High Court on 27 October 2010, concerning crimes

⁷ Translator's note: it is actually new paragraph 4 of article 23 that refers to "a relevant link with Spain".

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against humanity, torture and war crimes allegedly committed by certain Chinese authorities against the people of Tibet.

- Order of 29 October 2012, by which Central Court of Investigation No. 5 of the National High Court indicted seven persons for the alleged crime of genocide (as well as the alleged crimes of murder and kidnapping). Those indicted are Chilean soldiers suspected of having killed a Spanish national who was working as a diplomat⁸ for the United Nations at the United Nations Economic Commission for Latin America (ECLAC) and who therefore enjoyed the privileges and immunities corresponding to his office. As indicated in the legal reasoning, "*[the] the criminal proceedings initiated in a Spanish court shall be temporarily stayed in the event that it is established that proceedings based on the alleged acts have been initiated in the country or by the [international] Court*".

- Order 1916/2012, of 20 December, of the Criminal Chamber, Section 1, of the Supreme Court, establishing the inadmissibility of the appeal brought against the Order issued at the plenary session of the Criminal Chamber of the National High Court on 23 March 2012. The Spanish courts were found to lack jurisdiction to investigate allegations of torture and ill-treatment at the Guantánamo Bay detention centre, in application of the principle of subsidiarity, since the authorities of the United States of America had demonstrated that administrative and criminal proceedings had been, or were being, conducted to investigate the facts.

⁸ Translator's note: In fact, he was an international civil servant (Carmelo Soria).