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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

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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

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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

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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 th

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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.

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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,