

17 March 2024

*Translated from Spanish*

## **Information and observations of Spain on the scope and application of universal jurisdiction in response to the invitation from the General Assembly of 7 December 2023 (resolution 78/113)**

### **1. Regulation of universal jurisdiction in Spain: evolution and state of play**

The principle of universal jurisdiction is regulated in article 23.4 of Organic Act 1/2014 of 13 March, amending Judiciary Organic Act 6/1985 of 1 July, regarding universal justice, published in Official Gazette of Spain No. 63 of 14 March; the article has been in force since 15 March 2014. The provision does not contain a definition of universal jurisdiction but rather is limited to describing the exercise thereof.

Spain has been a pioneer in incorporating and applying the concept of universal jurisdiction in its domestic law, the first reference to it dating back to 1870. From that time until the present, universal jurisdiction has always been regulated in general procedural laws, as opposed to ad hoc criminal laws, which has been the approach taken by the majority of countries in the region. Historically, there has been a pendulum swing in the regulation, from the initial enshrinement of absolute universal jurisdiction to more and more limited understandings of the concept, to the point where it has been almost completely diluted. This is in line with the trajectory followed by other member States of the European Union, such as Belgium. Indeed, five major phases can be identified, characterized by successive amendments to the aforementioned article 23.4 of the Organic Act on the Judiciary.

In the initial phase (1985–2003), Organic Act 6/85 enshrined a very broad conception of universal jurisdiction, although its judicial application was more limited. In the second phase (2003–2009), following the ratification by Spain of the Rome Statute of the International Criminal Court, the exercise of universal jurisdiction was deemed inapplicable in respect of acts subject to the jurisdiction of the Court and committed outside Spain when the alleged perpetrators were not Spanish nationals, although Organic Law 3/2003 authorized the prosecution of female genital mutilation when the perpetrators were in Spain. In the third phase (2003–2009), Organic Act 1/2009 again expanded the catalogue of prosecutable offences while also further restricting the scope of universal jurisdiction by: (a) expressly recognizing the subsidiarity of the jurisdiction of Spanish courts in relation to the International Criminal Court; (b) requiring links to Spain which had not been previously required; and (c) disallowing the use of *actio popularis* for the exercise of universal jurisdiction. In the fourth phase (2014–2024), Organic Act 1/2014, which is currently in force, consolidated the near-absolute restriction on universal jurisdiction on the basis subsidiarity, the requirement of a relevant connection with Spain and the principle of non-intervention in the internal affairs of other States. A fifth phase is currently under way, since in the past three years, several reform proposals have been put forward, and on 20 February 2024, in its plenary session, the Congress of Deputies approved the initiation of parliamentary consideration of a draft law, introduced by the Plurinational Parliamentary Group SUMAR, a member of the current coalition Government, to amend paragraphs 2, 4 and 5 of article 24.3 of Organic Act 6/1985 “for the protection of human rights and universal jurisdiction”. The purpose of this reform would be to halt the gradual erosion of universal jurisdiction and to reinstate its scope, on the understanding that “it has been and must continue to be a fundamental instrument to restrict the movements of alleged perpetrators of serious human rights violations; and, above all, to guarantee the protection of victims and their right to bring charges against the perpetrators of the most serious crimes against humanity”.

### **2. Current limits on the exercise of universal jurisdiction by Spain and proposal for changes**

## **under way**

The legislative approach used in article 23.4 of Act 1/2014, currently in force, is to define how universal jurisdiction can be exercised for acts committed outside the national territory, whether they are the core crimes (genocide, war crimes and crimes against humanity set forth in the Rome Statute) or the 16 crimes of international concern included in the provision itself. With regard to all these acts, the exercise of universal jurisdiction is contingent on the existence of links based on the active personality principle (the perpetrator must be a natural or legal person with Spanish nationality or, when the perpetrator is a foreigner, must habitually reside in Spain) or the passive personality principle (the victim must be a Spanish national or residing in Spain) or the principle of territoriality. With the successive amendments, the limitations have become increasingly restrictive, to the point that, after the 2014 amendment, in the view of a segment of the international academic literature and human rights organizations, although universal jurisdiction remains *de jure* in the Spanish legal system, it has disappeared *de facto*.

Thus, in order to exercise universal jurisdiction over the core crimes, the links required are for the perpetrator to be of Spanish nationality or to habitually reside in the country (in the case of foreigners); or for the perpetrator to be present on Spanish territory (in the case of foreigners whose extradition has been rejected).

With respect to crimes of international concern, the links vary; they primarily relate to personality (nationality of the perpetrator or habitual residence in the country if the perpetrator is a foreigner, or registered office in the country in the case of legal persons), or to territoriality (Spain is the location where such crimes are committed, or they are intended to be committed on Spanish territory). The nationality of the victims is also grounds for the exercise of universal jurisdiction, but such cases might also require the perpetrators to be present on Spanish territory. With respect to several of the crimes of international concern included in the extensive list in article 23.4 of the Judiciary Organic Act, universal jurisdiction is subject to the conditions established in the relevant international treaties ratified by Spain or the instruments of international organizations of which Spain is a member.

- Crimes of torture and forced disappearance of persons: perpetrator is a Spanish national, victim is a Spanish national and presence on Spanish territory of the perpetrator
- Crimes of piracy, terrorism, drug trafficking, trafficking in human beings, crimes violating the rights of foreign citizens and crimes against the safety of maritime navigation: based on the conditions set forth in the treaties ratified by Spain or in the normative instruments of an international organization of which it is a member. In the case of trafficking in drugs, narcotics and psychotropic substances, perpetrator is a Spanish national or any of the acts were committed or were intended to be committed on Spanish territory
- Terrorism crimes: perpetrator is a Spanish national; perpetrator habitually resides in the country (if the person is a foreign national) or has a registered office in Spain (if the perpetrator is a legal person); victim is a Spanish national; the offence was committed to influence the actions of a Spanish authority; the offence was committed against a European Union institution that is headquartered in Spain, against a vessel or aircraft flying the Spanish flag or against Spanish official facilities, including embassies and consulates
- Crimes of unlawful seizure of aircraft: perpetrator is a Spanish national or the act was committed against an aircraft flying the Spanish flag
- Crimes against the safety of civil aviation: in the cases authorized by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Protocol supplementary thereto
- Crimes relating to the physical protection of nuclear materials: perpetrator is a Spanish

national

- Crimes of establishment or financing of criminal groups, or participation in such groups: the crimes were committed on Spanish territory, provided that they are punishable by a maximum penalty equal to or greater than three years of imprisonment
- Crimes against the sexual freedom and inviolability of minors: perpetrator is a Spanish national or, if a foreign national, habitually resides in the country; registered office in Spain if the perpetrator is a legal person; victim was a Spanish national or habitually residing in Spain at the time the crime was committed
- Crimes related to violence against women: perpetrator is a Spanish national or, if a foreign national, habitually resides in the country; victim is a Spanish national or habitually resides in Spain; presence of the perpetrator on Spanish territory
- Crime of trafficking in human beings: perpetrator is a Spanish national or, if a foreign national, habitually resides in the country; a registered office in Spain if the perpetrator is a legal person; victim is a Spanish national or a habitually resides in Spain and the perpetrator is present on Spanish territory
- Crimes of corruption among individuals or in international economic transactions: perpetrator is a Spanish national or, if a foreign national, habitually resides in the country; the perpetrator holds a position in an organization with a registered office in Spain or is a legal person with a registered office in Spain
- Crimes involving counterfeiting medical products or that involve threats to public health: perpetrator is a Spanish national or, if a foreign national, habitually resides in the country; registered office in Spain if the perpetrator is a legal person; victim was a Spanish national or habitually residing in Spain at the time the crime was committed

In addition to these links, the subsidiarity of Spanish jurisdiction prevents proceedings from being introduced when actions have already been initiated by an international court or by a foreign court of the State of nationality of the perpetrator or of the place where the acts were committed, although in the latter case it is an analytical subsidiarity, since it allows for prior assessment of the authenticity of such court action. Lastly, with respect to both crimes and misdemeanours, there is a procedural prerequisite consisting of the mandatory filing of a complaint by the victims or by the Public Prosecution Service.

In summary, Spain does not currently recognize pure and absolute universal jurisdiction that supports the fight against impunity and the protection of victims as interests of the international community as a whole; rather, it makes the exercise of universal jurisdiction contingent on conditions stemming from the personality and territoriality principles. Hence, the aim of the draft law of 20 February 2024 under consideration, pending the opinion of the Commission on Justice and possible amendments to be formulated by 24 March 2024, is to go back to the basics. The three main amendments to article 23.4 of the Judiciary Organic Act, which is currently in force, would involve: (a) requiring a minimal link in respect of war crimes, crimes against humanity and torture, and no link with respect to genocide, which would be prosecutable if it had gone unpunished even when there is no connection with Spain; (b) reinstating *acciones populares*; and (c) the reopening *proprio motu* of cases that were dismissed or archived under the current Organic Law 1/2014.

### **3. Most relevant jurisprudence and practice relating to universal jurisdiction of the Spanish courts**

Spain has extensive jurisprudence emanating from the National High Court (20 decisions of the central courts and criminal divisions, and 1 judgment), the Supreme Court (3 decisions and 13

judgments) and the Constitutional Court (13 judgments). Each of these three bodies has alternated between extensive and restrictive interpretations of article 23.4 of the Judiciary Organic Act on and has issued rulings on appeal, which has led to a certain disparity of criteria. The most significant decisions, which settle core questions about the nature of universal jurisdiction, include the following:

- Decision of 4 March 1999 of the Criminal Division of the National High Court, on the “Pinochet case”: The first case on universal jurisdiction, confirms a pre-existing unanimous Spanish judicial practice, which, as such, has been maintained until the present, recognizing the absolute immunity of active Heads of State from jurisdiction
- Judgment No. 237/2005 of 26 September of the Second Chamber of Constitutional Court, on the “Guatemala case” (R. Menchú): Granted the protection requested, given that the restrictive interpretation endorsed by the Supreme Court, by making the prosecution of genocide conditional on the victims being Spanish nationals and on the genocidal acts targeting the destruction of the group of Spanish nationals, violated the spirit of the 1948 Convention and disregarded the fact that it is the nature of the crimes that justifies universal prosecution, giving rise to an illegitimate restriction of the fundamental right to effective protection by the courts. In this same “Guatemala case”, in the decision of the National High Court of 26 July 2011, it was agreed that gender-based crimes should be included in the case, and the acts reported as crimes against sexual freedom and inviolability were incorporated into the crimes of torture and genocide
- Judgments Nos. 296/2015 of 6 May (“Tibet case”) and 297/2015 of 8 May of the Second Chamber of the Supreme Court (“Falun Gong case”): Justify the requirement that the exercise of universal jurisdiction over crimes and offences be contingent on meeting criteria that establish links, since neither treaty law nor customary international law impose an absolute or in absentia model of universal jurisdiction. Judgments Nos. 10/2019 of 28 January, 23/2019 of 25 February, and 35/2019 of 25 March, of the Second Chamber of the Constitutional Court, uphold this view and reject the alleged violation of the right to effective judicial protection resulting from the archiving of the criminal case owing to the lack of jurisdictional competence of the Spanish courts
- Decision of the Supreme Court of 18 April 2016 (“crimes of the Nazi regime case” (Totenkopf SS)), recognizes that there is a contradiction stemming from the fact that, since 2014, Spanish law has dealt similarly with the crimes of genocide, war crimes and crimes against humanity, which, as they are subject to rigorous criteria establishing links, remain de facto outside the jurisdiction of the Spanish courts, while, at the same time, it authorizes such jurisdiction over many, less serious offences. It is therefore necessary to distinguish between such crimes and other offences

Currently, according to the latest report of the Prosecutor-General’s Office, the “Rwanda case” (murder of six missionaries and three aid workers from Spain between 1994–2000) and the “Sahara case” (on genocide and terrorism with victims of Spanish nationality) are pending resolution by the Spanish courts. Furthermore, since 2013, in exercise of universal jurisdiction, the Argentine judge Servini de Cubría, has required Spain to collaborate in the investigation and punishment of crimes against humanity committed by the Franco regime.

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