
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 uni

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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 inte

November 2009). In addition to the reform mentioned, the aforementioned Organization Act

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*

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.”

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.

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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:

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 compla

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 in 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 Miloševi

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