

## Some Comments on Article 23(4)(m) of Spain's 1985 Organic Law of the Judiciary: Universal Jurisdiction over Trafficking in Human Being Offences?

Carmen PÉREZ GONZÁLEZ\*

### INTRODUCTION

Trafficking in human beings (hereinafter, THB)<sup>1</sup> can undoubtedly be considered a serious and severe violation of the most fundamental rights.<sup>2</sup> There is a wide consensus within the International Community about the need of a closer cooperation among States in order to prosecute THB offences in a more effective manner and to improve victims' detection and protection.<sup>3</sup> A range of multilateral treaties and European Union (hereinafter, EU) legal instruments have been adopted to pursue those objectives. All of them impose over States Parties concrete obligations regarding the establishment of criminal jurisdiction over THB offences. Article 15 of the UN Convention against transnational organized crime, at the universal level, and Articles 31 of the Council of Europe Convention on action against trafficking in human beings (hereinafter, Warsaw Convention)<sup>4</sup> and 10 (1) of the Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (hereinafter, Directive 2011/36/EU),<sup>5</sup> at the regional level, can be mentioned in this regard.

---

\* Lecturer in Public International Law, University Carlos III of Madrid. Email: carmen.perez@uc3m.es.

<sup>1</sup> According to Art. 3 (a) of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations (hereinafter, UN) Convention against transnational organized crime (hereinafter, the Palermo Protocol), THB "shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". Both the UN Convention and the Palermo Protocol were adopted by GA Res. 55/25, 15 November 2000. It is available at: <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menuaside> (accessed November 21, 2014).

<sup>2</sup> Art. 7 (2) (c) of the Rome Statute of the International Criminal Court includes trafficking in human beings among the acts amounting to a crime against humanity. On this question see: T. Obokata, "Trafficking of human beings as a crime against humanity: some implications for the international legal system", 54 *International and Comparative Law Quarterly* (2005), 445-458.

<sup>3</sup> A deep analysis of the international developments in the field of human trafficking can be found in A.T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, Nueva York, 2010).

<sup>4</sup> It was adopted on 16 May 2005 and is available electronically at: <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=8&DF=06/11/2014&CL=ENG> (accessed November 21, 2014).

<sup>5</sup> OJUE L, n. 101, 15 April 2011.

THB is a worldwide phenomenon and normally it constitutes a transnational crime.<sup>6</sup> Despite the increasing international efforts, available data show that very few criminals are convicted and most victims remain unidentified and/or unassisted.<sup>7</sup> The aim of this work is briefly exploring if the recent amendment of Article 23 (4) of the Spanish Organic Law of the Judiciary, which includes THB offences in subparagraph m), is in compliance with International Law obligations imposed to Spain regarding the establishment of criminal jurisdiction at internal level.

The analysis commences with an exam of the wording of Article 23 (4) (m) of the Spanish Organic Law of the Judiciary (Section 2). In Section 3, I will try to clarify the scope of international obligations imposed to Spain in this framework by International Law, both at universal and European regional level. Finally, some concluding remarks will be made in Section 4.

#### THE WORDING OF ARTICLE 23 (4) (M) OF THE SPANISH ORGANIC LAW OF THE JUDICIARY

On February 11 2014, the Spanish Congress of Deputies approved an amendment of Article 23 (4) of the Spanish Organic Law of the Judiciary. The new act<sup>8</sup> introduced a new subparagraph establishing jurisdiction over THB offences committed outside the Spanish territory both by Spanish nationals or by foreign citizens. According to Article 23 (4) (m) the competence of Spanish courts and tribunals over THB offences will be possible only if: (i) The accused individual is a Spanish citizen; (ii) The accused individual is a foreign citizen who is habitually resident in Spain; (iii) The accused is a legal person, enterprise, organization, group or any other kind of entity or group of persons having its headquarters or registered offices in Spain; or (iv) The victim is, at the moment of the commission of the offence, a Spanish national or a foreign citizen who is habitually resident in Spain, providing that the alleged perpetrator is in Spain.

<sup>6</sup> According to the United Nations Office on Drugs and Crime (hereinafter, UNODC), this term covers not only offences committed in more than one State, but also those that take place in one State but are planned or controlled in another. It also includes crimes committed in one State by groups that operate in more than one State, and crimes committed in one State that have substantial effects in another State. For Mattar, THB is a transnational offence that requires transnational policies, including the three X's: Extradition, extraterritoriality and exchange of information: M.Y. Mattar, "Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention", 14 *Tulane Journal of International and Comparative Law* (2005-2006), at 59.

<sup>7</sup> Several States and International Organizations collect data and provide information about the international, regional and/or national scope and characters of THB phenomenon. The United States Department of States elaborates a well-reputed annual Report (available at: <http://www.state.gov/j/tip/index.htm>, accessed November 21, 2014). In 2013, EUROSTAT presented the first report at the EU level on statistics on trafficking in human beings covering the period 2008-2010 (available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415\\_thb\\_stats\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415_thb_stats_report_en.pdf), accessed November 21, 2014). In Spain, the *Defensor del Pueblo* [Ombudsman] first report on this matter offered in 2012 a data collection obtained from the Interior Ministry's Center for Intelligence to Combat Organized Crime (CICO) and the *Fiscalía General del Estado* [Prosecutor General's Office] during 2009-2011 (available at: [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/contenido\\_1348128571191.html](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/contenido_1348128571191.html)), accessed November 21, 2014).

<sup>8</sup> Organic Law 1/2014, 13 March 2014. Official State Gazette n. 63, 14 March 2014.

It has to be taken into account that according to Article 24 (4), Spanish courts will exercise jurisdiction over THB offences committed outside Spanish territory also when the alleged perpetrator is present at Spanish territory and Spanish authorities refuse to extradite him or her.

This is the first time that Spanish legislation incorporates THB among the offences that could be prosecuted under the universal jurisdiction principle. Previous amendment to 1985 regulation of universal jurisdiction in Spain included in 2009 smuggling of migrants<sup>9</sup> offences, while limiting the competence of Spanish courts and tribunals to the cases where the alleged perpetrators were in Spain; or the victims were of Spanish nationality; or there was another connecting link to Spain. Migrant smuggling has been eliminated of Article 23 (4) after the last amendment of the Spanish Organic Law of the Judiciary. The Preamble of the Organic Law 1/2014 does not offer any explanation of this decision.

#### INTERNATIONAL OBLIGATIONS IMPOSED TO SPAIN REGARDING THE ESTABLISHMENT OF CRIMINAL JURISDICTION OVER THB OFFENCES

As it has been said, “[j]urisdictional rules are more complicated for trafficking than for many other crimes because trafficking often involves the commission of multiple offenses in two or more countries, in particular across different States or origin, transit and destination”.<sup>10</sup> The international instruments mentioned in the introduction of this work set out establish their own legal rules on jurisdiction.

#### (1) **The UN framework: The United Nations Convention against transnational organized crime**

The Palermo Protocol does not set out the obligations of States Parties with regard to the establishment of criminal jurisdiction over THB offences. These obligations are contained in Article 15 of the UN Convention against transnational organized crime itself. Paragraph 1 requires States Parties to establish jurisdiction to investigate, prosecute, and punish THB offences committed within their territory, or their marine vessels and aircrafts. Apart from that, the Convention only encourages States Parties to establish criminal jurisdiction over THB offences in other circumstances. For example, Article 15 (2) allows States Parties to establish jurisdiction when their national are either victims or perpetrators of THB offences.<sup>11</sup>

Also, it is important to underline that under the UN Convention against transnational organized crime State Parties has to consider THB offences as extraditable offences. Thus, if a State Party

---

<sup>9</sup> It is generally accepted that there are four main differences between THB and migrant smuggling *phenomena*. Firstly, while migrant smuggling involves consent, THB victims does not consent their situation (or, if they initially consented, that consent renders meaningless because of the coercive, deceptive or abusive action of traffickers). Secondly, migrant smuggling ends with the migrants' arrival at their country of destination, and THB involves the on-going exploitation of the victim. Thirdly, migrant smuggling is always transnational, whereas trafficking may not be (in cases of internal trafficking). Finally, smugglers derive their profits from the transportation of facilitation of the illegal entry or stay of a person into another country, while traffickers do so from victims' exploitation.

<sup>10</sup> Gallagher, *supra* n. 3, at 379.

<sup>11</sup> Cfr. Art. 15 (2) (a) and (b). Other possibilities are offered in Subparagraph (c) of this Art.

refuses extradition because the alleged offender is one of its nationals, it has the obligation to exercise its jurisdiction over the offences committed abroad<sup>12</sup>. At the same time, each State Party may also adopt such measures as may be necessary to establish its jurisdiction over THB offences when the alleged foreign offender is present in its territory and it does not extradite him or her.<sup>13</sup>

Since Article 15 (6) of the UN Convention establishes that the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law is not excluded, it can be concluded that the exercise of universal jurisdiction over THB offences is not forbidden by this international treaty.

## (2) Obligations imposed to Spain at European level

### (a) *The Council of Europe framework: The Warsaw Convention*

Article 31 of Warsaw Convention does not impose upon States Parties the obligation to establish universal jurisdiction over any offence referred in the Convention. The first paragraph of Article 31 imposes the obligation to adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed in its territory; or on board a ship flying the flag of that Party; or on board an aircraft registered under the laws of that Party; or by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State; or against one of its nationals<sup>14</sup>.

Besides that, Article 31 (2) adds that each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in the Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.

Finally, according to paragraph 5, the Warsaw Convention does not exclude, without prejudice to the general norms of international law, any criminal jurisdiction exercised by a Party in accordance with internal law. Again, establishing universal jurisdiction over THB offences is not contrary to the Convention.

### (b) *The European Union framework: The Directive 2011/36/EU*

Article 10 (1) of Directive 2011/35/EU obliges Member States to establish jurisdiction over THB offences where the offence is committed in whole or in part within their territory, or the offender is one of their nationals.

<sup>12</sup> Cfr. Art. 15 (3).

<sup>13</sup> Cfr. Art. 15 (4).

<sup>14</sup> The European Court of Human Rights (hereinafter, ECHR) has underlined that “(i)n addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories”: *Ranstev v. Cyprus and Russia*, ECHR (2010, application no. 25965/04), 289.

The establishment of further jurisdiction over THB offences committed outside the territory of Member States is possible (but not mandatory) under Directive 2011/36/EU. *Inter alia*, Member States who decide to establish jurisdiction where the offence is committed against one of their nationals or a person who is a habitual resident in their territory; the offence is committed for the benefit of a legal person established in their territory; or the offender is a habitual resident in its territory, shall inform the Commission.<sup>15</sup>

#### CONCLUDING REMARKS

Any binding international instrument imposes to Spain the obligation of establishing universal jurisdiction over THB offences. And based in the above analysis, it can be concluded that the conditioned competence established by Article 23 (4) (m) of the Spanish Organic Law of the Judiciary does not represent a breach of any international obligation in force for Spain at this moment.

But if we agree on the idea that “universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”<sup>16</sup> it seems an evidence that such a principle has not been incorporated to the abovementioned Article 23(3)(m) of the Spanish Organic Law of the Judiciary. The conditions enshrined in this provision force to Spanish courts to exercise jurisdiction over THB offenses committed outside Spanish territory only when there is a *connecting link* to Spain.<sup>17</sup>

It has been said that Organic Law 1/2014 represent the end of the Spanish model of universal jurisdiction.<sup>18</sup> This is true for THB offences which will be prosecuted by Spanish courts only when committed (i) in the territory of Spain (territoriality principle); (ii) outside the territorial jurisdiction of Spain by one of its nationals (principle of active personality); by a foreign citizen who is habitually resident in Spain in Spain or by a legal person, enterprise, organization, group or any other kind of entity or group of persons having its headquarters or registered office in Spain; (iii) outside the jurisdictional territory of Spain against one of its nationals (principle of passive personality) or against a foreign citizen who is habitually resident in Spain, providing that the alleged perpetrator is

<sup>15</sup> Cfr. Art. 10 (2) of Directive 2011/36/EU. Paragraph 3 adds that for the prosecution of THB offences committed outside the territory of the Member State concerned, “each Member State shall, in those cases referred to in point (b) of paragraph 1, and may, in those cases referred to in paragraph 2, take the necessary measures to ensure that its jurisdiction is not subject to either the following conditions: (a) the acts are a criminal offence at the place where they were performed; or (b) the prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed”.

<sup>16</sup> Cfr. Principle 1.1 of *The Princeton Principles on Universal Jurisdiction* (2001), available at: [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf) (accessed November 21, 2014).

<sup>17</sup> Even when the Spanish legislative goes beyond the international requirements, allowing the exercise of jurisdiction when the alleged perpetrator is a foreign citizen who is habitually resident in Spain –and not only a Spanish national– keeps on demanding a connection with Spain (in this case, the place of residence).

<sup>18</sup> A. Sánchez Legido, “El fin del modelo español de jurisdicción universal”, 27 *Revista Electrónica de Estudios Internacionales* (2014). See also C. Villacampa Estiarte, “Víctimas de la trata de seres humanos: su tutela a la luz de las últimas reformas penales sustantivas y procesales proyectadas”, 2 *InDret*(2014), at 13.

in Spain; and (iii) outside the territorial jurisdiction of Spain when the offender is present in Spanish territory and Spain does not extradite him or her (principle of *aut dedere aut iudicare*).

Keeping in mind the need of prosecuting THB offences in a more effective manner and taking into account that an important part of the alleged offenders and victims detected in Spain are not Spanish nationals, nor habitually residents in our country, but undocumented migrants, it remains uncertain if Article 23 (4) (m) will really contribute to foster accountability regarding THB phenomenon.