
The scope and application of the principle of universal jurisdiction: information provided by Spain

In resolution 64/117 of 16 December 2009, the United Nations General Assembly requested the Secretary-General to prepare a report on the scope and application of the principle of universal jurisdiction, based on information and observations from Member States.

In accordance with this resolution, the Government of Spain is pleased to submit the following information on Spanish legislation and practice relating to universal jurisdiction.

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

1. The Spanish Constitution of 1978, which establishes the basis of the Spanish legal system, does not contain any provision relating to the exercise of universal jurisdiction. Any exercise of such a power must therefore be based on Spanish domestic legislation, in 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 referring to it as such, 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) in its original formulation:

“4. Spanish jurisdiction shall also apply to acts committed by Spaniards or foreigners outside the national territory when those acts are classified as one of the following offences under Spanish criminal law:

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- (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; and
 - (g) Any other crime which should be prosecuted in Spain pursuant to international treaties or conventions.”

According to the aforementioned provision, universal jurisdiction is a form of extraterritorial exercise of criminal jurisdiction, which allows national criminal courts to prosecute certain categories of crimes, 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 competence 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 anywhere in 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, the exercise of 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, such as 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. These substantive amendments were made by the following pieces of legislation:

- Organization Act No. 3/2005 of 8 July amending Judicial Power Organization Act No. 6/1985 of 1 July on extraterritorial prosecution for female genital mutilation (Official Gazette No. 163 of 9 July 2005);
- Organization Act No. 13/2007 of 19 November, on extraterritorial prosecution for human trafficking or smuggling of persons (Official Gazette No. 278 of 20 November 2007).

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, which amended Judicial Power Organization Act No. 6/1985 of 1 July (Official Gazette No. 266 of 4

November 2009). In addition to the reform mentioned, the aforementioned Organization Act No. 1/2009 also amended 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. Taking a literal interpretation of article 23.4 of Act No. 6/1985, the National High Court concluded in the first cases submitted to it under the Act that the principle of universal jurisdiction was not subject to any condition in Spain and that the only relevant fact for establishing the exercise of its competence was the alleged commission of one or more of the crimes listed in the aforementioned article 23.4 of Act No. 6/1985.

As a result, the National High Court maintained a concept of absolute universal jurisdiction that was 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”.

Moreover, this concept of universal jurisdiction allows criminal proceedings to be brought even where the accused is not present in Spanish territory; this requires the subsequent initiation of extradition proceedings. This was the interpretation followed in the so-called *Pinochet* case, brought in 1996 against General Augusto Pinochet, who was accused of the crimes of genocide and torture. That case, which became a model for the exercise of universal jurisdiction in Spain, resulted in complex proceedings for extradition

from the United Kingdom that revealed the existing difficulties in ensuring proper application of the concept.

The National High Court used the same interpretation in the so-called *Argentina* case (the *Scilingo* case and the *Cavallo* case).

8. Soon afterwards, however, the National High Court changed its interpretation of article 23.4 of Act No. 6/1985 by introducing conditions for the exercise of universal jurisdiction. In the so-called *Guatemala* case, the Criminal Chamber of the National High Court declined to exercise universal jurisdiction because it considered that the Guatemalan courts were able to prosecute on the basis of the events that were the subject of the complaint and that it should therefore not exercise a universal jurisdiction that it described as “subsidiary” (Order issued at the plenary session of the Criminal Chamber of the National High Court, 13 December 2000).

The Supreme Court subsequently confirmed this restrictive interpretation of the scope of universal jurisdiction in its judgement No. 327/2003, of 25 February, which was issued as a result of the appeal, filed by the authors of the complaint, against the order issued by the National High Court in the case. In this judgement, the Supreme Court rejected the idea of subsidiary universal jurisdiction, but concluded that it could not be exercised in Spain unless one of the following conditions was fulfilled: that the accused was present in Spain, that the victim was Spanish, or that there was a specific Spanish interest in the matter.

The persons who had brought the original complaint before the National High Court, and had then appealed to the Supreme Court, filed for the remedy of amparo against Supreme Court judgement No. 327/2003 in special human rights proceedings before the Constitutional Court. As a result of that appeal, the Constitutional Court concluded, in its judgement No. 237/2005 of 26 September 2005, that Act No. 6/1985 had established a model of universal

jurisdiction that was strict and unconditional and that, consequently, the competent judicial bodies could not introduce restrictions or conditions on the exercise of universal jurisdiction other than the restriction imposed by the *res judicata* principle. In the opinion of the Constitutional Court, to impose any other condition or restriction would violate the right to effective legal protection set out in article 24.1 of the Spanish Constitution as the judicial body would be denying access to the courts without a specific legal basis.

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; the proceedings before that court are still under way.

The Constitutional Court has reiterated this doctrine in its judgement No. 227/2007 of 22 November,^{*} which was issued in *amparo* proceedings against a National High Court order and a Supreme Court judgement that had rejected a complaint concerning allegations of torture and crimes against humanity committed by Chinese leaders against members of the Falun Gong movement.

In any event, it should be noted that the Constitutional Court judgements referred to do 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 amendment of Act No. 6/1985 that would introduce restrictions on and conditions for the exercise of universal jurisdiction.

^{*} *Translator's Note:* The correct date is 22 October.

9. The scope of universal jurisdiction in Spain has been the subject of three successive reforms in 2003, 2005 and 2009 under Organization Act No. 18/2003, Organization Act No. 3/2005 and Organization Act No. 1/2009, respectively. While the first two Acts contain partial amendments, Organization Act No. 1/2009 redefined the overall scope of universal jurisdiction, taking into account and incorporating the first two amendments.

10. Organization Act No. 18/2003 on cooperation with the International Criminal Court 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.

Thus, under article 7 of Act No. 18/2003:

“2. When a complaint or dispute is brought before a judicial body or a body of the Office of the Public Prosecutor or when a ministerial department receives a request relating to acts that have taken place in other States, the alleged authors of which are not Spanish nationals and in the prosecution of which the [International Criminal] Court may have jurisdiction, those bodies shall not open any proceedings and should limit themselves to informing the author of the complaint, party to the dispute or requesting party of the possibility of applying directly to the Court Prosecutor, who may, in turn, initiate an investigation without prejudice to the taking, where necessary, of any urgent preliminary measures for which they have competence. In the same circumstances, the judicial bodies and the Office of the Public Prosecutor shall refrain from prosecuting *ex officio*.

3. Nevertheless, if the Court Prosecutor does not initiate an investigation or if the Court decides that the matter is inadmissible, the complaint, dispute or request may be brought before the relevant authorities a second time.”

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.

11. Organization Act No. 3/2005 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.

12. However, the primary reform of the model of universal jurisdiction to be exercised by Spanish courts was brought by the aforementioned Organization Act No. 1/2009.

As indicated in the explanatory introduction to the aforementioned Act, the reform of universal jurisdiction takes place “[in] compliance with the mandate established by the Congress of Deputies [lower chamber of the Spanish parliament], through the resolution adopted on 19 May 2009 in connection with the State of the Nation debate”. Also, “[it] adapts and clarifies [art. 23.4 of Act No. 6/1985] in accordance with the principle of

subsidiarity and the doctrine established by the Constitutional Court and the jurisprudence of the Supreme Court” of Spain.

This reform also takes into account the two previous amendments to the scope of universal jurisdiction which were made in 2003 and 2005 under Acts No. 18/2003 and No. 3/2005, respectively.

13. In accordance with article 1 of Act No. 1/2009, article 23.4 of Act No. 6/1985 is amended substantially by the inclusion of two new paragraphs:

“Without prejudice to the provisions of international treaties and agreements signed by Spain, in order for Spanish courts to have jurisdiction over the [...] offences [listed in art. 23.4 of Act No. 6/1985], 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.

The 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 the country or by a Court referred to in the previous paragraph.”

Under this 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 courts 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.

This modification of the scope of universal jurisdiction has already been taken into account by the National High Court; its criminal branch agreed in plenary session to halt the proceedings in the *Tibet* case (China) owing to the lack of any link with Spain (order of 4 November 2010), thus confirming the order previously issued by the examining magistrate.

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

14. 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, whereas the crime of counterfeiting foreign currency was removed in the 2009 reform.

Following the successive reforms of article 23.4 of Act No. 6/1985, universal jurisdiction may be exercised in Spain in respect of the following crimes:

- (a) Genocide and crimes against humanity;
- (b) Terrorism;

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- (c) Piracy or unlawful seizure of aircraft;
 - (d) Crimes related to the prostitution or corruption of minors and legally incompetent persons;
 - (e) Trafficking in psychotropic, toxic or narcotic drugs;
 - (f) Trafficking or smuggling of persons, including workers;
 - (g) Crimes relating to female genital mutilation if the perpetrators are present in Spain; and
 - (h) Any other crime that should be prosecuted in Spain under international treaties and conventions, especially international humanitarian law and human rights treaties.

15. According to the new 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.

IV. Spanish practice

16. 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 serious crimes, in particular genocide, torture and other crimes against humanity, and war crimes.

17. The following cases preceded the 2009 amendment of Act No. 6/1985:

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- *Pinochet* case (1996)
 - *Scilingo and Cavallo* case (Argentina, 1998)
 - *Guatemala* case (1999)
 - *Couso* Case (2003)
 - *Falun Gong* case (China, 2003)
 - *Rwanda* case (2004)
 - *Tibet* case (China, 2006 and 2008)
 - *Sahara* case (2006)
 - *Atenco* case (gender-based murders in Mexico, 2008)
 - *Nazi concentration camps* case (2008)
 - *Gaza* case (2008)
 - *Guantánamo* case (2009).

Subsequently to the 2009 reform, a complaint was lodged against various Israeli authorities by two Spanish nationals who had been present on one of the boats in the freedom flotilla intercepted on the high seas by an Israeli warship in May 2010.

18. 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.

19. In every case, some of the alleged perpetrators of the crimes occupied or have occupied high-level posts in their respective States and some of them had been agents in the service of the United Nations (the *Rwanda* case).

Nonetheless, in only one of the cases that the National High Court has heard on the merits has it declared itself not competent to exercise jurisdiction over one of the persons against whom a complaint had been made on the grounds of the post occupied by that person at the time when the judicial proceedings were initiated. That case concerned the complaint made in the *Rwanda* case against the then President of that country, Paul Kagame, whom the National High Court declared to be protected by the immunity of incumbent Heads of State under international law.

Similar decisions had been taken previously by Spanish courts in other cases in which complaints had been brought against incumbent Heads of State or Government. For example, the National High Court had declared that it did not have competence to prosecute Fidel Castro, Teodoro Obiang Nguema, Hassan II, Slobodan Milošević, Alan García, Alberto Fujimori and Silvio Berlusconi. In some of these cases, the National High Court's declaration of lack of competence in respect of a Head of State included a general statement that it was not competent to prosecute other persons allegedly involved in the case. In the *Rwanda* case, however, the Court restricted its statement of lack of competence to President Kagame, declaring itself competent to prosecute the other accused persons.

20. Although each of the aforementioned cases has faced various problems and has reached a different stage of the proceedings, attention is drawn to the great difficulties experienced by the National High Court in exercising its jurisdiction. This has largely been due to the fact that the accused persons were not present in Spanish territory and that extradition proceedings were required, as well as the equally important need to obtain judicial cooperation and assistance from the third States in whose territory most of the judicial, investigative and other activities essential for the proper conduct of the criminal proceedings had to take place.

21. Lastly, it is only in the *Scilingo* case that the National High Court, in the exercise of universal jurisdiction, has handed down a sentence: 1,084 years for torture and other crimes against humanity. The convicted person appealed unsuccessfully to the Supreme Court and the Constitutional Court. On 1 December 2008, Mr. Scilingo, who is currently serving his sentence in Spain, filed a complaint with the European Court of Human Rights for alleged violation of the right to a fair trial.

It should also be mentioned that in the *Cavallo* case, the accused, who was being prosecuted in Spain, was extradited to Argentina at the request of the courts of that country in order to be prosecuted for torture and other crimes committed in its territory.
