

*Causes and Initial Effects of the Spanish Organic Law 1/2009 Reforming the Principle of Universal Jurisdiction in Spain**

José Elías Esteve Moltó

Senior lecturer on Public International Law and International Relations, University of Valencia; Investigator advocate in claims related to Tibet and Burma at the Spanish National Court.

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ABSTRACT

For some years now, Spain has been in the vanguard of the court battle against international crime, particularly since the Pinochet case. The country's progressive legislation about universal justice and the interpretation of such principle by the Spanish Constitutional Tribunal in the Guatemalan case (and later, in the Falung Gong case) are the reasons behind its exceptional role in the application of International Criminal Law. However, the exercise of this right entitled to the victims, when directed against the

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citizens of one of the permanent U. N. Security Council country members, has precipitated a legal reform in the end. It is undeniable that these States, and particularly the U. S. and China, have put the Spanish political class under a great deal of pressure for the cases under trial at the Spanish National Court, such as the Guantanamo case, the *Bush Six*, the CIA case, and the Couso, Tibet and Falung Gong cases. Consequently, Spain passed the Organic Law 1/2009 that restricts the scope of universal jurisdiction in the country. The reforms in the Spanish Parliament and the following content amendment of the legislative reform of Article 23.4 of LOPJ point to the victory of the *real-politik* over the effective prosecution of the gravest international crimes. The presence of the accused in Spanish territory, the introduction of the principle of establishing standing to sue the defendant, or the requirement of relevant “connecting links with Spanish interests” are the new obstacles that stand between the Spanish courts and their capacity to try international crimes. Likewise, the ratification of the inversion of the principle of complementarity of jurisdiction of the International Criminal Tribunal with regard to the Spanish courts, plus the danger of the stay of proceedings prior to the opening of a criminal trial in another court limit further the access to justice. The effects of these new legal requirements on the cases of the Spanish National Court were not slow in coming. Not only the new complaints against the Burma’s military Junta have been disallowed, but it has also affected those cases already under investigation, which have been dismissed on the grounds of lack of connections with national interests. This is why cases such as the Tibetan case have died out after the legal reform, whereas others (Bush’s Administration’s legal advisors case) will withstand until the connecting link to the country’s interest is assessed and, particularly, until the role played by the Spanish Government and the coordination of the Prosecutor’s office with the U. S. Embassy in Madrid is evaluated. In any event, the first provisional assessment of this legal reform clearly indicates a shortfall in the victims’ right to justice and redress, and a policy to favour impunity for the most powerful.

Keywords

Universal jurisdiction, international crimes, amendment of Article 23.4 LOPJ, connecting links to national interests.

RÉSUMÉ

Depuis le cas Pinochet, Espagne a été à la avant-garde de la persécution des crimes internationales. Leur législation progressive sur la justice universelle et l’interprétation effectuée par le Tribunal Constitutionnel dans le cas Guatemala (et puis dans le cas Falung Gong) explique ce rôle privilégié en l’application du Droit Pénal International. Maintenant l’exercice du droit des victimes, que a été adressé contre les citoyens des Etats permanents du Conseil de Sécurité, a fini pour précipiter une réforme législative. Les pressions venues fondamentalement des Etats Unis et de la Chine sur la classe politique espagnole pour les enquêtes des cas « Six Bush », vols de la CIA, Couso, Tibet et Falung Gong, sont indéniables. En conséquence, Espagne a adoptée la Ley Orgánica 1/2009, restrictive de la juridiction universelle. Tant la procédure suivie dans le Parle-

ment, que les dispositions de la reforme de l'article 23.4 LOPJ, démontrent la victoire de la *real-politik* sur la persécution effective des crimes internationaux plus graves. La présence du accusé dans le territoire espagnol, l'introduction du principe de légitimité passive ou l'exigence d'un « lien de connexion remarquable avec l'Espagne », constituent nouveaux obstacles a surpasser pour affirmer la compétence de la juridiction espagnole pour poursuivre des crimes internationales. Au même temps, la ratification du renversement du principe de complémentarité de la juridiction de la Cour Pénal Internationale par rapport aux tribunaux espagnols et le danger de suspension provisoire devant du commencement d'une procédure pénale dans autre tribunal, a limité encore plus l'accès à la justice. Les effets de celles nouvelles conditions légales sur les cas de l'Audiencia Nacional ont été immédiates. Elles non seulement ont provoqué la non admission de nouvelles plaintes comme la dirigé contre la Junta Militaire de la Birmanie, mais aussi ont fermé des cas qui se trouvaient en enquête. Dans ce propos, le cas Tibet a été fermé, tandis que le « Six Bush » résiste, en attendant la possible liaison espagnole l'interférence du gouvernement espagnol et la coordination du ministère public avec l'Ambassade nord-américaine à Madrid. De toute façon, le premier bilan de cette reforme législative remarque le déficit du droit des victimes à la justice et à la réparation, au même temps que favorise l'impunité de les plus puissants.

Mots clés

Juridiction universelle, crimes internationales, reforme article 23.4 LOPJ, lien de connexion national.

RESUMEN

Desde hace unos años España ha estado en la vanguardia a la hora de perseguir crímenes internacionales, sobretudo a raíz del caso Pinochet. Su legislación progresiva en materia de justicia universal y la interpretación que de ella hizo el Tribunal Constitucional en el caso Guatemala (y posteriormente en el asunto Falung Gong) explican este papel privilegiado en la aplicación del Derecho Penal Internacional. Ahora bien el ejercicio de este derecho de las víctimas, cuando se ha dirigido contra nacionales de Estados que se sientan de forma permanente en el Consejo de Seguridad, ha acabado por precipitar una reforma legislativa. Las presiones especialmente provenientes de los Estados Unidos y de China sobre la clase política española por los casos abiertos en la Audiencia Nacional, como los de Guantánamo, "Six Bush", Vuelos de la Cia, Couso, Tíbet y Falung Gong, resultan innegables. Ello ha precipitado la aprobación de la Ley Orgánica 1/2009, por la cual se restringe el alcance de la jurisdicción universal en España. Tanto las formas seguidas en las Cortes Generales, como la reforma del contenido de la reforma legislativa del artículo 23.4 de la LOPJ apuntan a la victoria de la *real-politik* sobre la persecución efectiva de los crímenes internacionales más graves. La presencia del acusado en territorio español, la introducción del principio de legitimidad pasiva o la exigencia de un "vínculo de conexión relevante con España" conforman los nuevos obstáculos a superar para que la jurisdicción española sea competente para conocer crímenes internacionales. Asimismo la ratificación de la inversión del principio de complementariedad de la jurisdicción

del Tribunal Penal Internacional respecto de los tribunales españoles y el peligro de sobreseimiento provisional ante el inicio de un proceso penal en otro tribunal limitan aún más el acceso a la justicia. Los efectos de estos nuevos condicionantes legales sobre los casos en la Audiencia Nacional no se han hecho esperar. No sólo se han inadmitido nuevas querellas como la dirigida contra miembros de la Junta Militar en Birmania, sino que causas ya admitidas y en investigación han sido archivadas por no concurrir nexo alguno de conexión nacional. De esta forma casos como el del Tíbet han sucumbido a la reforma legal, mientras que otros como del “equipo jurídico de Bush” resiste a la espera de valorar la posible conexión nacional y sobretudo la interferencia en el proceso del ejecutivo español, junto con la coordinación de la fiscalía con la Embajada norteamericana en Madrid. En todo caso el primer balance provisional de esta reforma legislativa, a todas luces apunta, al déficit del derecho de las víctimas a la justicia y a la reparación, y al favorecimiento de la impunidad de los más poderosos.

Palabras clave

Jurisdicción universal, crímenes internacionales, reforma artículo 23.4 LOPJ, conexión nacional.

I. BACKGROUND: APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION BY THE SPANISH COURTS

Up until the reform of the principle of universal jurisdiction in October 2009, the Spanish legislation was one of the most progressive bodies of statutes enacted to effectively pursue international crime. Indeed, since 1985, following the approval of the *Ley Orgánica del Poder Judicial* (hereinafter ‘Spanish Organic Law on the Judiciary’, LOPJ), Article 23.4 of this law established that the Spanish jurisdiction was competent to try a series of international crimes, irrespective of the nationality of the victims and of the alleged offenders, and regardless of the place where the crime was committed.¹

¹ BOE (hereinafter ‘Spanish National State Gazette’), no. 157 of 2nd September 1985, pp. 20 632 to 20 678. Article 23.4 LOPJ: “Spanish courts will be equally capable of exercising jurisdiction over crimes committed by Spanish people or by foreigners outside the national territory which could be deemed to constitute any of the following crimes in Spanish criminal trial law:

- (a) Genocide.
- (b) Terrorism.
- (c) Piracy and hijacking of aircraft.
- (d) Counterfeiting.
- (e) Crimes related to prostitution and corruption of minors and the disabled. (Amended by the sole final provision of the Spanish Organic Law 11/1999 of 30th April.)
- (f) Unlawful traffic in psychotropic, toxic, and narcotic drugs.
- (g) Those related to female genital mutilation, provided those responsible are in Spain. (Added by way of the single article of the Spanish Organic Law 3/2005 of 8th July.)
- (h) Any other which according to international treaties or conventions, in particular conventions on international humanitarian law and protection of human rights, ought to be prosecuted in Spain.

In this context, together with this provision and its related proceedings, it is important to remember that criminal action in Spain may be brought 1) publicly by the State through the Public Prosecutor (an option never put into practice pursuant to the principle of universal jurisdiction in cases of human rights violations), and 2) *ex parte*, at the request of one of the parties. In the former, proceedings commence with the victims (private prosecution) – or the citizens, or the associations who can prove a specific interest or act in defense of the victims (*actio popularis*)² – filing a suit or bringing a charge; this factor makes the fight against impunity much more dynamic.

However, despite the Spanish legislation being advanced as regards universal jurisdiction, it had remained inactive until, in March 1996, the Unión Progresista de Fiscales (a progressive association of prosecutors), led by the anti-corruption prosecutor, Carlos Castresana, brought an unusual charge filed at the *Juzgados Centrales de Instrucción* of the *Audiencia Nacional* (hereinafter ‘First-instance Central Courts’ and ‘Spanish National Court’ respectively) under the protection of Article 23.4 of LOPJ. The members of the Argentinean military Junta were charged with the crimes of genocide, terrorism and torture.³ Months later, on 4th July that same year, this association filed another complaint in the same terms against Augusto Pinochet and the highest-ranking officers of the Chilean armed forces. They were accused of commissioning the very same international crimes perpetrated not only against Spanish citizens, but also against other victims, regardless of their nationality. The judge in charge of the pre-trial investigation of these acts (the committal proceedings known as “Operation Condor”) was Baltasar Garzón.

All sorts of human rights organizations, victims and victim associations, not only from Spain but also from Argentina, Chile, Europe and the United States, appealed jointly and took the stand to give evidence of the crimes committed by the dictatorships of the Southern Cone. But the criminal proceedings attracted the interest of the international community when, on 16th October 1998, the dictator Augusto Pinochet was brought into custody in London following an arrest warrant issued by the First-instance Central Court no. 5 at the Spanish National Court.⁴

All court decisions in Spain arising from this case and, more specifically, Pinochet’s indictment,⁵ applied the principle of universal jurisdiction for the first time,⁶ and the absolute interpretation in favour of the victims encouraged the bringing of proceedings

² Article 125 of the Spanish Constitution, regulated in sections 19.1 and 20.3 of the LOPJ.

³ The complete criminal complaint in Spanish at <http://www.derechos.org/nizkor/arg/espana/inicial.html>.

⁴ First-instance Central Court no. 5 at the Spanish National Court, Summary Proceedings 19/97, terrorism and genocide: “Operation Condor”, indictment dated 10th December 1998. María del Carmen Márquez Carrasco and Joaquín Alcaide Fernández, “In Re-Pinochet”, *AJIL* 93 no. 3, (1999), pp. 690–696.

⁵ Michael Ratner, Reed Brody, (eds.), *The Pinochet Papers: the case of Augusto Pinochet in Spain and Britain*, Kluwer Law International, Boston, 2000. Antoni Pigrau Solé, “El proceso a Pinochet en España” [The case of Augusto Pinochet in Spain], *ILSA J. Int’l & Comp. L.*, 6, (2000), pp. 775–807. Antonio Remiro Brotons, *El caso Pinochet. Los límites de la impunidad* [The case of Pinochet. The Limits of Impunity], Política Exterior-Biblioteca Nueva, Madrid 1999.

⁶ A. Sánchez Legido, “Spanish Practice in the Area of Universal Jurisdiction”, *SPYL*, no. 8, (2001–2002), pp. 17–53.

of other cases of impunity before the Spanish National Court. Thus, the repercussions of this case on a national and international level are undeniable and lengthy, particularly since the process of attempted extradition of the Chilean dictator.⁷

From then on, the interpretation and application of the principle of universal jurisdiction was considered by some as an exercise of justice that should limit itself at all costs by criteria such as the connection to a national concern, the principle of subsidiarity and the application of a *test of reasonability*. Others, meanwhile, argued that such factors of influence contradicted the interest of international legislation when it came to fighting impunity.⁸ Be that as it may, the Spanish courts delivered their judgment on the matter and revealed a judicial reasoning sustained in International Law, (ordinary and common law, invoking the law of Nuremberg),⁹ both to motivate the practical application of the universal jurisdiction in an absolute sense, and to put a stop to the presumed abusive use of this right.

⁷ Naomi Roht-Arriaza, "The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction", in *International Prosecution of Human Rights Crimes*, pp. 115–23.

⁸ Special mention should be made of the purist interpretation of said case by jurists such as the participants in the Princeton Project on Universal Jurisdiction, whose core guidelines have been applied in practice in different judicial judgements delivered by Spanish courts, cfr. *The Princeton Principles on Universal Jurisdiction*, Princeton University, New Jersey, 2001. See also: B. Broomhall, *International Justice and the International Criminal Court*, Oxford, 2003, p. 112; N.H.B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford, 2003, p. 35. In Spain, M. Ollé Sesé, "Crímenes contra la humanidad y jurisdicción universal" [Crimes against humanity and Universal Jurisdiction], *La Ley Penal* n° 25 (2006), pp. 5–20; J.M Gómez Benítez. "El exterminio de grupos políticos en el derecho penal internacional: entre el genocidio y los crímenes contra la humanidad" [The extermination of political groups in International Criminal Law: between genocide and crimes against humanity], in *Revista de Derecho y Proceso Penal*, 2000, no. 4, p. 147 and following.

By contrast, G. Fletcher, "Against universal jurisdiction", *JICJ* 1 (2003), p. 580; H. Kissinger, "The pitfalls of universal jurisdiction: risking judicial tyranny", *Foreign Affairs*, July/August 2001. In Spain, Rodríguez Fernández y Echarri Casi, "El derecho a la denominada jurisdicción universal" [The Right to the so-called Universal Jurisdiction], *La Ley*, n° 6377, 13th December 2005; Rodríguez Ramos, "La extradición de Pinochet: error jurídico y ¿error político?" [The extradition of Pinochet: juridical error, and political error?], *La Ley* 4, (1999).

⁹ Following this absolute interpretation, for the first time and in a historical decision, the Spanish National Court has echoed the law of Nuremberg. This first decision of conviction of the accused (the Scilingo case) acknowledges that it is compulsory for the Spanish State; it even states the following (also based on the earlier decisions of the International Tribunal for the former Yugoslavia): "We believe that the opinion stating that the principles of Nuremberg would fall within the framework of customary International Law has become unquestionable, further to the decision of the General Assembly of the United Nations 3074 (XXVIII) of 3rd December 1973 which states the need for international cooperation in aspects such as detention, arrest, extradition and punishment of those guilty of war crimes and crimes against humanity". It can also be said that, in many of the decisions announced by the current *ad hoc* international criminal courts, the following theory has wide support and acceptance: "from the Nuremberg Statute onwards, the habitual character of the prohibition of crimes against humanity and the enforcement of the individual criminal responsibility for perpetrators lacks a thorough debate (Tadic Affair of ICTY)", cfr. Ruling on crimes against humanity in the Scilingo case, 19th April 2005, *Sección Tercera de la Sala de lo Penal* (hereinafter '[Third or 'x number'] Division of the Criminal Court'), ruling no. 16/2005, fundamental point of law no. 2.1.

The truth is that the ruling of the *Tribunal Constitucional* (hereinafter ‘Spanish Constitutional Court’) of 26th September 2005 on the Guatemalan case seemed apparently to put an end to this debate, as it acknowledged the legal qualification of the jurisdiction of Spain in absolute terms to prosecute universal crimes.¹⁰ Hence, this legal decision ordered Spanish courts to investigate the crime of genocide in Guatemala, even though the victims were not Spanish, nor were those allegedly responsible in Spanish territory,¹¹ and thus, on this point, overturning the ruling of the *Tribunal Supremo* (hereinafter ‘Spanish Supreme Court’) of 25th February 2003.¹² In fact, it concluded arguing that the only limitation expressly included in that same LOPJ to universal jurisdiction was that of “the delinquent not being acquitted, pardoned or convicted abroad, or, as in this last case, not having served sentence”.¹³ Following this reasoning and, refuting the order of the full bench of the Spanish National Court of 13th December 2000, the Spanish Constitutional Court ruled that in order to apply universal jurisdiction, provision “either by the court or by the claimant, of serious and reasonable circumstantial evidence of judicial failure to act that would prove unwillingness or inability to effectively prosecute the crimes”,¹⁴ in the country where the acts had been committed”, would suffice.

During the time it took for the Guatemalan case to be decided, the ruling of the appeal following the action taken for the alleged commission of international crimes in Tibet was pending at the Spanish National Court. Finally, on 16th January 2006, the Fourth Division of the Criminal Court at the Spanish National Court issued an order

¹⁰ Ruling of the Second Division of the Spanish Constitutional Court of 26th September 2005, Ruling no. 237/2005 in http://www.tribunalconstitucional.es/jurisprudencia/Stc_ing/STC2007-237-2005.html. The opinions expounded in the works of the standard legal authorities are diametrically opposed to the ruling of the Spanish Constitutional Court of 26th September 2005, ruling no. 237/2005, Antoni Pigrau Solé, “A propósito de la Sentencia 237/2005 del Tribunal Constitucional, de 26 de septiembre de 2005, en el caso Guatemala y de su interpretación por la Audiencia Nacional” [On the Ruling 237/2005 of the Constitutional Tribunal, of 26th September 2005, in the Guatemala case and its interpretation by the Spanish National Court], *REDI*, vol. LVII (2005), pp. 893–910; Juan Santos Vara, “La jurisdicción de los tribunales españoles para enjuiciar los crímenes cometidos en Guatemala” [The jurisdiction of the Spanish courts to try crimes committed in Guatemala], *REEI* 11 (2006), pp. 1–21. By contrast, Romualdo Bermejo García and Carlos Ruiz Miguel, “Jurisprudencia en materia de Derecho Internacional Público: una sentencia incongruente, restrictiva e irresponsable (nota a la Sentencia 237/2005 del Tribunal Constitucional)” [Earlier decisions on Public International Law: an incongruous, restrictive and irresponsible ruling (note to Ruling 237/2005 of the Constitutional Court)], *REDI*, vol. LVII (2005), pp. 911–924.

¹¹ On the presence of the accused in national territory, see Antonio Cassese, “Is the bell tolling for universality? A plea for a sensible notion of universal jurisdiction”, *JICJ* 1 (2003), pp. 589–595.

¹² Ruling of the Spanish Supreme Court on the Guatemalan genocide case, Criminal Court, ruling no. 327/2003, appeal to the Spanish Supreme Court, n° 803/2001, <http://sentencias.juridicas.com/docs/00184214.html>.

¹³ Article 23.2.c LOPJ, section 5 of this article refers to: “5. In cases included in sections 3 and 4, content of (c), section 2 of this article applies.”

¹⁴ Ruling of the Second Division of the Spanish Constitutional Court of 26th September 2005, ruling no. 237/2005, fundamental point of law no. 4. Naomi Roth-Arriaza, “Guatemala Genocide Case. Judgment No. STC237/2005”, *AJIL* 100 (2006), pp. 207–213. Hervé Ascensió, “The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals”, *JICJ* 4 (2006), pp. 586–594.

granting leave to proceed with the action.¹⁵ The significance of this decision lies in that, on the first opportunity this court had to deliver judgment on universal jurisdiction following the ruling on the Guatemalan genocide case, the balance tipped in favor of an absolute interpretation that supported justice for the victims. In fact, at a later stage, the Spanish Constitutional Court, in a second ruling of the so-called Falung Gong case, reaffirmed this thesis.¹⁶

Thenceforth, those cases granted leave to be heard continued their pre-trial investigation phase at the Spanish National Court – the Rwanda¹⁷ and Couso¹⁸ cases – and they gave leave for other cases to go ahead:¹⁹ the CIA flights case,²⁰ Sahara,²¹ Falung Gong,²²

¹⁵ Order of 16th January 2006, Fourth Division of the Criminal Court, Spanish National Court, Appeal Proceedings 196/05, Preliminary Proceedings 237/05.

¹⁶ Ruling of the Spanish Constitutional Court 227 of 22nd October 2007, whose fundamental point of law no. 5 stated that: "(...) this Court, following the reasons transcribed below, has pronounced that the exigencies of links or connecting elements for bringing into play the jurisdictional rule of Article 23.4 of LOPJ, expressed in the Ruling of the Criminal Court of the Spanish Supreme Court of 25th February 2003 conflicts with the effective protection of the court, from the aspect of right of access to proceedings (Article 24.1 CE)".

¹⁷ Order of 6th April 2005, First-instance Central Court no. 4, Spanish National Court, Preliminary Proceedings no. 55/2005. Jordi Palou Loverdos in: "Esperanzas para la justicia universal" [Hopes for Universal Justice], *Abogados*, February 2007, pp. 60–63 and "Crímenes de guerra contra españoles, ruandeses y congolese en África Central (1990–2006): El conflicto de los Grandes Lagos desde la perspectiva de los Derechos Humanos y el Derecho Internacional Humanitario" [War Crimes against Spaniards, Rwandans and Congolese in Central Africa (1990–2006): The Conflict of the African Great Lakes from the Human Rights and International Humanitarian Law point of view], *REEI*, (2006) in [http://www.reei.org/reei%2013/PalauLoverdos\(reei13\).pdf](http://www.reei.org/reei%2013/PalauLoverdos(reei13).pdf).

¹⁸ Leave was granted on 9th July 2003 to proceed with action regarding the murder of the journalist José Couso in Bagdad by the U. S. troops. Later, further to the issuing of an international arrest warrant, the Second Division of the Criminal Court of the Spanish National Court stayed proceedings with an order issued on 8th March 2006, which was appealed to the Spanish Supreme Court. The Criminal Court of the Spanish Supreme Court ordered the reopening of the case, mainly based on the Guatemalan ruling of the Spanish Constitutional Court, Ruling no. 1240/2006, of 5th December 2006.

¹⁹ A. Pigrau Solé, *La jurisdicción universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales* [Universal Jurisdiction and its Application in Spain: Persecution of Genocide, War Crimes and Crimes against Humanity by the National Courts], Oficina de Promoción de la Paz y de los Derechos Humanos, Generalitat de Catalunya, 2009, pp. 93–108.

²⁰ Order of 9th June 2009, Preliminary Proceedings 109/2006, First-instance Central Court no. 2, Spanish National Court. Ignasi Guardans Cambó, "Entregas extraordinarias, torturas y vuelos de la CIA" [Extraordinary handling, torture and CIA flights], in Antonio Cuerda Riezu and Francisco Jiménez Garcías, *Nuevos desafíos del Derecho Penal Internacional*, Tecnos, 2009, pp. 47–72.

²¹ Order of 29th October 2007, First-instance Central Court no. 5, Spanish National Court, Summary Proceedings 362/2007.

²² In total, the group Falung Gong has made four formal complaints. Even though, initially, the First-instance Central Court no. 2 of the Spanish National Court refused to consider them, the appeals succeeded at a later stage in higher instances, see Ruling of the Spanish Constitutional Court 227 of 22nd October 2007, Appeal for legal protection 3382–2005, and the Ruling 645/2006 of the Spanish Supreme Court, Court no. 2, of 20th June 2006, appeal to the Spanish Supreme Court 1395/2005.

El Salvador,²³ Palestine,²⁴ the SS commanders of Nazi Germany,²⁵ Guantanamo,²⁶ and the case against six members of U. S. President Bush's team.²⁷ Inasmuch as all these cases were gradually turning Spain into a legal refuge for the victims of forgotten conflicts, the country soon came under scrutiny, and was regarded as a source of diplomatic friction with other nations, following the persecution of their leaders on the grounds of systematic violations of human rights.

II. CAUSES OF THE REFORM

2.a. Compulsory adaptation of Spanish legislation to International Criminal Law

Even though the aforementioned Spanish legislation was flexible when it came to ascribing competence to the Spanish jurisdiction on international crime matters, the need for legislative reforms was demanded in order to adapt Spanish domestic regulations to International Criminal Law.

Since 1985, according to Article 23.4 of LOPJ, the weight of the law should be brought to bear on such crimes as genocide, terrorism "and any other crime that, as stated in the international treaties or conventions, ought to be prosecuted in Spain." To this end, crimes such as the following are also included: torture (the Convention Against Torture being in force in Spain since its ratification on 21st October 1987)²⁸ and all other crimes listed in the 1949 Geneva Conventions (ratified by Spain on 4th August 1952),²⁹ and in the First Additional Protocol of 1977 (in force from 21st April 1989).³⁰

²³ Order of 12th January 2009, Preliminary Proceedings 391/2008, First-instance Central Court no. 6, Spanish National Court.

²⁴ Order of 21st January 2009, Preliminary Proceedings 157/2008, First-instance Central Court no. 4, Spanish National Court.

²⁵ Order of 17th June 2008, Preliminary Proceedings 211/2008, First-instance Central Court no. 2, Spanish National Court.

²⁶ Order of 27th April 2009, Preliminary Proceedings 150/2009, First-instance Central Court no. 5, Spanish National Court.

²⁷ Order of 4th May 2009, Preliminary Proceedings 134/2009, First-instance Central Court no. 6, Spanish National Court.

²⁸ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was approved by the U. N. General Assembly Resolution 39/461 on 10th December 1984 in New York. Instrument of ratification of 21st October 1987 (Spanish Official State Gazette no. 268, of 9th November 1987).

²⁹ Geneva Convention (I) of 12th August 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (in force in Spain from 4th February 1953, Spanish Official State Gazette no. 236 of 23rd August 1952); Geneva Convention (II) of 12th August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (in force in Spain from 4th February 1953, Spanish Official State Gazette no. 239 of 26th August 1952); Geneva Convention (III) of 12th August 1949 relative to the Treatment of Prisoners of War (in force in Spain from 4th February 1953, Spanish Official State Gazette no. 249 of 5th September 1952); Geneva Convention (IV) of 12th August 1949 relative to the Protection of Civilian Persons in Time of War (in force in Spain from 4th February 1953, Spanish Official State Gazette no. 246 of 2nd September 1952).

³⁰ Instruments of ratification of Protocols I and II Additional to the Geneva Conventions of 12th August 1949, relating to the Protection of Victims of International and Non-International

The Spanish Criminal Code also includes and defines some of these international crimes. In the Law 44/1971 of 15th November the crime of genocide was included in Article 137-bis (a) and (b) of the Code. At a later stage, in the new Spanish 1995 Criminal Code, Article 607, the crime of genocide is listed together with the independent crime of torture.³¹ The new Code itself was modified by the Organic Law 15/2003 of 25th November, which in Article 607-bis defines and imposes punishment for the commission of crimes against humanity.³²

With regard to the application of this new “crimes against humanity” category of offence, in force from 1st October 2004,³³ to acts committed prior to that date and its apparent conflict with the principles of legality and retroactivity, the judges of the Spanish National Court in the Scilingo case decided to overcome this legal obstacle by arguing that the starting point was the “the International Law prohibition, of such conducts referred to in the recently adopted offence type, and penalised by law for decades, because this prohibition is a regulation of general enforcement in all States, as it is an international peremptory norm (*jus cogens*). Therefore, it would be inaccurate to affirm that such conducts were not prohibited in the past.”³⁴ Nevertheless, at a later stage and further to this same subject, the Spanish Supreme Court concluded, as

cont.

Armed Conflicts, drafted in Geneva on 8th June 1977, Spanish Official State Gazette no. 177 of 26th July 1989, pp. 23 828 to 23 863.

³¹ Convention adopted by the U. N. General Assembly Resolution 39/46 of 10th December 1984, published in the Spanish Official State Gazette no. 268 of 9th November 1987. This crime becomes part of the Spanish Criminal Code by way of the Organic Law 10/1995, Articles 174, 176 and 177.

³² In force from 1st October 2004. Article 607-bis. “1. Those who fall foul of the law for committing deeds included in the following paragraph, as part of a systematic or widespread attack either against civilians or against a part of the civil population, are guilty of crimes against humanity.

In any event, the commissioning of such acts is considered a crime against humanity:

1. If the victim is a member of a group or assemblage persecuted on political, racial, national, ethnical, cultural, religious or gender grounds, or for any other reasons universally acknowledged as unacceptable according to International Law.
2. In the context of an institutionalised regime based on systematic oppression and domination of a racial group over one or more racial groups, with the intention to perpetuate such regime.”

³³ Lastly, this ruling concludes that since the inclusion of crimes against humanity in 2004 by means of Article 607-bis in the Spanish Criminal Code, it is no longer deemed necessary for the crime of genocide to be interpreted in such an ample way (but that this interpretation had had to be imposed previously in order to fight impunity) as was the case with Pinochet; C. Castresana Fernández, “De Nüremberg a Madrid: la sentencia del caso Scilingo” [From Nuremberg to Madrid: the ruling of the Scilingo Case], *Jueces para la Democracia* 54, November 2005, pp. 1–2; M. Capellà i Roig, “Los crímenes contra la humanidad en el caso Scilingo” [Crimes against humanity in the Scilingo case], *REEI*, no. 10 (2005), p. 13; Christian Tomuschat, “Issues of universal jurisdiction in the Scilingo case”, *JICJ* 3 (2005), pp. 1074–1081. Giulia Pinzauti, “An instance of reasonable universality: The Scilingo case”, *JICJ* 3 (2005), pp. 1092–1105.

³⁴ Ruling for crimes against humanity in the Adolfo Scilingo case, Summary Proceedings 19/1997, Fundamental point of law no. 1.b. All documents of the Scilingo available in Spanish at <http://www.derechos.org/nizkor/espana>.

seen in the Ruling 798/2007 of 1st October, that the “crimes against humanity” category of offence was not applicable to the Scilingo case. The Second Division court argued that, at the time of commission of the crime, that international regulation had yet to be included in the national law, and, therefore, it could not be directly enforced by the Spanish courts.³⁵

Apart from this discrepancy over precedents, the classification of this “crimes against humanity” offence in Article 607-bis is out of line with the content of Article 7 of the Rome Statute of the International Criminal Court (1998). The regulation of murder as a crime against humanity, the abolition of the independent nature of persecution and apartheid, plus the exclusion of extermination, enforced sterilisation and other inhuman acts, part of this category of offence included in the Spanish Criminal Code,³⁶ were elements of utmost importance to justify the amendment of the law.

Likewise, the Spanish Criminal Code defines and punishes “offences against people and protected assets in cases of armed conflict” in Book III, Title XXIV, entitled “Crimes against the International Community”. This Title was included in the 1995 Spanish Criminal Code, and later amended in the 2003 partial amendment incorporated to adapt its provisions to the requirements of the Rome Statute of the International Criminal Court.³⁷ Thus, the Code provided for a number of war crimes not envisaged in the 1995 reform. However, the said 2003 Criminal Code reform³⁸ was far from being comprehensive and did not include all war crimes classed as such by conventional International Law. Part of these omissions refer to criminal acts such as the commission of acts of sexual assault on protected people³⁹ and the recruitment or enlistment of children

³⁵ Ruling 798/2007 of 1st October of the Spanish Supreme Court, fundamental point of law no. 4. R.J. Wilson, “Spanish Supreme Court affirms conviction of Argentine Former Naval Officer for crimes against humanity”, 12 *ASIL Insight* 1 (2008) at <http://www.asil.org/insights080130.cfm>.

³⁶ A detailed analysis on the lack of coordination between Spanish law and the Statute of the International Criminal Court on crimes against humanity in V. Bou Franch, “Los crímenes de lesa humanidad en el Estatuto de la Corte Penal Internacional y en el Derecho español” [Crimes against Humanity in the Statute of the International Criminal Court and in Spanish Law], in C. Ramón Chornet, *Estabilidad internacional, conflictos armados y protección de los derechos humanos*, Valencia, 2010, 293–340, pp. 330–334.

³⁷ Organic Law 15/2003 of 25th November, Spanish Official State Gazette 283 de 26th November 2003 Sec. 1 pp. 41 842 to 41 875, www.boe.es/boe/dias/2003/11/26/pdfs/A41842-41875.pdf.

³⁸ Fernando Pignatelli y Meca, *La sanción de los crímenes de guerra en el Derecho español. Consideraciones sobre el Capítulo III del Título XXIV del Libro II del Código Penal* [The Sanction of War Crimes in Spanish Law. Considerations on Book II, Title XXIV of the Spanish Criminal Code], Ministerio de Defensa, Secretaría General Técnica, 2003. Carmen Quesada Alcalá, “Corte Penal Internacional y derecho interno: el impacto del Estatuto de Roma en la legislación española” [International Criminal Court and National Law: the Impact of the Rome Statute on Spanish Legislation], *REDM* n° 86 (2005), pp. 363–417.

³⁹ Depending on the situation in which it is committed, sexual assault constitutes an act of genocide (Ruling *Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, 1998), an act of torture (Ruling *Mejía v. Perú*, Inter-American Commission on Human Rights, 1996; Ruling *Aydin v. Turkey*, European Court of Human Rights, 1997) or a crime against humanity. In point of fact, Article no. 7.1.g. of the Rome Statute states that “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed

under eighteen to participate directly in hostilities that are extremely relevant to this category of offence.⁴⁰

Therefore, it was necessary to close these legal loopholes via legislation, as well as amending Article 7.2 of the Organic Law 18/2003 on Cooperation with the International Criminal Court,⁴¹ which had inverted the principle of complementarity of the Rome Statute.⁴²

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as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (...) (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." Precisely, on 22nd February 2001, the International Criminal Tribunal for the former Yugoslavia decided that rape, torture and sexual slavery should be considered crimes against humanity, a reasoning used accordingly to convict three Serbians (Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic) to 28, 20 and 12 years of imprisonment on charges of participating in the systematic rape of many Bosnian women, regardless of their age (minor or elderly) or their physical condition (some of them were pregnant), and as part of an ethnic cleansing strategy executed by the Serbian Army, Ruling Kunarac et al. (IT- 96-23 & 23/1) Foča.

⁴⁰ These actions, which violate the International Humanitarian Law, constitute a war crime according to Article 8.2.b. (xxvi) of the Rome Statute, which specifically prohibits: "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." It should also be noted that the Additional Protocol I to the Geneva Conventions, Article 4, specifically protects the rights of children in an armed conflict. Furthermore, Article 77 of this same international instrument expressly prohibits recruiting and using children as soldiers. See F. Gómez Isa, "Protección jurídica internacional de las niñas y niños soldado" [International legal protection of child soldiers], in F. Aldecoa Luzárraga and J.J. Corner Delaygua, *La protección de los niños en el Derecho Internacional y las Relaciones Internacionales* [The Protection of Children in International Law and International Relations], Barcelona, 2010, pp. 139–172.

⁴¹ Organic Law 18/2003 on Cooperation with the International Criminal Court, Spanish Official Gazette no. 296 of 11th December 2003, pp. 44 062 to 44 068 in <http://www.boe.es/boe/dias/2003/12/11/pdfs/A44062-44068.pdf>. Article 7.2: "When someone lodges a complaint before a judicial organ, the Spanish Public Prosecutor or the Prosecutor's office, in relation to a situation in which one or more crimes within the jurisdiction of the court appear to have been committed by a non Spanish national outside Spanish territory, the said organ will refrain from proceeding and will apprise the plaintiff of the possibility of taking their claim directly to the Prosecutor of the International Criminal Court who may initiate an investigation. This does not preclude adopting, if necessary, the first urgent proceedings within their jurisdiction. Should this occur, the judicial organs and the Public Prosecutor will refrain from proceeding on their own initiative.

A. Pigrau Solé, "Desvirtuando la jurisdicción universal en España: del caso Guatemala a la Ley Orgánica 18/2003 de cooperación con la Corte Penal Internacional" [Distorting Universal Jurisdiction in Spain: from the Guatemalan Case to the Spanish Organic Law 18/2003 on Cooperation with the International Criminal Court], in *Soberanía del Estado y derecho Internacional, Homenaje al Profesor Juan Antonio Carrillo Salcedo*, Univ. Córdoba – Univ. Sevilla – Univ. Málaga, Sevilla, 2005, Vol II. 1059–1083, pp. 1078–1081. José Ricardo Pardo Gato, "Corte Penal Internacional y/o justicia universal: ¿las dos caras de la misma moneda?" [International Criminal Court and/or Universal Justice: two sides of the same coin?], *REDM* 92 (2009), 109–142, pp. 134–137. The author interprets that "the Spanish judge who institutes proceedings further to a complaint shall determine, in the first instance, if ICC is or is not competent to judge the acts."

⁴² Complementarity is the principle that should prevail between the national criminal jurisdictions and the International Criminal Court. This being so, Article 17 of the Statute

This lack of harmony between Spanish Law and International Criminal Law, together with the political will on a European and Spanish level to act in the interests of protecting victims, seemed to create the appropriate context for a possible reform in this positive direction. In fact, the Council of Justice and Home Affairs of the European Union was already demanding the prosecution and punishment of those responsible for international crimes.⁴³ Similarly in Spain, the 2008 Human Rights National Plan (*Plan Nacional de Derechos Humanos*) expressly established the battle against impunity as its core priority.⁴⁴ If this were the case, why has a necessary reform in favor of International Criminal Law culminated in limiting the real prosecution of international crimes?

2.b. Political and diplomatic pressure

Despite the grandiloquent political statements made by the governments in favor of justice for the victims of serious violations of human rights and the “responsibility to protect”,⁴⁵ the truth is that their active and practical enforcement has been far from peaceful to date. Indeed, the diplomatic conflicts created by the judicial conduct of proceedings at the Spanish National Court have been constant. The Pinochet case was behind the Chilean Government threats of commercial boycotts and formal complaints to the international courts. That same attitude of rejection was shown by the Guatemalan

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states that the Court should take part in an issue when a State is unable or unwilling to exercise its jurisdiction. However, in addition to the principle of complementarity, another mainstay of the structure of the Rome Statute is the duty to cooperate with the Criminal Court and fulfill all requirements it may demand from a party State. It is, therefore, quite surprising that, on the apparent grounds of fulfilling this obligation, the Spanish Parliament enacted the Organic Law 18/2003, the aforementioned Article 7.2 of which, contradictorily “inverts” this principle of complementarity. A. Remiro Brotons, “La responsabilidad penal individual por crímenes internacionales y el principio de jurisdicción universal” [Individual criminal responsibility on international crimes and the principle of universal jurisdiction], *Colección Escuela Diplomática nº 4, Creación de una jurisdicción penal internacional*, Escobar Hernández, Madrid, 2000, pp. 193–235, affirms that “the complementarity of the International Criminal Court designed in Rome with respect to the State jurisdictions manifests a duality: on the one hand, State jurisdictions must provide for the prosecution of the crimes not included in the Court Statute; on the other, on common ground, the Court – unlike the *ad hoc* tribunals for the former Yugoslavia and Rwanda (Articles 9.2 and 8.2 respectively) – does not have priority, and is subsidiary of the State jurisdictions.”

⁴³ Council Decision 2003/335/JHA of 8th May 2003, Official Journal L118, 14/05/2003 P.0012–0014, http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_118/l_11820030514en00120014.pdf, preambular paragraphs.

⁴⁴ Gobierno de España, Plan Nacional de Derechos Humanos [Human Rights National Scheme], Madrid, 2008, p. 10.

⁴⁵ The systematic and serious violation of people's most elemental rights legitimises a “responsibility to protect”, as laid down by the International Commission on Intervention and State Sovereignty. See comment on this report by E. López-Jacoiste Díaz: “La responsabilidad de proteger: reflexiones sobre su fundamento y articulación” [Responsibility to protect: considerations on its fundamental principles and organisation], *AEDI XXII*, (2006), pp. 285–315. See also UN Secretary General's report “A wider concept of liberty: development and human rights for all”, U. N. Doc. A/59/2005, paragraphs 135 and 203.

Government and their Constitutional Court (*Corte de Constitucionalidad*) further to the order of 16th January 2008 issued by the First-instance Central Court no. 1 at the Spanish National Court. Judge Santiago Pedraz issued an international appeal through various channels requesting cooperation on the Mayan genocide.⁴⁶

Similarly, a month later, after the international arrest warrant issued by Judge Fernando Andreu against 40 high-ranking Rwandan officials,⁴⁷ the African Union condemned the abuse of the principle of international jurisdiction, because it was threatening international order.⁴⁸ And all this, despite encouragement by the International Criminal Tribunal for Rwanda, in the *Prosecutor v. Ntuyahaga*⁴⁹ case, to all member States of the international community to pursue those responsible of these crimes.⁵⁰ Similarly, in this African context, the Kingdom of Morocco showed a deep sense of unease after the opening of preliminary proceedings on presumed crimes of genocide and torture against Western Saharan victims.⁵¹

These diplomatic tensions fuelled the debate about the application of the principle of universal jurisdiction, one that had already taken place at the Spanish Supreme Court during the Guatemalan case. That ruling adjudicated that the Spanish subsidiary intervention, based on the grounds of the inactivity of the jurisdiction of a third country, "meant judging the capacity of the jurisdictional organs of a State to administer justice." Alerts were also raised as to the importance a statement of this calibre might have in the sphere of international relations. It was also added that Article 97 of the Spanish Constitution determines that the Government directs foreign affairs and that the repercussions of these cases in such an area cannot be ignored. Contrary to these remarks, seven judges (the current Public Prosecutor Conde Pumpido among them)

⁴⁶ Order of 16th January 2008, Guatemalan case, Preliminary Proceedings 331/2009, First-instance Central Court no. 1, Spanish National Court.

⁴⁷ Order of 6th February 2008, Rwandan case, Preliminary Investigation 3/2008-D, First-instance Central Court no. 4, Spanish National Court.

⁴⁸ This dissatisfaction was taken to the General Assembly of the United Nations, cfr. United Nations General Assembly, A/63/237, Request for the inclusion of an additional item in the agenda of the sixty-third session. Abuse of the principle of universal jurisdiction: letter dated 21st January 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General.

See detailed analysis by L. Arimatsu: "Universal jurisdiction for international crimes. Africa's hope for justice?" IL BP 2010/01, Chatman House.

⁴⁹ Decision on the Prosecutor's Motion to withdraw the Indictment, *Case No. ICTR-98-40-T, Trial Chamber I*, 18th March 1999, "The Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law."

⁵⁰ In this same sense, Belgium and Switzerland have passed sentences condemning Rwandans guilty of acts of genocide in Belgium and Switzerland. Similar proceedings are taking place in Belgium, Denmark, France, The Netherlands, Finland, Norway and the United Kingdom, REDRESS-FIDH: *EU Update on international crimes* 3: 5th Jul 2007, "Rwandan gets 20 years in genocide trial", <http://africa.reuters.com/top/news/usnBAN547002.html>.

⁵¹ Order of 29th October 2007, Saharan case, Preliminary Proceedings 362/2009, First-instance Central Court no. 5, Spanish National Court.

withheld assent in a dissentient judgment. Their reasoning was based on the decision of the Appellate Committee of the House of Lords, rendered on 24th March 1999 on the Pinochet case, which recalled that "International Law provides for offences *jus cogens* to be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."⁵²

However, these diplomatic discrepancies were not particularly worrying until the prosecution involved the heads of state of the most powerful countries (and their allies), who have a permanent seat in the United Nations Security Council. This was the precise moment the amendment of Article 23.4 of LOPJ virtually became a matter of state. It seems quite possible that this political turmoil triggered the amendment.

In fact, the preliminary proceedings of the Tibetan case opened, and the first Tibetan victim gave evidence on the 5th June 2006 before the judge at the Spanish National Court. This initial testimony led to the Chinese Government's⁵³ angry protests, lodged officially by the spokesperson of the Chinese Ministry of Foreign Affairs, Liu Jianchao, who appeared before international media claiming that the investigation of the presumed offences that took place in Tibet was "nothing but fabrication and libel." Furthermore, the Beijing Government summoned the Spanish ambassador in the Chinese capital, to protest against the Spanish judicial conduct of proceedings, asseverating that using the human rights issue in Tibet was merely an excuse to interfere in China's home affairs. They also added that not only did they reject foreign interference by the Spanish judges, but they also openly declared that the Spanish courts had no jurisdiction to prosecute the case. At the same time, they were confident that the Spanish Government would honour their request for the "appropriate handling of this affair, so that, with mutual effort, the Chinese-Spanish partnership would continue the healthy development of the past years."⁵⁴

Then, the dictates of the *real politik* imposed over the ideals of justice and, in January 2009, the former Israeli Secretary of Foreign Affairs, Tzipi Livni, protested to her Spanish counterpart, Miguel Ángel Moratinos, over the investigation underway, ordered by Judge Fernando Andreu at the Spanish National Court, against an Israeli minister over a bombing in Gaza in 2002.⁵⁵ The Spanish minister immediately promised his Israeli counterpart that the law would be amended to check the courts' initiative.

⁵² Dissenting judgment of the decision of the Spanish Supreme Court on the Guatemalan case on genocide, Criminal Court, Ruling no. 327/2003, appeal to the Supreme Court no. 803/2001, fundamental point of law no. 10.

⁵³ Mugambi Jouet, "Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond", Ga. J. Int'l & Cia. L. Vol. 35-3, (2007), 495-537, pp. 525-526.

⁵⁴ "Pekín convoca al embajador español para quejarse de las imputaciones de genocidio" [Beijing summons the Spanish Ambassador to complain about the accusations of genocide], *El País*, 9th June 2006. Such criticism was echoed by the official Chinese news agency, Xinhua, "Interference in Tibet issue opposed", Xinhua – China Daily, Beijing, 7th June 2006 and the international press, cfr. "China warns Spain over Tibet lawsuit", *International Herald Tribune*, Agence France Presse, Reuters, The Associated Press, 7th June 2006.

⁵⁵ Order of 29th January 2009, Gaza bombing case, Preliminary Proceedings 157/2008, First-instance Central Court no. 4, Spanish National Court.

Similarly, Obama's U. S. Government had repeatedly opposed the investigation led by Judge Baltasar Garzón⁵⁶ and Judge Eloy Velasco⁵⁷ over several cases of torture in Guantanamo. Following these criteria, the Chief Prosecutor at the Spanish National Court, Javier Zaragoza, in a report after a meeting with the U. S. Embassy political advisor, requested the non-pursuance of this criminal case,⁵⁸ facts later confirmed by the Wikileaks cables.⁵⁹ The investigation of the CIA flights and the Couso case found similar obstacles;⁶⁰ and once again, the Wikileaks documents disclosure exposed how several Spanish ministers and the Chief State Prosecutor cooperated with the U. S. ambassador in Madrid, who verified the Spanish support as "complete".⁶¹

⁵⁶ Order of 27th April 2009, Preliminary Proceedings 150/2009, First-instance Central Court no. 5, Spanish National Court.

⁵⁷ Order of 4th May 2009, Preliminary Proceedings 134/2009, First-instance Central Court no. 6, Spanish National Court.

⁵⁸ J. Yoldi, "El fiscal rechaza investigar Guantanamo tras hablar con Estados Unidos" [The public prosecution rejects investigating Guantanamo after talking to the United States], *El País*, 18 April 2009.

⁵⁹ "Cable criticising the indictment of former U. S. officials for their involvement in Guantanamo. Prior to her visit to Spain in 2009, the U. S. Ambassador in Madrid informs Napolitano about U. S.-Spain relations and the 'irritating' issue of trying to indict several officials.", *El País*, 30th November 2010, http://www.elpais.com/articulo/espana/Cable/critican/acusaciones/mandos/EE/UU/torturas/Guantanamo/elpepuesp/20101130elpepunac_17/Tes.

⁶⁰ "Cable on the Spanish Government monitoring of the Couso case", *El País*, 30th November 2010, http://www.elpais.com/articulo/espana/Cable/seguimiento/Gobierno/espanol/caso/Couso/elpepuesp/20101130elpepunac_14/Tes. A legal analysis of the Couso case in J.M. Sánchez Patrón, "La competencia extraterritorial de la jurisdicción española para investigar y enjuiciar crímenes de guerra: el caso Couso" [Extraterritorial competence of Spanish jurisdiction to investigate and prosecute war crimes], *REEI*, no. 14, (2007).

⁶¹ Carlos Yarnoz, "EE UU maniobró en la Audiencia Nacional para frenar casos. La embajada intentó boicotear las causas 'Guantanamo', 'Couso' y 'vuelos de la CIA'. – Políticos y fiscales españoles colaboraron en la estrategia" [The U. S. manoeuvred in the Spanish National Court to check cases. The Embassy tried to boycott the Guantanamo, Couso and CIA flights cases. Spanish politicians and prosecutors collaborated in the strategy], *El País*, 30th November 2010, in http://www.elpais.com/articulo/espana/EE/UU/maniobro/Audiencia/Nacional/frenar/casos/elpepuesp/20101130elpepunac_1/Tes. Mónica Ceberio Belaza, "Los ministros españoles trabajan para que no prosperen las órdenes de detención" [Spanish ministers work to stop arrest warrants]. "U. S. backed by the Spanish Government and prosecutors to close the Couso case. – A cable from the U. S. Embassy affirms that Conde-Pumpido told Aguirre that he was doing all he could to dismiss the case of the death in Baghdad of Telecinco TV channel cameraman. – Moratinos assures that Vice President De la Vega is supportive", *El País*, 30th November 2010, in http://www.elpais.com/articulo/espana/ministros/espanoles/trabajan/prosperen/ordenes/detencion/elpepuesp/20101130elpepunac_35/Tes: "For the last few years, forcing dismissal of the Couso case at the Spanish National Court has been one of the main objectives of the U. S. Embassy in Madrid. In this diplomatic struggle, the legation put pressure on in two directions. On the one hand, they kept contact with some members of the Government: the then Vice President, María Teresa Fernández de la Vega; and the then ministers of Justice and Foreign Affairs, Juan Fernando López Aguilar y Miguel Ángel Moratinos, and with the Secretary of State for Justice, Julio Pérez Hernández. On the other, they directly approached the Chief State Prosecutor, Cándido Conde-Pumpido, and the Chief Prosecutor at the Spanish National Court, Javier Zaragoza. The support of the Spanish Government was, according to the Embassy, 'complete'".

Once again, in spring 2009, the Tibetan cases against the Beijing regime shook the Spanish Government. First, Judge Ismael Moreno⁶² at the Spanish National Court requested the authorities of the People's Republic of China to question former President Jiang Zemin and six other high-ranking officials accused of crimes against humanity, genocide, torture and terrorism against the people of Tibet. To this end, the judge issued a letter of request, demanding that the replies of several former officials of the Chinese Government be "urgently" sent to him; among these officials were the former Prime Minister from 1998–2003, Li Peng, the chief of Security and the chief of the Armed Police at the time of the repression of the late 80s.

Later, on 5th May 2009, Judge Santiago Pedraz, who had opened a preliminary investigation on a second complaint for crimes against humanity committed in 2008⁶³ (investigation which was granted leave to proceed nine days before the opening of the Beijing Olympics), sent a second letter of request to China. This time, he requested authorisation from the Chinese Government to question three of its current ministers, suspected of committing crimes against humanity on the grounds of presumed orchestration of a "systematic and harsh repression of the Tibetan civilian population", with the death toll rising to 203, 1000 injured and almost 6000 illegal arrests and disappearances.⁶⁴ Two days later, the Chinese Government officially demanded Spain to take "immediate and effective" measures to block the "false lawsuit" on the Tibetan genocide in order not to compromise "the bilateral relations between Spain and China."⁶⁵

The Spanish authorities' reaction was not slow in coming. That same week, Carlos Dívar, president of the *Consejo General del Poder Judicial* (hereinafter 'General Council of the Spanish Judiciary'), stated: "We cannot become the judicial policemen of the world."⁶⁶ With the same intention, the General State Prosecutor, Conde Pumpido, announcing the preliminary reforms of universal justice, declared that this kind of legal initiatives threatened to turn the Spanish National Court "into a toy in the hands of people wishing

⁶² On this case, see J.E. Esteve Molto, "El auto de admisión a trámite de 10 de enero de 2006 de la Audiencia Nacional – la aplicación de la jurisdicción universal al caso del genocidio del Tibet" [Order to grant leave to pursue the case of 10th January 2006, Spanish National Court – Application of universal jurisdiction to the Tibetan genocide case], *AEDI*, Vol. LVII (2006), pp. 579–607.

⁶³ Order of 5th August 2008, Preliminary Proceedings 242/2008-10, First-instance Central Court no. 1, Spanish National Court. The seven politicians and military men charged in this case were, among others: the Minister of Defense, Lian Guanglie; the Minister of State Security, Geng Huichang; the Secretary of the Chinese Communist Party in the autonomous region of Tibet, Zhang Qingli, and the member of the Politburo in Beijing, Wang Lequan.

⁶⁴ Court order of 5th May 2009, Preliminary Proceedings 242/2008-10, First-instance Central Court no. 1, Spanish National Court.

⁶⁵ Europa Press, "China pide medidas efectivas para que la Audiencia Nacional abandone el caso sobre el Tibet" [China demands effective measures to block the Tibetan case at the Spanish National Court], *El País*, 7th May 2009.

⁶⁶ Dívar, on universal jurisdiction: "We cannot become the judicial policemen of the world." The president of the General Council of the Spanish Judiciary (CGPJ) wishes to amend this law, *El Mundo*, 4th May, 2009. "In his opinion, the law should refer to aspects more specifically related to Spanish interests abroad insufficiently protected, or certain offences not pursued in those countries." <http://www.elmundo.es/elmundo/2009/05/04/espana/1241452393.html>.

to be in the limelight.”⁶⁷ A few days later, the amendment of the controversial Article 23.4 of LOPJ began its passage through the stages of parliamentary procedure.

III. REFORM PROCESS FOLLOWED IN THE SPANISH PARLIAMENT AND THE FINAL TEXT ENACTED

When examining the process of modification of the principle of universal jurisdiction followed in the Spanish Parliament, it is important to determine its form and content. Firstly, following the chronology of the events triggered by international pressure, the swiftness of the amendment surprises no one. Indeed, on 19th May 2009, the two major national parties, (under the initiative of the conservative Partido Popular, and supported by the socialist PSOE) agreed the terms of the amendment of the controversial article of the LOPJ in Parliament. However, the amendment was not only hasty, but it was included in a legal amendment extrinsic to the debate: the Reform of Procedural Codes Draft Bill to implement the new judicial office.⁶⁸ Moreover, this first parliamentary resolution has its origin in a session about the general political debate on the state of the nation, thus avoiding the necessary public and political debate about the advisability or not of restricting the limits of universal jurisdiction, and of the suitability of coordinating Spain's domestic law with International Criminal Law.

This decision sparked off an avalanche of reactions within the sphere of politics and in legal circles. Predictably, the official authorities stressed the positive nature of the reform.⁶⁹ Accordingly, several days later, on 22nd May, María Teresa Fernández de la Vega, First Vice President, said that the law amendment would not be “a serious step backward in the commitment to justice and freedom”, but an enhancement of this principle.⁷⁰ Conversely, the most progressive legal circles⁷¹ and organisations of human

⁶⁷ Aranzadi Civitas, “Conde-Pumpido anuncia que la fiscalía no apoyará la querella contra los asesores de Bush que idearon Guantanamo” [Conde Pumpido announces that he will not support the demand against Bush's advisors who devised Guantanamo], 17th April 2009, in <http://www.aranzadi.es/index.php/informacion-juridica/noticias/conde-pumpido-anuncia-que-la-fiscalia-no-apoyara-la-querella-contra-los-asesores-de-bush-que-idearon-guantanamo>.

⁶⁸ F. Garea, M. Altozano, “El Congreso limita de tapadillo la justicia universal” [The Parliament covertly restricts universal justice], *El País*, 22nd May 2009.

⁶⁹ The arguments in favour of the reform in Ignacio de la Rasilla del Moral, “*The Swan Song of Universal Jurisdiction in Spain*”, *Int'l Crim. L. Rev.* Vol. 9, (2009), 777–808, p. 806.

⁷⁰ “De la Vega afirma que la limitación de la justicia internacional no será un retroceso” [De la Vega affirms that the restriction of international justice will not be a step backwards], *El País*, 23rd May 2009. Aiming to justify the amendment on the same grounds, the Minister of Foreign Affairs, Miguel Ángel Moratinos, stated that “Justice requested greater effectiveness from us in universal jurisdiction” and that the International Criminal Court was the appropriate jurisdiction to try these kinds of cases, cfr. “Moratinos defiende que el Tribunal de La Haya aplique la justicia universal” [Moratinos, in favour of the Hague Tribunal for universal justice cases], 28th May 2009, in <http://www.adn.es/politica/20090528/NWS-2935-Moratinos-Tribunal-Haya-universal-justicia.html>.

⁷¹ “Garzón, Andreu, Pedraz y Velasco critican la limitación de la jurisdicción universal” [Garzón, Andreu, Pedraz and Velasco criticise the restrictions to universal jurisdiction], *El País*, 25th May 2009. “El freno a la justicia universal indigna a los magistrados” [The check to universal

rights defenders condemned “the curtailment of universal justice” and “the waiving of rights to please the powerful.”⁷² They argued, “The application of the principle of universal jurisdiction in the Spanish courts should not be determined by domestic interests or by the nationality of the victims or their offenders, because those limitations are incompatible with the universality of jurisdiction that best serves the common interest of mankind on which it is based.”⁷³

Finally, on 25th June, the Spanish Parliament passed the bill almost unanimously,⁷⁴ justifying the amendment in order to avoid diplomatic conflicts.⁷⁵ After this first parliamentary procedure, the bitter dispute over universal jurisdiction, between those who opposed and those who advocated change, arose once again in the Spanish Senate.⁷⁶ Ironically, some concluded that “we ought to put a stop to the ‘games’ played by certain judges at the Spanish National Court, involved (...) in doing things they shouldn’t do,”⁷⁷

cont.

jurisdiction outrages judges], *Público*, 25th May 2009: “The examining magistrates of the Spanish National Court consider that the amendment negotiated in the Parliament is a step backwards, even more so when Spain was then a world referent.” See also C. Whitlock, “Spain judges cross borders in right cases”, *The Washington Post*, 24th May 2009.

⁷² “Jueces y fiscales critican el freno a la justicia universal – Asociaciones progresistas denuncian que los derechos cedan ante los “poderosos” [Judges and prosecutors criticise the check to universal justice – Progressive associations report that rights are waived in favour of the “powerful”], *Público*, 26th May 2009, “It is a matter of great concern that our politicians have decided to consider the introduction of restrictions in the current applicable legislation under the wing of international powers and their own interests.” Martín Pallín, “¿Quién teme a la justicia universal? No podemos convivir impasiblemente con hechos tan insoportables como el genocidio” [Who is afraid of universal justice? We cannot exist side by side with offences as unbearable as genocide], *El Periódico*, 23th May 2009. He denounced that: “Universal jurisdiction is not about investigating all kinds of offences as if in some sort of global police court. That is just a deceitful claim they want the public opinion to believe. Universal jurisdiction is defined by the specific regulations of our domestic law and those of the Statute of the International Criminal Court.” M. Ollé Sesé, “El avance de la justicia universal” [The progress of universal justice], *El País*, 23th May 2009. Bonifacio de la Cuadra, “Los derechos humanos, globalizados” [Human rights, globalised], *El País*, 10th May 2009.

⁷³ J.M. Gómez Benítez, “Jurisdicción universal” [Universal Jurisdiction], *El País*, 23rd May 2009.

⁷⁴ Boletín Oficial de las Cortes Generales, Congreso de los Diputados, IX Legislatura, Serie A [Official Parliamentary Gazette, Spanish Parliament, IX Term of office, A Series]: Proyectos de Ley [Bills], 6th July 2009.

⁷⁵ Diario de Sesiones del Congreso de los Diputados, IX Legislatura 2009, nº 95, Sesión Plenaria nº 90, [Official record of the sessions, Spanish Parliament, IX Term of office 2009, no. 95, Plenary Session no. 90] 25th June 2009, p. 45.

⁷⁶ A critical and lucid analysis of the parliamentary debates in Prof. Antonio Remiro Brotons, “Derecho y política en la persecución de crímenes internacionales en España” [Law and politics in the persecution of international crimes in Spain], in J. Tamarit Sumilla (coord.) *Justicia de transición, justicia penal internacional y justicia universal*, Atelier, Barcelona, pp. 207–224.

⁷⁷ Cortes Generales, Diario de Sesiones del Senado, IX Legislatura, Comisiones nº 202, Comisión de Justicia [Parliament, Official record of the sessions, IX Term of office, Commissions no. 202, Justice Commission], 5th October 2009, p. 9. Conservative Senator Conde Bajén assessed in similar terms the use of universal justice in his speech in the Senate: “What is it for? It is of no use to the Spanish State. Probably, it is very useful for the judge doing these things; it may be useful for him because he can say he goes to New York to learn English and he can charge

and that with the amendment “we will be far more effective than before” in the effective judicial protection of matters such as ‘Pinochet or Rwanda-Burundi’.⁷⁸ Meanwhile, others warned that we were witnessing “a true legal mistake that jeopardises democracy” and that, all things considered, “the principle of universal jurisdiction was about to be violated”, which dealt “a hard blow to the Spanish legal system’s contribution to the prosecution of suspected perpetrators of crimes punishable by the International Law.”⁷⁹

Simultaneously to these heated debates in the Spanish Parliament, pressure on the Spanish Government intensified. In fact, on 8th June 2009, the Chinese authorities expressed their profound disagreement over another letter of request, this time on the subject of crimes against humanity concerning, among others, Lian Guanglie (Minister of Defense); this letters rogatory was issued by Court no. 1 at the Spanish National Court on 28th May 2009. The Chinese Embassy sent an official letter to the Spanish Ministry of Foreign Affairs and Cooperation with an express threat: “The proceedings opened at the Spanish National Court on this false lawsuit violate the basic principles of jurisdiction and State immunity established by International Law; these actions also fall outside the scope of the Convention on Mutual Legal Assistance in Criminal Matters between Spain and China. The Chinese party firmly withholds any legal aid that may be requested from the courts on the matter, and demands that the Spanish Government fulfil its responsibilities under International Law. They also call for Spain to adopt immediate and effective measures to prevent any abuse of the Convention on Mutual Legal Assistance in Criminal Matters between Spain and China, putting an end once and for all to the alleged case.”⁸⁰

In fact, those “immediate and effective measures” demanded by Beijing were not slow in coming and, following the Senate approval, the final amendment of Article 23.4 of LOPJ was endorsed by a large majority in the Spanish Parliament. These are the terms of the final version:

hundreds of thousands of euros for his little lectures in some university or other over there. That could be useful. (*Applause from the Conservative party (PP) bench in the Senate.*) But, is it useful to Spain? Not in the slightest.” Diario de Sesiones del Senado, IX Legislatura, nº 54, Sesión del Pleno [Official record of the sessions, Senate, IX Term of office, no. 54, Plenary Session], 7th October 2009, p. 2576.

⁷⁸ Cortes Generales, Diario de Sesiones del Senado, IX Legislatura, nº 54, Sesión del Pleno [Spanish Parliament, Official record of the sessions, IX Term of office, no. 54, Plenary Session], 7th October 2009, p. 2581, speech by Díaz Tejera, Socialist party (PSOE) senator.

⁷⁹ Diario de Sesiones del Senado, IX Legislatura, nº 54, Sesión del Pleno [Spanish Parliament, Official record of the sessions, IX Term of office, no. 54, Plenary Session], 7th October 2009, pp. 2572–2573, speech by Guillot Miravet, senator for left wing parties Iniciativa Verds and Esquerra Unida. This senator also accused the major parliamentary groups with these words: “The reply of Grupo Popular and Grupo Socialista is to restrict universal jurisdiction, subordinate it to a fake *realpolitik*, based on the defence of who-knows-what never-explained interests.”

⁸⁰ Note to the Ministry of Foreign Affairs and Cooperation from the Chinese Embassy, N.V. 097/09, 8th June 2009, sent by the office of the Undersecretary of Justice, Deputy General Directorate for International Legal Cooperation (Subsecretaría de Justicia, Subdirección General de Cooperación Jurídica Internacional.) Preliminary Proceedings 242/2008-10, First-instance Central Court no. 1, Spanish National Court.

4. Spanish courts will be equally capable of exercising jurisdiction over crimes committed by Spanish people or by foreigners outside the national territory which could be deemed to constitute any of the following crimes in Spanish criminal trial law:

- (a) Genocide and crimes against humanity.
- (b) Terrorism.
- (c) Piracy and hijacking of aircraft.
- (d) Crimes related to prostitution and corruption of minors and the disabled.
- (e) Unlawful traffic in psychotropic, toxic, and narcotic drugs.
- (f) Unlawful traffic or clandestine immigration of persons, whether workers or not.
- (g) Those related to female genital mutilation, provided those responsible are in Spain.
- (h) Any other which according to international treaties or conventions, in particular conventions on international humanitarian law and protection of human rights, ought to be prosecuted in Spain.

Without detriment to what might be provided for in international treaties and conventions signed by Spain, in order to enable Spanish courts to try the aforementioned crimes, it must be established that the purported perpetrators are in Spain or that there are victims of Spanish nationality, or that there is some relevant connecting link with Spain, providing no procedure has been initiated in another competent country or in an international court entailing an investigation and effective prosecution, if appropriate, of such punishable acts.

The criminal action initiated in the Spanish courts shall be provisionally stayed the moment there is proof of another court procedure on the deeds about which accusation has been made in the country or by the court mentioned in the previous paragraph.⁸¹

The new wording should be considered together with section III of the Preamble of this new Act; it states that is compulsory to "include classes of offences not already included, the prosecution of which is safeguarded by the covenants and general practice of International Laws, such as crimes against humanity and war crimes."⁸² First, it seems extremely surprising that, although crimes against humanity and war crimes are to be included in the new legal text, the definition of such crimes in the Spanish Criminal Code does not conform to that of the ratified Rome Statute; the more so, given the lacunae already mentioned above. In fact, the Preamble expressly cites the persecution of war crimes, whereas the different sections clearly omit it. Although the Spanish Parliament initially approved a text that included this contingency, the Senate eliminated it, and it would appear that, in their haste, they forgot to modify the Preamble.

⁸¹ Organic Law 1/2009 of 3rd November, complementary to the Reform of Procedural Codes Act implementing the new judicial office, which amends the Organic Law 6/1985, of 1st July, on the Judiciary. Spanish Official State Gazette no. 266 of 4th November 2009, pp. 92 091–92 092 in http://www.boe.es/diario_boe/txt.php?id=BOE-A-2009-17492.

⁸² Spanish Official State Gazette no. 266, of 4th November 2009, p. 92 090, Preamble, section III.

This Preamble also adds, "The reform allows for the adjustment and clarification of the precept according to the principle of subsidiarity and the doctrine emanating from the Constitutional Court and the earlier decisions of the Supreme Court."⁸³ On the matter of subsidiarity, the Spanish Constitutional Court (in the Guatemalan case mentioned above) had already expressed its categorical opinion, determining that in order to enforce universal jurisdiction, it would be enough to adduce evidence "by operation of law or by the claimant, of reasonable grounds for suspicion of legal failure to act that would prove a unwillingness or inability to effectively prosecute those crimes."⁸⁴

In addition, the judges of the highest Spanish courts maintain oppositional stances for assessing the 'connection to national interests' criteria included in the new reform. On the one hand, the Spanish Supreme Court has continuously demanded that "within the framework of universal justice, action should be linked to a national interest to ensure its legal standing; in addition, its scope should also be adjusted to meet the criteria of rationality and respect for the principle of non-intervention", which are determinative elements included in the reform. However, the Spanish Constitutional Court interpreted these requirements in a way diametrically opposed to that of the Spanish Supreme Court and the later amendment of the LOPJ; so the reform is not concerned with reconciling the differing opinions of the two courts, but with legislating on the restrictive thesis of the Spanish Supreme Court.

With respect to the need to establish the purported perpetrator's presence in Spain, this is referred to as a new determinant when considering any complaint; the more so considering that undefended action is not allowed in Spain. However, the Spanish Constitutional Court overcame this obstacle and reasoned that, despite the defendant failing to appear, it is possible to open an investigation and take procedural steps.⁸⁵ This is so that, at a later stage, the trial may remain dormant until the extradition mechanism is applicable and there is, therefore, a possibility of taking those allegedly responsible for universal crimes to court, as happened in the Pinochet case.⁸⁶ Furthermore, the Spanish Constitutional Court dealt with the other connecting link (that the victims be of Spanish nationality) indicating that this "is an additional requirement for which there is no provision in current legislation and which moreover, lacks theological grounds insofar as, relating to genocide in particular, it contradicts the very nature of the offence and the shared aspiration of its universal prosecution, encroaching

⁸³ Spanish Official State Gazette no. 266, loc. cit.

⁸⁴ Ruling of the Second Division of the Constitutional Court of 26th September 2005, ruling no. 237/2005, fundamental point of law no. 4.

⁸⁵ Angel Sánchez Legido, "Jurisdicción universal penal y derecho internacional" [Universal Criminal Jurisdiction and International Law], *Tirant Lo Blanch*, Valencia, 2004, pp. 268–319, chapter on universal jurisdiction *in absentia*.

⁸⁶ Ruling of the Second Division of the Constitutional Court of 26th September 2005, ruling no. 237/2005, fundamental point of law no. 4. Human Rights Watch, *Universal jurisdiction in Europe. The State of the Art*. Vol. 18, no. 5 (D), June 2006, p. 87. This argument must be referred to when assessing the usefulness of prosecuting the Tibetan case in the Spanish courts because the Spanish law does not allow trials *in absentia*, cfr. Bakker, Christine, "Universal jurisdiction of Spanish Courts over genocide in Tibet: The Scilingo case", *JICJ* 4 (2006), pp. 595–601.

virtually on its foundations”.⁸⁷ Unfortunately, for the effective application of universal justice, none of these judicial considerations of the Spanish Constitutional Court has been included in the reform.

In conclusion, the legal form and the coherence of the Constitutional Court doctrine seem to be at variance with the amendment of the act. Equally questionable is the intention to adjust the new legal text to International Criminal Law (to the Rome Statute in particular) and to endow universal jurisdiction with greater effectiveness. Let us consider how this new article of LOPJ has been put into practice.

IV. INITIAL EFFECTS OF THE REFORM

4.a. The appeal to the Spanish Ombudsman: Suspected unconstitutionality of the reform

The amendment of Article 23.4 of LOPJ has prompted complaints about the likely unconstitutionality of the new precept. In fact, the content of certain senators’ declarations already envisaged this potential effect, as they stressed in parliamentary debate that the new wording contravened Article 96 of the Spanish Constitution (CE).⁸⁸ This is precisely one of the reasons put forward by the *Plataforma contra la impunidad por la Justicia Universal* (a platform against impunity via universal justice formed by 174 organisations) in the document submitted to the Spanish Ombudsman. The text requested to lodge an appeal of unconstitutionality against the proposed legislation, against the Organic Law 1/2009.⁸⁹

As the reason for unconstitutionality is based on Article 96 of CE, the principle of legality or strict observance of the law of Article 9.3 and 10.2 of CE is also invoked. In this sense and according to this precept, the ombudsman is reminded in the text that the interpretation of any provision relating to fundamental rights should be construed in conformity with the Universal Declaration of Human Rights and the international

⁸⁷ Ruling of the Second Division of the Constitutional Court of 26th September 2005, ruling no. 237/2005, fundamental point of law no. 4.

⁸⁸ Speech by Sampol i Mas in the debate in the Senate, Spanish Parliament, *Diario de Sesiones del Senado*, IX Legislatura, n° 54, Sesión del Pleno [Official record of the sessions, IX Term of office, no. 54, Plenary Session], 7th October 2009, p. 2567: “Therefore, with this bill, the Government and the members of parliament voting in favour, intend to breach, among others, the Geneva Conventions. Such conventions are already part of the Spanish legal system. They intend not only to break these conventions, these international treaties, but they would also contravene Article 96 of the Spanish Constitution, which reads: “Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law. An international treaty signed by the Spanish Government cannot be broken unilaterally.”

⁸⁹ Document submitted by *Plataforma contra la impunidad por la Justicia Universal* to the Spanish Ombudsman, File 10000125, Madrid, 13th January 2010.

treaties.⁹⁰ In fact, the Vienna Convention on the Law of Treaties of 23rd May 1969 is called upon in this context, as it determines the precedence of international law over the internal law of a country, once the former is included in the internal legal system of a State.⁹¹ Therefore, referring to the Spanish commitments as outlined in the Convention against Torture (1984) and the Geneva Conventions (1949), it must be remembered that Article 26 of this same Vienna Convention enunciates the principle of good faith that governs the observance of treaties by its member parties.⁹² The object and purpose should also be considered.⁹³ None of these legal requirements should be overlooked, particularly in view of the proviso expressly included in the new Article 23.4 of LOPJ, which is applicable “without detriment to the stipulations of the international conventions and treaties signed by Spain.”

According to the line of thought on the question of possible unconstitutionality, Article 24.1 CE must be kept in mind, as it safeguards the right to obtain effective protection from the judges and courts in the exercise of people's rights and legitimate interests. It is precisely this last provision that was invoked in its day in the famous ruling of the Spanish Constitutional Court on the Guatemalan case. Further to this matter, the argument for the connection of the crimes to “other relevant Spanish interests” (as demanded by the Spanish Supreme Court) was answered, and concluded that such an interpretation exceeded the bounds of the constitutionally admissible in the framework laying down the right to effective judicial protection, inasmuch as it interferes with this right as set forth in Article 24.1 CE.” Furthermore, the Spanish Constitutional Court revoked the decision of the Supreme Court in another of its arguments, specifying that the need to prove the failure to prosecute the act (in the country of commission of the crimes, Guatemala, in this case) would be a “*probatio diabolica*, which would result in impunity in this context.” It also added that “in all, such severe restriction of universal jurisdiction

⁹⁰ Article 10.2 CE: “Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights, and international treaties and agreements thereon ratified by Spain.”

⁹¹ Vienna Convention on the Law of Treaties of 23rd May 1969, deposit of the instrument of accession by Spain of 16th May 1972, enforcement both in Spain and in general on 27th January 1980, Spanish Official State Gazette no. 142, 13th June 1980. Article 27 of the Convention specifies, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

⁹² According to the principle of *pacta sunt servanda* (Article 26 of the Vienna Convention, one of the fundamental rights of International Law according to Resolution 2625/XXV of the United Nations General Assembly), every treaty in force is binding upon the parties to it and must be performed by them in good faith. The corollary of this fundamental principle of International Law states that the States (unitarily bound) cannot invoke the provisions of their internal law as justification for failure to adhere to their international commitments. Thus, the provisions relating to the exercise of jurisdiction should be applied observing the legal commitments listed in the conventions and treaties signed by Spain.

⁹³ In fact, Article 31.1 of the Vienna Convention on the Law of Treaties proposes, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose.”

contradicts the hermeneutic rule *pro actione*, and it deserves a constitutional reproach for violating Article 24.1 CE.”⁹⁴

Finally, the Spanish Ombudsman has not lodged an appeal for the judicial review of the proposed legislation. However, the Spanish Constitutional Court will inevitably evaluate these arguments in the future, when the question is formally raised to the Court via all the cases that have been dismissed at the Spanish National Court as a consequence of the reform.

4.b. Effects on criminal proceedings at the investigative stage

When the new Article 23.4 of LOPJ came into effect on its publication in the Spanish Official State Gazette (BOE) in November 2009, there were thirteen cases pending trial at the Spanish National Court, under the principle of universal jurisdiction. Of them, “five could be dismissed pursuant to the reform, (...) precisely those most politically controversial.”⁹⁵ All of them affected in one way or another different leaders and military commanders of the two major world powers with a permanent seat on the United Nations Security Council: China and the United States. Two of the proceedings relate to the Tibetan genocide and the religious group Falung Gong, others to the cases of the Guantanamo victims and one against six high-ranking officials of the Bush Administration charged with allegedly orchestrating the torture system at the U. S. military base in Cuba. In this last case, however, the claimant has provided new evidence of political meddling and interference of prosecutors after disclosure of the cables published by Wikileaks. Such evidence could imply a change of direction in the proceedings.⁹⁶ Similarly, interferences in the Guantanamo case under investigation by Judge Baltasar Garzón have been verified.⁹⁷

⁹⁴ Ruling of the Second Division of the Spanish Constitutional Court of 26th September 2005, ruling no. 237/2005, fundamental point of law no. 4.

⁹⁵ J. Roldán Barbero, “La política exterior española en materia de derechos humanos” [Spanish foreign politics on human rights], in C. Ramón Chornet, *Estabilidad internacional, conflictos armados y protección de los derechos humanos* [International stability, armed conflicts and protection of human rights], Valencia, 2010, 253–292, p. 276.

⁹⁶ Center for Constitutional Rights, Joint Expert Opinion, 11th December 2010, First-instance Central Court no. 6, Preliminary Proceedings 134/09. This document describes such interferences and encloses copies of the cables. Those cables also refer to the Couso and CIA flights cases and could equally affect the development of both proceedings at the Spanish National Court, 07MADRID1805/122552, 18th September 2007 (discussing meeting between U. S. Embassy staff in Madrid and Javier Zaragoza to discuss proceedings in Spain against former Guantanamo detainees); 07MADRID82/92692, 16th January 2007, 07MADRID101/93036 18th January 2007, 07MADRID141/94177 26th January 2007, and 07MADRID911, 14th May 2007/12958 (discussing meeting between U. S. officials and Spanish officials, including Attorney General and Chief Prosecutor, regarding Couso case); 06MADRID3104/91121, 28th December 2006 (discussing the rendition case pending before Judge Moreno).

⁹⁷ Carlos E. Cué, “Zaragoza tiene una estrategia para torcer el brazo a Garzón en el ‘caso Guantanamo’” [Zaragoza has a strategy to twist Garzon’s arm in the Guantanamo case]. On three occasions the Chief Prosecutor at the Spanish National Court studied with the

The other case of concern to the Spanish Government, because of the relentless Israeli pressure, was closed prior to the reform coming into force.⁹⁸ In fact, the Plenary Session of the Spanish National Court's Criminal Court, in a controversial order of 9th July 2009, acceded to the wishes of the prosecutor, who demanded that the case be closed.⁹⁹ On the one hand, the principle of subsidiarity was invoked in favour of an investigation of the acts denounced in a "democratic State" such as Israel. On the other, the argument stating that the said investigation did not constitute a "criminal case" was disregarded, as a military commission was in charge of clarifying those acts.¹⁰⁰

With respect to the other controversial cases pending, after the reform came into effect, some judges required the claimants and the public prosecution body to declare whether these cases met the new legal requirements.¹⁰¹ It is not surprising that the first case where the prosecutor has requested the staying of the proceedings under allegations of lack of relevant connecting links to Spanish interests is also the most politically sensitive; we refer to the Tibetan case of 2008, in which the accused are Beijing Government ministers currently serving their term of office.

Simultaneously, fulfilling the requirement and related to the enforcement of Law 1/2009, different human rights associations have submitted their respective allegations. One of the major judicial arguments refers to the potential unconstitutionality of the reform and to the subsequent staying of the current cases. In this sense, they expostulate that the Spanish courts now face new lack of jurisdiction issues that prevent these

cont.

U. S. the steps to be followed to stay proceedings", *El País* 30th December 2010, http://wap.elpais.com/index.php?module=elp_gen&page=elp_gen_noticia&idNoticia=20101130elpepuna c_37.Tes&seccion=nac. According to the confidential cables the Embassy's first step dates back to the 31st March 2009. That day, U. S. diplomats contacted Agustín Santos, chief of the cabinet of the then Minister of Foreign Affairs, Miguel Ángel Moratinos, to inform him that the U. S. Government considered "a serious issue" the opening of proceedings in Spain for alleged torture cases in Guantanamo. Immediately after, the U. S. representatives focused on the Chief Prosecutor at the Spanish National Court, Javier Zaragoza. William Duncan, political advisor to the Embassy, together with a legal advisor, visited him in his office at the Spanish National Court, in Génova Street, on 1st April 2009. "He explained that it was for him to decide whether to open a criminal case or not. The evidence was on his desk in four red folders a foot tall", describes Duncan in a cable dated the same day."

⁹⁸ On the case, see C. Pérez González y R. Escudero Alday (eds.), "La responsabilidad penal por la comisión de crímenes de guerra: El caso de Palestina" [Criminal responsibility for the commission of war crimes: the Palestinian case], *Aranzadi*, Thomson Reuters, University Carlos III of Madrid, 2009.

⁹⁹ Order 1/09 of the Plenary Session of the Criminal Court of the Spanish National Court, appeal 31/09, Proceedings of the Second Division of the Court no. 118/09, First-instance Central Court no. 4, Preliminary Proceedings 157/08.

¹⁰⁰ Dissenting judgement of the Order 1/09 of the Criminal Court Plenary Session of the Spanish National Court expressed by the judges Manuela Fernández Prado, José Ricardo de Prada Solaesa, Clara Bayarri García and Ramón Sáez Varcárcel.

¹⁰¹ The first judge to request such statements was Santiago Pedraz, examining magistrate in the Tibetan case against ministers, politicians and military officials on active service. Court order of 27th November 2009, Preliminary Proceedings 242/2008–10, First-instance Central Court no. 1, Spanish National Court.

cases from actually being tried.¹⁰² This legal loophole has not been rectified by way of temporary provisions,¹⁰³ so an order to stay proceedings may violate the principle of *pro actione* and the right to effective judicial protection set forth in Article 24.1 CE.¹⁰⁴

Nevertheless, despite these allegations, the Tibetan case was the first one to suffer the consequences of the amendment of Article 23.4 of LOPJ. Judge Santiago Pedraz, in an order dated 26th February 2010, decided that the issue did not meet the reform's requirements, as there was no relevant national connecting link between Spain and Tibet.¹⁰⁵

However, the Second Division, or the Plenary Session, of the Spanish National Court's Criminal Court have yet to decide on the appeal of this case. One of the issues pending interpretation is the exact meaning of "a relevant connecting link with Spanish interests," a concept which is both subjective and vague and not legally defined in the

¹⁰² Lack of competence must not be mistaken for lack of jurisdiction under fresh circumstances, as the reform only affects this second option. Spanish jurisdiction is completely deprived of the right to try crimes of genocide, crimes against humanity, terrorism, piracy and hijacking of aircraft, among others, which are still crimes in the Spanish Criminal Code, unless there are Spanish victims, or the purported perpetrators are in Spain, or there is evidence of relevant connecting links to Spanish interests. If this is so, the Spanish courts cannot prosecute these crimes unless any of these requirements are met. This does not imply a lack of competence but a lack of jurisdiction: in other words, the impossibility of trying a case.

¹⁰³ Allegations of 21st December 2009, Tibetan case, Preliminary Proceedings 242/2008–10, First-instance Central Court no. 1, Spanish National Court. According to these allegations, until the reform came into effect, the courts had the capacity to prosecute cases, but this apparently is now eliminated. This new lack of jurisdiction situation is eliminated or rectified by means of the appropriate temporary provisions. The problem arises when, as in the current case study, such provisions do not exist. The legislator has forgotten them, thus eliminating the issue of jurisdiction without further mention as to what is to happen to the current proceedings pending. Although it refers to the lack of competence, Article 51.2 of the famous LOPJ states, "the decision that declines actual competence should also state the competent judicial authorities." That is, should the Spanish National Court declare itself incompetent on grounds of lack of jurisdiction, and is therefore unable to try the case, since the crime has not ceased to exist, the Court should indicate who is competent to institute proceedings. Besides, if no said competent organ exists, such a crime is likely to continue to be a crime, unless the Spanish courts are deemed competent.

¹⁰⁴ The ruling of the Spanish Constitutional Court 35/1995 of 7th February, fundamental point of law no. 5, declares that all decisions that deny access to a case should be closely analysed, as the principle of *pro actione* is to be met in all instances. Therefore, according to the private complainant associations, these principles incorporated in Article 24 of the CE may lead to an interpretation of the reform that implies all cases pending should continue their course until they are fully tried. This argument forces the jurisdictional organs to interpret the legal requirements proportionally according to the duties this principle entails. It prevents certain interpretations and applications of the said principles from disproportionately obstructing or eliminating the right of a judicial organ to try a case and give judgement according to law, ruling of the Constitutional Tribunal 122/1999 of 28th June, fundamental point of law no. 2. Stated also in the ruling of the Constitutional Tribunal 157/1999 of 14th September, fundamental point of law no. 3: the particularly strict court interpretation of legality may lead to violate the right to the effective judicial protection guaranteed by the principle of *pro actione*.

¹⁰⁵ Order of stay of proceedings dated 26th February 2010, Preliminary Proceedings 242/2008, First-instance Central Court no. 1, Spanish National Court. See especially judicial reasonings nos. 1 and 2.

Spanish Organic Law 1/2009. To this end, the thesis of the Public Prosecutor stipulates (in order to continue hearing the case) that there be some sort of link connected to “historical, social, cultural, legal or political relations, the existence of a former common political unit ruling both countries, a common language with relevant cultural links, or membership of international political organizations among others.” However, on the other hand, private complainants interpret this to mean that any sort of link could conceivably be accepted, provided it is relevant, as they argue in their appeal.¹⁰⁶ Therefore, according to the adage *ubi lex non distinguit, nec nos distinguere debemus*, economic and commercial links with China are valid. In any event, the First-instance Central Court no. 1 of the Spanish National Court has waived this argument and added that the relevant link should apply to the connections of Spain with Tibet, and not to those of Spain with China.¹⁰⁷

Similarly, in the notification of 7th April 2010, Judge Eloy Velasco, examining magistrate of the case against officials of the Bush Administration,¹⁰⁸ has requested the parties to declare whether there are still grounds to proceed with the investigation in the light of the modification of the “requirements for trying crimes under the principle of universal prosecution.” The reply of the Joint Expert Opinion to the judge’s request believes that such a connection exists because not only is one of the tortured victims Spanish, but also because the prosecution of international crimes benefits Spanish interests as signatory of international treaties, such as the Convention against Torture (1984) and the Geneva Conventions (1949).¹⁰⁹

In short, two of the most sensitive cases for Spanish politicians, Palestine and Tibet, have been stayed (although appeals are still pending), whereas the Guantanamo case and the “Bush Administration’s legal advisors case” are still open until there is a final assessment of the connecting links to national interests and of the new evidence based on the Wikileaks cables. Overall, it seems that all the other issues, such as the murder of the Spanish Jesuits in El Salvador, the Guatemalan case and the Saharan case, will presumably continue their procedural advance. The historical link and the existence of a former common political unit ruling both countries in their colonial past, the Spanish nationality of some of the victims, together with the little and limited repercussion of these cases in the sphere of international relations dictate the arguments in favour of the persecution of these crimes against humanity. In view of these precedents, and as a result of the latest violent repression of the Saharan people¹¹⁰ and the Israeli raid on

¹⁰⁶ Appeal of amendment of 3rd March 2010, Preliminary Proceedings 242/2008, First-instance Central Court no. 1, Spanish National Court.

¹⁰⁷ Order of dismissal of appeal of amendment of 26th March 2010, Preliminary Proceedings 242/2008, First-instance Central Court no. 1, Spanish National Court, single fundamental point of law, b.

¹⁰⁸ Court order of 7th April 2010, Preliminary Proceedings 134/2009, First-instance Central Court no. 6, Spanish National Court.

¹⁰⁹ Joint Expert Opinion by M. Ratner, K. Gallagher of Center for Constitutional Rights, W. Kalleck and G. Sullivan of European Center for Constitutional and Human Rights, of 23rd April 2010, Preliminary Proceedings 134/2009, First-instance Central Court no. 6, Spanish National Court.

¹¹⁰ Two claims have been filed before the Spanish National Court relating to these events: “La Liga Española pro Derechos Humanos se querrela contra tres ministros marroquíes y

the flotilla of aid ships trying to reach Gaza,¹¹¹ which included Spanish citizens among its members, new statements of claim have been lodged before the Spanish National Court. Presumably, leave would be granted to hear them, given the national connection with the acts denounced.

4.c. Connection to national interests and refusal to consider new complaints of international crimes

While justice for the victims of those cases under trial has proved limited or been overturned as a result of the reform, the effects on new complaints have been equally restrictive. Before the Organic Law 1/2009 came into effect, two new legal initiatives were put forward invoking the still unamended Article 23.4 of LOPJ with the objective of avoiding new legal determinants.

On 6th October 2009, a suit was filed against the highest-ranking U. S. and U. K. representatives on the grounds of the international crimes committed in Iraq in the last two decades. A few weeks later, the First-instance Central Court no. 1 of the Spanish National Court stayed the case with a single juridical reasoning. They claimed that the court “lacked competence to try the denounced acts as those allegedly responsible are not in Spain, the victims are not Spanish and there is no relevant connection to Spanish interests.”¹¹² In this case, the judge quoted verbatim the opinion included in the prosecutor’s report, who added, “Iraq itself has initiated proceedings that mean the denounced acts are already under investigation.”¹¹³ Such assertion is surprising, to say

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pide la declaración de Jiménez” [The Spanish Pro-Human Rights League files a complaint against three Moroccan ministers and demands an explanation from Jiménez], Europa Press, 16th November 2010, in <http://www.europapress.es/internacional/noticia-sahara-liga-espanola-pro-ddhh-querella-contra-tres-ministros-marroquies-pide-declaracion-jimenez-20101116120108.html>. “La familia del español muerto en el Sáhara se querella contra Marruecos” [The family of the Spaniard who died in the Sahara files a complaint against Morocco], *El País*, 23rd November 2010, in http://www.elpais.com/articulo/Comunidad/Valenciana/familia/espanol/muerto/Sahara/querella/Marruecos/elpepuint/20101123elpval_3/Tes.

¹¹¹ Manuel Altozano: “Querella por crímenes contra la humanidad contra Netanyahu por el abordaje de la flotilla. [The complaint filed against the Israeli Prime Minister and six members of his Cabinet bases the competence of the Spanish National Court on the alleged illegal arrests, deportation and forcible transfer of three Spanish citizens to Israel,” *El País*, 22nd July 2010. Full content of the complaint in http://www.elpais.com/elpaismedia/ultimahora/media/201007/22/espana/20100722elpepunac_2_Pes_PDF.pdf.

In the end, the complaint was granted leave to proceed at the First-instance Central Court no. 5, http://www.redress.org/EU_Newsletter_Nov_2010.pdf. For further information on the order to grant leave by the First-instance Central Court no. 5 of 30th July 2010, Preliminary Proceedings 197/2010, visit http://www.telecinco.es/pdf/2010-7-30_Auto_abre_diligencias_ataque_flotilla.pdf.

¹¹² Order of stay of proceedings dated 23rd November 2009, Preliminary Proceedings 302/2009, First-instance Central Court no. 1, Spanish National Court.

¹¹³ Report of Prosecutor Ignacio Gordillo Álvarez-Valdés no. 02181/2009, of 18th November 2009, Preliminary Proceedings 302/2009, First-instance Central Court no. 1, Spanish National Court.

the least, particularly taking into account the questionable legitimacy, impartiality and real competence of the Iraqi Special Tribunal.¹¹⁴

Another complaint relates to war crimes and crimes against humanity committed by Burma's military Junta. In this case, Judge Fernando Grande-Marlaska has agreed to stay proceedings "which does not mean that the extreme gravity of the acts committed is obviated and that we do not believe that it is necessary to investigate them."¹¹⁵ This order to stay proceedings not only refers once again to the lack of connections to Spanish interests, but also – just as in the Palestinian case – to the current investigation under way in the country where the events took place, Myanmar (formerly known as Burma). This last argument appears to ignore that officials of a dictatorial State preside over the investigative commission, which leads us to presuppose a biased result. Moreover, the alleged investigation body has not initiated an "effective prosecution" of the acts, one of the concurrent points that must be met according to the new text of Article 23.4 of LOPJ.¹¹⁶

Nevertheless, one of the most relevant judicial debates arising from this case (and from the subsequent reform appeals and other appeals) revolves around the competence of the Spanish jurisdiction to try alleged war crimes. To this end, the current reform of Article 23.4 of LOPJ prescribes that the connection to national interests applies "without detriment to what may be provided for in international treaties and conventions signed by Spain." Accordingly, the Geneva Conventions, ratified by Spain, and those referred to in the Spanish Criminal Code, stipulate that the crimes included in their provisions should be pursued on the basis of the principle of universal jurisdiction, regardless of the nationality of the perpetrator (Convention I, Article 49; Convention II, Article 50; Convention II, Article 129; Convention VI, Article 146). These provisions specifically dictate that for those crimes against civilians protected in armed conflicts, "States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, and compel them to appear before their own tribunals, regardless of their nationality."¹¹⁷ This is the interpretation followed by Judge Fernando Andreu, First-instance Central Court no. 4 at the Spanish National Court, in the case of the assault against civilians at Camp Ashraf in Baghdad. Instead of following the Prosecutor's recommendation to stay the case, the judge opted to disregard the fact that the compulsory connections to the Spanish interests were not met, and

¹¹⁴ V.S. Ghoshray, "Enforcing International Criminal Law in the Iraqi Special Tribunal: an analysis of the scope, jurisdiction and legitimacy of the proposed legal framework", in www.isrl.org/Papers/2004.

¹¹⁵ Order of stay of proceedings dated 23rd December 2009, Preliminary Proceedings 284/2009, First-instance Central Court no. 3, Spanish National Court.

¹¹⁶ In this respect, the Note by the Secretary General of the United Nations, A/63/341 dated 5th September 2008 arrived at a similar conclusion: this body has neither identified nor sanctioned any of those responsible for the massacre of September 2007. In fact, the conclusion reads "The legal framework in Myanmar purports to function impartially issuing sentences under an apparent rule of law. However, the judiciary is not independent and is under the direct control of the Government and the military."

¹¹⁷ Convention I, Article 49; Convention II, Article 50; Convention II, Article 129; Convention VI, Article 146.

resorted to the obligation of the Spanish courts to pursue war crimes according to the stipulations in Article 146 of the IV Geneva Convention. Therefore, he has sent letters rogatory to the Iraqi legal officials to corroborate whether the country is investigating the acts denounced.¹¹⁸

Contrarily, the examining magistrate Grande Marlaska, further to the filing of the same allegation in the reform appeal of the Burma case, has decided not to pursue it as he considers the case to be an internal matter. He has argued that the “principle of universal jurisdiction can only be invoked for the so called “grave breaches”, as defined in the Geneva Conventions I to IV and the Protocol I. Accordingly, the application of the principle of universal justice is not compulsory in trials of war crimes that cannot be considered grave breaches – those included in Protocol II of 1997 applying to the acts committed in a non-international armed conflict.”¹¹⁹

However, the court division has still to decide on the appeal after evaluating the judicial reasonings. The first issue to consider is that the definition of “protected person in the event of war crimes” according to the Article 608 of the Criminal Code (Section 7) applies to “anyone considered as such in the Additional Protocol II dated 8th Jun 1977 or in any other international treaties signed by Spain.” Consequently, those protected are the victims of internal armed conflicts mentioned in Protocol II. As a result, all penalties envisaged for offenders under the provisions included in that chapter referring to “offences against people and protected assets in case of armed conflict,” are valid for international or internal war crimes alike.

Indeed, the effects of Article 8 of the Statute of the International Criminal Court in the domestic legislation should be emphasized,¹²⁰ as it acknowledges the attribution of individual international responsibility to the commission of a war crime in the event of a non-international conflict. Consequently, and further to the acts denounced in the Burma complaint, according to Article 8, 2, (e), (viii) of the Rome Statute, in armed conflicts not of an international character, ordering the displacement of the civilian population for reasons related to the conflict constitutes a war crime, particularly when committed as part of a plan or policy, or as part of a large scale perpetration of such crimes, provided it can be considered a serious violation of the laws and customs applicable in armed conflicts not of an international nature. Displacement can be considered a war crime when a displacement of civilians for reasons related to the conflict is ordered, unless the security of the civilians involved or imperative military reasons so demand. Also, Article 3 common to all 1949 Geneva Conventions and to the Additional Protocol II, applies to non international armed conflicts. Similarly, during an armed conflict and in accordance with International Law, Article 611.4 of the Spanish Criminal Code punishes

¹¹⁸ Order of 26th November 2009, Preliminary Proceedings 211/2008, First-instance Central Court no. 4, Spanish National Court. The acts denounced in this complaint referred to the armed assault by Iraqi Special Forces on 28th and 29th July 2009 against unarmed Iranian civilians in Camp Ashraf. The death toll of the attack reached 11 Iranians in exile belonging to the People's Mujahedin Organization of Iran, and the arrest of 36 refugees.

¹¹⁹ Order of stay of proceedings of the reform appeal dated 3rd March 2010, Preliminary Proceedings 284/2009, First-instance Central Court no. 3, Spanish National Court.

¹²⁰ F. Pignatelli and Meca, “El artículo 8 del Estatuto. Los crímenes de guerra” [Article 8 of the Statute: war crimes], *REDM* no. 75, (2000), pp. 229–380.

anyone guilty of “(4) Deportation, forceful transportation, taking of hostages or illegal confinement of any protected person (...)”¹²¹ with “a term of imprisonment of ten to fifteen years, without detriment to the penalty faced for the ensuing results.

Moreover, the kidnapping, conscripting or enlisting of children under age is also considered a war crime, especially in this case, as Myanmar is the country with the largest number of child soldiers in the world. The Rome Statute defines as “serious violations of the laws and customs applicable in non international armed conflicts,” particularly in Article 8.2.e. (vii): “Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.” To this end, in the case against Bosco Ntagandathe, the International Criminal Court has convicted this former military chief of staff of the Patriotic Forces for the Liberation of Congo for the commission of war crimes on charges of conscripting children under the age of fifteen years, who were sent to fight in the Congo armed conflict.¹²²

Also, in May 2004, the Appeals Chamber of the Special Court for Sierra Leone decided that, in the context of an internal armed conflict, the prohibition to recruit children under the age of fifteen was already part of Customary International Law before 1996, thus, the infringement was subject to criminal penalties.¹²³

Therefore, although all those arguments should or should not be interpreted and applied by the judges appointed as rapporteurs at the Criminal Division of the Spanish National Court, the truth is that the filter of the new legal requirements of the new Article 23.4 of LOPJ is, in fact, hindering the granting of leave to proceed of new cases.

V. PROVISIONAL ASSESSMENT OF THE REFORM

In the light of all that has happened in the Spanish courts to date, particularly in the First-instance Central Courts at the Spanish National Court, the conclusion is clear: the aspirations for justice of the victims of international war crimes have not been fulfilled. The new requirements, such as the connection to domestic interests, are seriously hampering the persecution of alleged genocide and war criminals.¹²⁴

However, there is no unanimous criterion for the application of these legal provisions in all courts. Thus, it is still premature to draw definitive conclusions on the scope of the reform until the judges of the Plenary Session of the Spanish National Court, the Supreme Court and particularly the Constitutional Court decide on the new requirements of Article 23.4 of LOPJ. The legal indefinity of the phrase “relevant connecting

¹²¹ On the regulation of war crimes in Spain, F. Pignatelli and Meca, *La sanción de los crímenes de guerra en el derecho español* [War Crime Penalties in Spanish Law], Ministerio de Defensa, Madrid, 2003.

¹²² ICC – 01/04–02/06, *Case Prosecutor v. Bosco Ntaganda*. Warrant arrest issued by Pre-Trial Chamber I, unsealed on 28th April 2008.

¹²³ Summary of Decision on Preliminary Motion on Lack of Jurisdiction (Child Recruitment), *Prosecutor v. Sam Hing Norman*, Appeals Chamber of the Special Court for Sierra Leone, 31st May, 2004, Case No. SCSL-2003-14-AR72 (E).

¹²⁴ Ignacio de la Rasilla del Moral, “The Swan Song of Universal Jurisdiction in Spain”, *Int’l Crim. L. Rev.* Vol. 9 (2009), p. 805, concludes that the reform entails the staying of proceedings in the Israel and China cases.

links with Spanish interests", the exact application of what is prescribed in the Geneva Conventions,¹²⁵ the retroactive effect of the new legislation on criminal procedure,¹²⁶ and the possible infringement of the reform of the constitutional right to an effective judicial protection, are arguments that will be progressively resolved in different legal instances; nevertheless, prospects are daunting for those who intend to put an end to impunity.

If this is so, the provisional judicial results do not currently match the optimistic prospects envisaged by the Spanish Government when the First Vice President herself declared that the reform would not be a serious step backward regarding the commitment with justice and freedom, but an enhancement and a reaffirmation of the principle of universal justice. Victims and top government leaders differ significantly in their analysis of the repercussions in the international relations sphere. For instance, during President José Luís Rodríguez Zapatero's last visit to Israel, while the Spanish Parliament was passing the reform, his Israeli counterpart, Shimon Peres, thanked him publicly for the amendment of the Act and the staying of the Palestinian case.¹²⁷ The Gaza victims who turned to the Spanish National Court for justice invoking the principle of universal jurisdiction are unlikely to share this gratitude. This is why Article 23.4 of LOPJ has been described as "a conspiratorial step in favour of granting impunity to those *friends and acquaintances* with business links."¹²⁸

Some of these victims are perhaps wondering whether a resort to violence and terror is inevitable to demand those rights inherent to people, at least as a means of attracting the attention of the international community. Regrettably, this is the current paradox: on the one hand, peace is sought and international terrorism is fought in illegal wars; and, on the other, peaceful proposals to solve deeply entrenched crises, such as those of Tibet and Burma, go unrewarded. This feeling of despair sows the seed for the formation of violent groups, whose voices are starting to be heeded among the oppressed peoples who have resisted non-violently for decades. If there is a real interest to resolve international conflicts peaceably, compliant to the United Nation's intentions, the stress should be on dealing with the causes rather than focusing exclusively on their extreme signs.

¹²⁵ On the compulsory prosecution of war crimes by the States, Eric David, "Que reste-t-il de la compétence universelle dans la loi du 5 août 2003?", *Jura Falconis*, jg 40, (2003–2004), no. 1, 55–72 in <http://www.law.kuleuven.be/jura/art/40n1/david.html>.

¹²⁶ Manuel Ollé Sesé, "El principio de justicia universal en España: del caso Pinochet a la situación actual" [The principle of universal justice in Spain: from the Pinochet case to the current situation], in J. Tamarit Sumilla (coord.) *Justicia de transición, justicia penal internacional y justicia universal*, Atelier, Barcelona, 225–242, p. 220. According to this lawyer, initiator of several lawsuits based on the principle of universal justice in Spain, "The criminal procedure legislation follows the principle *tempus regit actum* and, therefore, they cannot be retroactively applied".

¹²⁷ J.M. Muñoz and M. González, "Peres agradece a Zapatero que haya impedido los juicios en España contra militares israelíes" [Peres thanks Zapatero for blocking the trials against Israeli military men in Spain], *El País*, 15th October 2009.

¹²⁸ Antonio Remiro Brotons, "Derecho y política en la persecución de crímenes internacionales en España" [Law and Politics in the prosecution of international crimes in Spain], in J. Tamarit Sumilla (coord.) *Justicia de transición, justicia penal internacional y justicia universal*, Atelier, Barcelona, p. 220.

In conclusion, it is striking that universal justice laws should be hastily amended if those pursued for international crimes are the leaders of the most powerful countries. What happens in Spain is not an isolated example. Belgium, for instance, did the same in 2003, when a Belgian court prosecuted Israeli Prime Minister Ariel Sharon for the attacks on the Sabra and Shatila Palestinian refugee camps, near Beirut.¹²⁹ In addition to these voids in the national courts with regard to universal jurisdiction, there exists the impossibility of pursuing the leaders of these same powerful countries through the International Criminal Court, as they have not entered into the Rome Statute. Therefore, it is not surprising that the selective use of universal justice and the International Criminal Law (particularly in African cases) has been described as a new form of “neocolonialism.”¹³⁰ There appears to be a different measuring stick for prosecuting international crimes, but surprisingly enough, there are neither diplomatic confrontations nor legal controversy if the prosecution focuses exclusively in cases such as piracy in the Indian Ocean.¹³¹

Nevertheless, despite these requirements, the catalytic and contagious effect of the universal justice cases in Spain on the beginning of the end of impunity in Chile and Argentina; the “pedagogic effect,”¹³² even the ethic effect,¹³³ of the effective application of the International Criminal Law; the opportunity of the victims to have access to justice and redress; the prosecution of international crimes in domestic courts the International Criminal Court finds legally impossible to try (particularly if the offenders are citizens of any of the United Nations Security Council member countries that have not signed the Rome Statute),¹³⁴ and the ability to cut dictators off in their own countries are all

¹²⁹ Malvina Halberstam, “Belgium’s Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?”, *Cardozo L. Rev.* 25 (2003), 247–266. Human Rights Watch, “Belgium universal jurisdiction law repealed”, 1st August 2003.

¹³⁰ E. Musoni, “AU Justice Ministres protest abuse of universal jurisdiction”, 5th November 2008, at www.allafrica.com/stories/200811050742.html.

¹³¹ This is the reason behind the expansion of the principle of universal jurisdiction to Kenya: that this country’s courts can try pirates arrested by third countries outside Somalian waters. Kenya Merchant Shipping Act, Article 369 (4) (a), classifies piracy as a crime “whether the ship (...) is in Kenya or elsewhere or whatever the nationality of the person committing the act.”

¹³² A. Pigrau Solé, “La jurisdicción universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales” [Universal jurisdiction and its application in Spain: the persecution of genocide, war crimes and crimes against humanity by the national courts], *Oficina de Promoción de la Paz y de los Derechos Humanos, Generalitat de Catalunya*, 2009, pp. 136–143.

¹³³ Y. Shany, “No longer a weak Department of Power? Reflection on the emergence of a new international judiciary”, *EJIL* 20 1, (2009), 73–91, p. 81.

¹³⁴ A. Pigrau Solé, “La jurisdicción universal y su aplicación en España” [Universal jurisdiction and its application in Spain], *op. cit.* p. 123; the author argues that in those cases where the CPI is not competent and the offenders are “citizens of the permanent United Nations Security Council member countries (...) the possibility of impunity is so high that it is advisable to keep the potential universal jurisdiction tracks as wide open as possible.” *International Law Association, London Conference, Committee on International Human Rights Law and Practice, “Final Report on the exercise of Universal Jurisdiction in respect of Gross Human Rights Offences”, 2000*, pp. 9–10. Mugambi Jouet, “Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond”, *Ga. J. Int’l & Cia. L.* Vol. 35–3, (2007), 495–537, p. L., Vol. 35–3, (2007) pp. 513 and 537.

key elements that should lead to the strengthening and widest possible application of universal justice, and not to restraining it.

The crucial aspect is that the exercise of universal jurisdiction on the part of the victims and Human Rights associations directly re-establishes popular will and universal solidarity in criminal matters, limiting corrupt leaders and dictators' abuse of power. All this refers to the following basic democratic reasoning: "International law still protects sovereignty, but it is the people's sovereignty rather than the sovereign's sovereignty."¹³⁵ This should be the principle inspiring and regulating International Criminal Law, leaving aside any political or economic interests. It was expressed thus in the Guatemalan case dissenting judgement at the Spanish Supreme Court. The dissenting judges concluded the following: "The exercise of universal jurisdiction, as it eradicates impunity for the greatest crimes against humanity such as genocide, contributes to make our civilization more peaceful and humanized. It does not restore the victims' lives. It cannot guarantee that all offenders are finally convicted. But it can help prevent some crimes and try some offenders. This way, it contributes to a more just and secure world and to consolidating International Law, rather than violence, as the most common way of solving conflicts."¹³⁶

¹³⁵ Michael W. Reisman: "Sovereignty and Human Rights in Contemporary International Law", *AJIL*, Vol. 84 (1990), p. 869.

¹³⁶ Dissenting judgement of the ruling of the Spanish Supreme Court in the Guatemalan genocide case, Criminal Division, Ruling no. 327/2003.