

Translated from Spanish

Ministry of Foreign Affairs and Cooperation

Office of the Under-Secretary of Foreign
Affairs and Cooperation

International Law Division

Madrid, 22 February 2016

Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction”

In response to the request of the General Assembly contained in paragraph 3 of its resolution 70/119 of 14 December 2015 for Member States to submit “information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties and their national legal rules and judicial practice”, Spain is pleased to present the following information.

Legal rules

Spanish law provides for the principle of universal jurisdiction, although its scope has been limited in recent times as a result of the legislative reforms adopted in 2009 and 2014.

In its original formulation, article 23, paragraph 4, of Organic Act No. 6/1985 of 1 July on the Judiciary (hereinafter referred to as Organic Act No. 6/1985)¹ recognized the jurisdiction of Spanish courts over offences committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish criminal law: genocide; terrorism; piracy or unlawful seizure of aircraft; counterfeiting of foreign currency; crimes related to prostitution; trafficking in psychotropic, toxic or narcotic drugs; or any other crime which should be prosecuted in Spain pursuant to an international treaty or agreement.

It is worth reproducing the original wording of article 23 of Organic Act No. 6/1985 in full:

1. In the system of criminal law, the Spanish courts shall have jurisdiction over offences committed on Spanish territory or aboard Spanish vessels or aircraft, without prejudice to the provisions of international treaties to which Spain is a party.
2. The Spanish courts shall also have jurisdiction over acts recognized as offences under Spanish criminal law, even if they have been committed outside the national territory, provided that the perpetrators are Spanish nationals or foreigners who have acquired Spanish nationality after the commission of the crime, and subject to the following conditions:
 - (a) The act is an offence in the place where it was committed;
 - (b) The victim or the Public Prosecution Service has filed a complaint or brought a case before the Spanish courts;

¹ Organic Act No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July 1985).

(c) The alleged perpetrator has not been acquitted, pardoned or convicted abroad, or, in the latter case, has not served his or her sentence. If he or she has served part of the sentence, this will be taken into account in order to reduce proportionally the sentence imposed.

3. The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory where those acts are classified as one of the following offences under Spanish criminal law:

- (a) Treason or crimes against the peace or independence of the State;
- (b) Crimes against the monarch, his or her consort or successor or the regent;
- (c) Rebellion or sedition;
- (d) Forgery of the royal signature or seal, the State seal, the signatures of ministers or public or official seals;
- (e) Counterfeiting of Spanish currency and the circulation of such currency;
- (f) Any other act of counterfeiting that is directly detrimental to the credit or interests of the State, and the introduction or circulation of the resulting counterfeit articles;
- (g) An attack against Spanish authorities or public officials;
- (h) Crimes committed in the performance of their duties by Spanish public officials residing abroad and crimes against the Spanish public administration;
- (i) Crimes related to exchange control.

4. The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish criminal law:

- (a) Genocide;
- (b) Terrorism;
- (c) Piracy or unlawful seizure of aircraft;
- (d) Counterfeiting of foreign currency;
- (e) Crimes related to prostitution;
- (f) Trafficking in psychotropic, toxic or narcotic drugs;
- (g) Any other crime which should be prosecuted in Spain pursuant to an international treaty or agreement.

5. In cases such as those referred to in paragraphs 3 and 4, the provisions set forth in paragraph 2 (c) of this article shall apply.

As illustrated, paragraph 1 attributes to the Spanish courts jurisdiction over crimes committed on the national territory (territorial principle); paragraph 2 recognizes the jurisdiction of the Spanish courts over crimes committed abroad by Spanish nationals (active personality principle); paragraph 3 recognizes the jurisdiction of the Spanish courts over crimes that have a particularly serious impact on the protection of State interests, irrespective of the nationality of the perpetrator and the fact that the crime was committed abroad (protective principle); and paragraph 4 provides for the exercise of universal jurisdiction by the national courts, which it declares competent to try offences that have no link to Spain in that they are committed by foreigners outside the national territory.

Article 23, paragraph 4, of Organic Act No. 6/1985 has undergone six amendments: the purpose of the initial amendments was simply to include new offences in the list of acts that could be prosecuted on the basis of universal jurisdiction; the amendments made after 2009 also redefined the scope of universal jurisdiction by introducing restrictions on its exercise.

With respect to the first set of reforms, Organic Act No. 11/1999,² Organic Act No. 3/2005³ and Organic Act No. 13/2007⁴ expanded the material scope of the provision to include crimes related to the corruption of minors or legally incompetent persons, female genital mutilation and trafficking or smuggling of persons. With regard to female genital mutilation, Spanish jurisdiction is affirmed only in cases where the perpetrators are present in Spain.

Organic Act No. 1/2009⁵ and Organic Act No. 1/2014⁶ also expanded the list of offences covered by article 23, paragraph 4, of Organic Act No. 6/1985 but at the same time reduced the scope of the provision.

In Organic Act No. 1/2009, the offence of counterfeiting foreign currency was removed from the list, while crimes against humanity were added; the Act also introduced an explicit reference to treaties on international humanitarian law and human rights protection in the subparagraph relating to the treaty-based obligations assumed by Spain. However, as mentioned, the Act also for the first time limited the scope of article 23, paragraph 4, of Organic Act No. 6/1985 by establishing that there must be a link with Spain, which had not previously been stipulated (except with regard to the offence of female genital mutilation), and by introducing the principle of subsidiarity.

As a result of this reform put forward by the socialist Government of José Luis Rodríguez Zapatero, article 23 (paras. 4 and 5) was amended as follows:

4. The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish criminal law:

- (a) Genocide and crimes against humanity;
- (b) Terrorism;
- (c) Piracy or unlawful seizure of aircraft;

² Organic Act No. 11/1999 of 30 April (Official Gazette No. 104 of 1 May 1999).

³ Organic Act No. 3/2005 of 8 July (Official Gazette No. 163 of 9 July 2005).

⁴ Organic Act No. 13/2007 of 19 November (Official Gazette No. 278 of 20 November 2007).

⁵ Organic Act No. 1/2009 of 3 November (Official Gazette No. 266 of 4 November).

⁶ Organic Act No. 1/2014 of 13 March (Official Gazette No. 63 of 14 March 2014).

- (d) Crimes related to the prostitution or corruption of minors or legally incompetent persons;
- (e) Trafficking in psychotropic, toxic or narcotic drugs;
- (f) Illegal trafficking or smuggling of persons, whether or not they are workers;
- (g) Crimes relating to female genital mutilation if the perpetrators are present in Spain;
- (h) Any other crime that should be prosecuted in Spain under an international treaty or agreement, especially treaties on international humanitarian law and human rights protection.

Without prejudice to the provisions of international treaties and agreements signed by Spain, in order for the Spanish courts to have jurisdiction over the aforementioned offences, it must be established that the alleged perpetrators are present in Spain, that there are victims of Spanish nationality or that there is some relevant link with Spain and, in any event, that no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes.

Criminal proceedings initiated in a Spanish court shall be temporarily stayed where it has been established that proceedings based on the alleged acts have been initiated in a country or by a court referred to in the previous paragraph.

5. In the event that criminal proceedings are initiated in Spain in cases such as those referred to in paragraphs 3 and 4 above, the provisions set forth in paragraph 2 (c) of this article shall still apply.

As illustrated, the jurisdiction of the Spanish courts thus became dependent on the existence of a link with Spain, which could be based on the presence of the perpetrator in the national territory, the Spanish nationality of the victims or any other “relevant link” with Spain. In addition, taking into account the doctrine established by the Constitutional Court and the case law of the Supreme Court, the principle of subsidiarity was established, in accordance with which the Spanish courts may exercise jurisdiction only if the offences are not being investigated and prosecuted effectively by another country or by an international court. Moreover, proceedings already initiated in Spain must be temporarily stayed if proceedings connected with the same offences are initiated by a court in another country or an international court.

Organic Act No. 1/2014, put forward by the conservative Government of Mariano Rajoy, introduced similar parameters. Following this new reform, paragraphs 4-6 of article 23 now read as follows:

4. The Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the following offences under Spanish law, subject to the stated conditions:

- (a) Genocide, crimes against humanity or crimes against protected persons or property in situations of armed conflict, where proceedings are brought against a Spanish national, a foreign national who habitually resides in Spain or a foreign national present in Spain whose extradition has been refused by the Spanish authorities;

(b) Torture and other offences against moral integrity under articles 174-177 of the Criminal Code, where:

1. Proceedings are brought against a Spanish national; or
2. The victim had Spanish nationality at the time when the crime was committed and the person accused of the crime is present in Spanish territory;

(c) Crimes of enforced disappearance under the International Convention for the Protection of All Persons from Enforced Disappearance, done at New York on 20 December 2006, where:

1. Proceedings are brought against a Spanish national; or
2. The victim had Spanish nationality at the time when the crime was committed and the person accused of the crime is present in Spanish territory;

(d) Crimes of piracy, terrorism, trafficking in toxic, narcotic or psychotropic substances, trafficking in persons, crimes against the rights of foreign nationals and crimes against the safety of maritime navigation committed in maritime areas in the cases provided for in the treaties ratified by Spain or the normative instruments of an international organization of which Spain is a member;

(e) Terrorism, in any of the following circumstances:

1. Proceedings are brought against a Spanish national;
2. Proceedings are brought against a Spanish national or a foreigner who habitually resides *or is present* in Spain, *or against any individual who does not fall into one of these categories but who collaborates with a Spanish national or with a foreigner residing or present in Spain to commit a terrorist offence*;
3. The crime is committed on behalf of a legal person whose registered office is in Spain;
4. The victim had Spanish nationality at the time when the crime was committed;
5. The crime is committed with the aim of unlawfully influencing or determining the actions of any Spanish authority;
6. The crime is committed against an institution or agency of the European Union that is headquartered in Spain;
7. The crime is committed against a vessel or aircraft flying the Spanish flag; or
8. The crime is committed against Spanish official facilities, including Spanish embassies and consulates.

For these purposes, a Spanish official facility means any permanent or temporary facility in which Spanish authorities or public officials carry out their public functions;

(f) Crimes under the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970, where:

1. The crime is committed by a Spanish national; or
2. The crime is committed against an aircraft flying the Spanish flag;

(g) Crimes under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, and the Protocol supplementary thereto, done at Montreal on 24 February 1988, in the cases set forth therein;

(h) Crimes under the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on 3 March 1980, where the offence is committed by a Spanish national;

(i) Trafficking in toxic, narcotic or psychotropic substances, where:

1. Proceedings are brought against a Spanish national; or
2. Action has been taken to carry out one of these crimes or to establish a criminal group or organization with a view to committing one of these crimes on Spanish territory;

(j) Crimes involving the establishment and financing of or membership in a criminal group or organization, or crimes committed by members of such groups or organizations, where the latter have acted with a view to committing an offence in Spain that is punishable with a term of three or more years in prison;

(k) Crimes against the sexual freedom and inviolability of minors, where:

1. Proceedings are brought against a Spanish national;
2. Proceedings are brought against a foreign national who habitually resides in Spain;
3. Proceedings are brought against a legal person, company, organization, group or any other kind of entity or association of persons that has its headquarters or registered office in Spain; or
4. The victim had Spanish nationality or was habitually resident in Spain at the time when the crime was committed;

(l) Crimes under the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011, where:

1. Proceedings are brought against a Spanish national;
 2. Proceedings are brought against a foreign national who habitually resides in Spain;
- or
3. The victim had Spanish nationality or was habitually resident in Spain at the time when the crime was committed and the person accused of the crime is present in Spain;

(m) Trafficking in persons, where:

1. Proceedings are brought against a Spanish national;
2. Proceedings are brought against a foreign national who habitually resides in Spain;
3. Proceedings are brought against a legal person, company, organization, group or any other kind of entity or association of persons that has its headquarters or registered office in Spain; or
4. The victim had Spanish nationality or was habitually resident in Spain at the time when the crime was committed and the person accused of the crime is present in Spain;

(n) Crimes of corruption among individuals or in international economic transactions, where:

1. Proceedings are brought against a Spanish national;
2. Proceedings are brought against a foreign national who habitually resides in Spain;
3. The crime is committed by the director, manager, employee or partner of a commercial enterprise, company, association, foundation or organization that has its headquarters or registered office in Spain; or

4. The crime is committed by a legal person, company, organization, group or any other kind of entity or association of persons that has its headquarters or registered office in Spain;

(o) Crimes under the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health of 28 October 2011, where:

1. Proceedings are brought against a Spanish national;
2. Proceedings are brought against a foreign national who habitually resides in Spain;
3. Proceedings are brought against a legal person, company, organization, group or any other kind of entity or association of persons that has its headquarters or registered office in Spain;
4. The victim had Spanish nationality at the time when the crime was committed; or
5. The victim was habitually resident in Spain at the time when the crime was committed;

(p) Any other offence in respect of which prosecution is required under a treaty that is in force for Spain or under other normative instruments of an international organization of which Spain is a member, in the cases and circumstances specified therein.

The Spanish courts shall also have jurisdiction over the above-mentioned offences, where such offences are committed outside the national territory by a foreign national present in Spain whose extradition has been refused by the Spanish authorities, if this is required under a treaty that is in force for Spain.

5. The offences referred to in the preceding paragraph shall not be prosecutable in Spain in the following cases:

(a) Where proceedings to investigate and prosecute the offence have been initiated by an international court established in accordance with a treaty or agreement to which Spain is a party;

(b) Where proceedings to investigate and prosecute the offence have been initiated in the State in which the offence was committed or in the State of nationality of the accused person, if:

1. The accused person is not present in Spanish territory; or
2. Proceedings have been initiated to extradite the accused person to the country in which the offence was committed or to the country of nationality of the victims or to bring the accused person before an international court or a court or in one of the aforementioned countries, unless the extradition is not authorized.

The provisions of subparagraph (b) shall not apply where the State that has jurisdiction is unwilling or unable genuinely to carry out the investigation; this shall be determined by the Second Division of the Supreme Court, which shall be presented with a reasoned statement by the relevant judge or court.

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

6. The offences referred to in paragraphs 3 and 4 shall be prosecutable in Spain only upon submission of a complaint by the victim or the Public Prosecution Service.⁷

Organic Act No. 1/2014 once again increased the number of offences subject to prosecution under the principle of universal jurisdiction, for instance, by extending the list of offences involving violence against women beyond genital mutilation and adding offences involving corruption of public officials or organized crime. On the other hand, it maintained the requirement of a link with Spain (to be established on a case-by-case basis); upheld the principle of subsidiarity, which is implemented by specifying to which country's courts the Spanish courts would cede jurisdiction, unless the State in question is unwilling or unable genuinely to carry out the investigation; and introduced a new procedural restriction in accordance with which the legal standing to initiate proceedings is limited to the victim and the Public Prosecution Service.

Organic Act No. 1/2014 includes a single transitional provision, which states:

Proceedings relating to the offences referred to in this Act that are in progress at the time of its entry into force shall be stayed until it can be verified that the requirements established therein have been met.

Accordingly, proceedings pending before the Spanish courts, including the *Tibet* case (initiated on the basis of allegations against a number of Chinese leaders accused of genocide in Tibet), the *Falun Gong* case (based on a complaint brought by followers of the Falun Gong movement against a number of Chinese leaders accused of genocide and torture) and the *Rwanda* case (based on a complaint brought against 79 members of the Rwandan Patriotic Front and the Government of Rwanda accused of terrorism, torture, genocide, war crimes and crimes against humanity), will be stayed as a result of the reform. Note: these cases were stayed rather than definitively closed, as proceedings could reopen in the event that the requirements set out in the new version of article 23, paragraph 4, of Organic Act No. 6/1985 are met.

Judicial practice

With regard to judicial practice, it should first of all be noted that Spanish judges and courts have applied article 23, paragraph 4, of Organic Act No. 6/1985 with some frequency. Attached

⁷ The amendments made to paragraph 4 (e) 2 pursuant to Organic Act No. 2/2015 of 30 March (Official Gazette No. 77 of 31 March 2015) are shown in italics.

hereto are several pages from the book *La jurisdicción universal y su aplicación en España. La persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales* (Universal jurisdiction and its application in Spain. The prosecution of genocide, war crimes and crimes against humanity by the national courts) (2009) by Professor Antoni Pigrau Solé, which provide an account of the cases brought before and declared admissible by the National High Court of Spain on the basis of universal jurisdiction over cases of genocide, war crimes and crimes against humanity.

Secondly, it should be noted that criminal proceedings in many of those cases did not progress very far because of three types of circumstances: (i) the accused persons enjoyed immunity from jurisdiction by virtue of their status as current or former Heads of State, Heads of Government or Ministers for Foreign Affairs (as in the cases of Paul Kagame, Fidel Castro, Hassan II, Teodoro Obiang Nguema and Hugo Chávez); (ii) the Spanish Government decided to extradite the accused to their own countries, where criminal proceedings against them were under way (as happened with Ricardo Cavallo and Juan Carlos Fortea, for example); or (iii) a third country decided not to comply with an extradition request issued by Spain (as happened with Augusto Pinochet and the military personnel implicated in the *Guatemala* case).

In fact, the case of Argentine military officer Adolfo Scilingo was the first (and, to date, the only) case to result in convictions from both the National High Court (in 2005) and the Supreme Court (in 2007).

It is also worth noting that at times the application of universal jurisdiction has been a source of tension and disagreement between those two courts. For instance, in the *Guatemala* case concerning the genocide of the Mayan people, the Criminal Division of the National High Court in 2000 rejected the existence of Spanish jurisdiction, considering it to be subsidiary to the jurisdiction of Guatemala, whose courts were not unable to prosecute (although up to that time they had not done so). That order was appealed to the Supreme Court; the Court's Criminal Division annulled the order in its judgment of 25 February 2003 but applied an even more restrictive interpretation of the principle of universal jurisdiction, ruling that universal jurisdiction could not be exercised in the absence of a link with Spain, namely the presence of the accused in the national territory, the Spanish nationality of the victims or some other link. Both decisions, which, it should be noted, were adopted before the 2009 reform, were annulled by the Constitutional Court, which recalled the absolute terms in which article 23, paragraph 4, of Organic Act No. 6/1985 (in its original version, at that time) enshrined universal jurisdiction (judgment No. 237/2005 of 26 September 2005).

Lastly, it should be noted that proceedings in the Spanish courts have been adjusted in line with the legislative changes set out above. In that regard, as mentioned above, an immediate consequence of the reform introduced by Organic Act No. 1/2014 was the stay of the *Tibet* case (National High Court Criminal Division Order No. 38/2014 of 2 July 2014, confirmed by Supreme Court Criminal Division Judgment No. 296/2015 of 6 May 2015), the *Falun Gong* case (National High Court Criminal Division Order No. 44/2014 of 15 July 2014, confirmed by Supreme Court Criminal Division Judgment No. 297/2015 of 8 May 2015) and the *Rwanda* case (National High Court Criminal Division Order of 28 January 2015, confirmed by Supreme Court Criminal Division Judgment No. 551/2015 of 24 September 2015), in accordance with the transitional provision of the Act.
