

The Principle of Universal Criminal Jurisdiction in Spanish Practice (2003–2009)

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I. INTRODUCTION

Since the middle of the nineties, Spanish courts have assumed an outstanding leading role as to the application of the Principle of Universal Criminal Jurisdiction (hereinafter “PUCJ”, after the Spanish abbreviation), with the aim of facing the impunity of those who commit serious human rights violations in third States. Specifically, this is the result of the proceedings started before the *Audiencia Nacional* (AN),

the Spanish High Court competent on these matters, under Art. 23.4 of the Spanish Organic Law on the Judicial Branch of 1985¹ (hereinafter “LOPJ”), regarding the criminal prosecution brought against the main perpetrators of Argentinean and Chilean dictatorships.² Subsequently, they have been followed by other proceedings³

¹ *BOE* (Spanish Official Gazette) of 2nd July 1985. Art. 23.4 – in the version in force until November 2009, as cited below – provides *the universal criminal competence of the Spanish jurisdiction* to hear of those acts committed by Spaniards or foreigners outside the national territory which are liable to be defined under Spanish Criminal Law as *crimes of genocide and terrorism, as well as any other which, under the international treaties and conventions ratified by Spain, shall be prosecuted in Spain* (this section also accounts for piracy offences, the unlawful seizure of aircrafts; the counterfeit of foreign currency; offences related to prostitution, and the unlawful traffic of psychotropic, toxic and narcotic drugs). Generally, there shall be met the condition that “the offender shall not have been acquitted, pardoned or convicted abroad or, in this last case, he shall not have served sentence”, for the application of Art. 23.4. And “should the offender have only served it partly, this will be taken into account to reduce the sentence proportionally as appropriate”. It must be warned that for the application of Art. 23.4 the other two conditions are *not* required, in spite of the fact that their occurrence, of cumulative character, is necessary to implement the *principle of active personality* under Art. 23.2, which allows Spanish courts to have jurisdiction over offences committed in third States where the alleged perpetrators are Spanish nationals (on the contrary, as it will be subsequently seen, it was not until November 2009 that the Spanish legislation included the *principle of passive personality*, based on the victim’s nationality). The two conditions are the following – namely, the act is punishable in the place of the commission, and the offended party or the Public Prosecution Service brings criminal proceedings before Spanish courts. Likewise, it may be observed that the LOPJ does not demand the presence of the accused within Spanish territory for the start of criminal proceedings, under article 23.4. However, the start of proceedings will not imply a final criminal sentence – either prosecution or acquittal – when the accused is not in Spain, since Spanish legislation does not allow oral proceedings *in absentia* of the accused (Arts. 834 and subsequent ones of the Rules of Criminal Procedure). On the other hand, the LOPJ confers on the Chamber for Criminal Matters of the AN the competence to hear of those offences committed outside the national territory when said prosecution falls to the Spanish courts under the acts and treaties ratified by Spain (Art. 65.1e)). We will below refer to the reforms introduced in 2005 as to female genital mutilation offences, and in 2007 as to smuggling and illegal immigration.

² In particular, the proceedings were started after the *Unión Progresista de Fiscales* (Prosecutors Progressive Union) had brought both actions – on 28th March 1996 in the case of Argentina and on 1st July of same year in the case of Chile; they were followed by the criminal prosecutions brought by the *Fundación Presidente Allende* (President Allende Foundation) on 5th July of the same year and by the *Agrupación de Familiares de Detenidos-Desaparecidos* (Association of the Families of those Detained and Disappeared) on 11th September of 1996. For further information on these cases and the ones to be cited, see: M. Ollé Sesé, *Justicia universal para crímenes internacionales*, [Universal Justice for International Crimes], Madrid, 2008, pp. 64 and subsequent ones.; and 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 Pursuit of Genocide, War Crimes and Crimes against Humanity by National Courts], Barcelona, 2009, pp. 93–108.

³ In this respect, there must be pointed out that in accordance with Art. 125 of the Spanish Constitution of 1978, apart from the Public Prosecution Service and the direct victims

related to serious human rights violations committed in Guatemala, China – Falun Gong –, Tibet, Peru, Iraq, Guantanamo, El Salvador, Western Sahara,⁴ Rwanda,⁵ the Occupied Palestinian Territories⁶ and Nazi extermination camps.⁷

The series of legal proceedings which have developed over this period of time included the application of the PUCJ.⁸ Over the last few years, both the Spanish

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of the crime (private prosecution), any *Spanish national* may bring public-interest action before Spanish courts, even if he or she is not a direct victim of the crime (*actio popularis*). Likewise, all proceedings started under the PUCJ before Spanish courts so far have always been brought at the request of the injured party, either a direct victim of the crime (private prosecution) or not (*actio popularis*), and never at the request of the Public Prosecution Service.

⁴ Regarding this last subject, the Order of Examining Magistrate's Court No. 5 of the AN of 29th October 2007 may be referred to, in which, under Art. 23.4 of the LOPJ, Spanish courts' competence is confirmed as to the alleged genocide and torture acts committed by an overall of 13 senior officials or former senior officials of the Moroccan civil and military Administrations against Sahrawi people.

⁵ On 6th April 2005 criminal action was brought before the AN to inquire the circumstances in which the deaths of 9 Spanish citizens (six members of a religious order and three voluntary workers) occurred. These people were murdered between 1990 and 2002 in Rwanda and the Democratic Republic of the Congo. After statements from 22 witnesses had been taken and other procedural steps had been carried out, on 6th February 2008, Examining Magistrate's Court No. 4 of the AN ordered the indictment of 40 senior officials of the Rwandan Patriotic Front due to crimes of genocide, crimes against humanity, war crimes, terrorism and torture; and it issued international and European warrants of arrest and imprisonment against them.

⁶ The bombing in 2002 of the house of the alleged leader of Hamas, Sala Shehaden, caused the death of 15 people and injured other 150. In June 2008, criminal action was brought against Israeli Minister for the Defence, and against other 6 people working for him, for an alleged crime against humanity. Main Examining Magistrate's Court No. 4 of the AN made the Order of 29th January 2009 which allowed the aforesaid action, under Art. 23.4 of the LOPJ; and urged the judicial cooperation of Israeli authorities. The Order of 30th June 2009 by the Chamber for Criminal Matters of the AN filed the case, as it was deemed, in accordance with the Prosecution, that the facts were being duly investigated by Israeli courts, in application of the principle of subsidiarity.

⁷ On 19th June 2008, criminal action was brought before the AN for crimes against humanity, including murder, extermination, slavery, deportation, torture and other inhuman acts, against four former members of the SS Totenkopf who had acted in National Socialist concentration camps in Austria and Germany. The Public Prosecution Service supported the criminal action because there was evidence that these three camps (Mauthausen, Sachsenhausen and Flossenbürg) housed 7,000 Spaniards and that said prisoners "were subjected to extermination programmes designed by the National Socialist system". The Examining Magistrate in Court No.2 of the AN made the Order of 17th July 2008 which allows the aforementioned criminal action. Among the defendants, there appeared Johann Leprich, Anton Titjung, Josias Kumpf and Iwan (John) Demjanjuk. All of them were in the United States, except Demjanjuk, who had been extradited to Germany where he was to be judged. On 17th September 2009, the Examining Magistrate ordered indictment against the first three defendants, as well as their preventive detention, for which he issued a European warrant of arrest.

⁸ Likewise, some of the criminal actions brought raised the question of the immunity from criminal jurisdiction enjoyed by foreign Heads of State and Government before

Supreme Court (TS) and the Constitutional Court (TC) have pronounced on the scope and the limits of this principle. More recently, in November 2009, Art. 23.4 of the LOPJ of 1985 was modified.

In this essay⁹ a brief analysis of case law in Spanish courts is firstly carried out. Such an analysis is considered necessary for the subsequent study and assessment of the recent legislative changes enacted at the end of 2009. In fact, with this reform

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Spanish courts; specifically, as a result of the criminal actions brought against Cuban leader, Fidel Castro; Moroccan Monarch, Hassan II; the President of Equatorial Guinea, Teodoro Obiang; and, more recently, against the President of Rwanda, Paul Kagame (Order of Examining Magistrate's Court No. 4 of the AN of 6th February 2008). In these cases, Spanish courts have recognised the absolute immunity from criminal jurisdiction of these persons as long as they are in office: see R. Carnerero Castilla, *La Inmunidad de Jurisdicción Penal de los Jefes de Estado extranjeros*, [The Immunity from Criminal Jurisdiction of Foreign Heads of State], Madrid, 2007, pp. 57 and subsequent ones; J. Jorge Urbina, "Crímenes de guerra, justicia universal e inmunidades jurisdiccionales penales de los órganos del Estado", *Anuario Mexicano de Derecho Internacional* ["War Crimes, Universal Justice and Immunity from Criminal Jurisdiction of State's Bodies", *Mexican Yearbook of International Law*], vol. VIII (2008), 255–306, pp. 278–287.

⁹ Due to a lack of time it is not possible to carry out a comparative study between the Spanish practice and those in other States, or, more specifically, to assess the repercussions which the start of criminal proceedings in Spain has as to the implementation, in the third States involved, of legal reforms and plans of action by their courts, aimed at fighting against impunity. According to J. Roldán Barbero, "La política exterior española en materia de derechos humanos" (Spanish Foreign Policy on Human Rights), in C. Ramón Chornet (coord.), *Estabilidad internacional, conflictos armados y protección de los derechos humanos* (International Stability, Armed Conflicts and Human Rights Protection), Valencia, 2010, 253–292, p. 278, "... the Spanish Judicial Branch, relying on the unlimited and even excessive corroboration from the Constitutional Court in its Judgment on the *Guatemala case*, carried out – regardless of the ulterior motives of its makers, and with the support of British and Mexican Justices in the *Pinochet* and *Cavallo cases* respectively – a civilizing mission with great value as a precedent and as public denunciation, and with a deterrent effect on well-known satraps or those still to be known and suffered. In this sense, it cannot go unnoticed the fact that the initiatives taken by Spanish courts, apart from the international warrant of arrest implied, have encouraged citizens to bring action, by virtue of the political and legal principle of preferential territorial jurisdiction, against those violations of human rights committed all across Latin America (especially in Argentina and Chile, against their own monsters)...". In this very same sense, there must be highlighted that, after the Judgment delivered on 13th July 2007 by the Supreme Court of the Argentinean Republic (confirming the Judgment by the Federal Judge in San Martín which declares the unconstitutional nature of Order No. 1002/89), and the enactment of National Act 24952, which formally repeals Acts 23492 – *de Punto Final* – and 23521 – *de Obediencia Debida* –, and National Act 25779, which annuls all legal effect of Acts 23492 and 23521; in December 2009, 19 former soldiers were to stand trial over crimes against humanity, including the kidnapping, torture and physical disappearance of 85 victims during the military Dictatorship. Among the accused, there could be found Ricardo Cavallo, who was detained in Spain between 2003 and 2008 precisely under the PUCJ, after having been arrested in and extradited from Mexico; and who was subsequently extradited from Spain to Argentina in 2008.

the Spanish lawmaker attempts to give an answer to the difficulties faced in the development of this case law. However, this legal reform has not solved all the queries posed by the application of the PUCJ, as it will be proved later.¹⁰

II. THE PUCJ IN THE FIRST JUDGMENTS OF THE TS: THE CONTRA LEGEM INTERPRETATION OF ART. 23.4 OF THE LOPJ

The TS faces for the first time the application of the PUCJ in its Judgment 327/2003 of 25th February 2003,¹¹ through which it settles the appeal against the Order of the Plenary Session of the Chamber for Criminal Matters of the AN of 13th December 2000, in the Guatemala case.¹² In this Judgment, passed by a close majority of 8 to 7, the TS defends, in short, the following position regarding the universal criminal jurisdiction of Spanish courts as to the acts committed in Guatemala by nationals of this Latin American State. Firstly, with regard to the so-called *principle of subsidiarity*, the TS rejects the application which the Court of first instance made of this principle; according to the TS, the decision about the real or apparent inactivity of third States' courts to prevent and punish the crime of genocide does not fall to Spanish judges and courts, but to the Spanish Government, under Art. 97 of the Spanish Constitution (hereinafter "CE") [*sic*].¹³ Moreover, in the TS' opinion, Art. VIII of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948¹⁴ is, in any case, applicable. The

¹⁰ This essay aims to enlarge the essays published in the *SYIL* on the Spanish practice in this field: J. Ferrer Lloret, "Impunity in Cases of Serious Human Rights Violations: Argentina and Chile", *SYIL*, vol. III (1993–1994), 3–42; A. Sánchez Legido, "Spanish Practice in the Area of Universal Jurisdiction", *SYIL*, vol. VIII (2001–2002), 17–52.

¹¹ TS case law is available in: <http://www.poderjudicial.es>

¹² Through the Order of 13th December 2000, the Plenary Session of the Chamber for Criminal Matters of the AN decided to file the proceedings started in the Guatemala case. According to the Chamber for Criminal Matters, in this case "there is no record of refusal by the State of the Territory and, we insist, this is the only one which shall (according to the preferential jurisdiction criterion of Art. 6 of the Convention on Genocide) hear of the complaints and related criminal actions brought before Main Examining Magistrates' Court No. 1. In addition, we cannot infer judicial inactivity by virtue of the passing of time, which was feasible in Chile and Argentina due to the lapse of time gone by since the end of the military dictatorships, given the fact that, as it is accounted for, the material underpinning the initial complaint was released on 25th February 1999 and the complaint itself was brought on 2nd December 1999. There is not a judicial decision by Guatemala dismissing this complaint" (Fourth Legal Ground).

¹³ According to the TS, "a declaration of this kind [in relation to a State with which Spain maintains 'normalized diplomatic relations'] does not fall to the State's Courts. Art. 97 of the Spanish Constitution establishes that it is the Government that runs the foreign policy, and the repercussion in this field of such a declaration cannot go unnoticed" (Sixth Legal Ground).

¹⁴ *BOE* of 8th February 1969 and 18th September 1985. It must be mentioned that, in *BOE* of 10th December 2009, there appears the approval of the withdrawal of the reservation

Article provides the proceedings which the State parties can exercise to make effective the obligation of prevention and punishment of the crime of genocide; it establishes the appeal to the competent United Nations (UN) organs so that these adopt, under the Charter of the United Nations, the measures they consider appropriate. In the TS' opinion, despite the fact that the violations of human rights committed in Guatemala have been the centre of attention before the UN organs, "it must be pointed out that the answer of the UN to those reports has not been similar to the one given in the cases of Rwanda and the former Yugoslavia".¹⁵

Secondly, with regard to the application of Art. VI of the Convention of 1948, and in connection with Art. 23.4 of the LOPJ, the TS deems that said precept does not provide for or forbid universal jurisdiction expressly. However, in the TS' opinion, in the light of the conventional practice and after referring to the action of German and Belgian courts:

"... , today, case law supports that no State in particular shall establish order unilaterally by resorting to Criminal Law (against anyone or anywhere). What is needed is a *point of connection* which legalizes the extraterritorial scope of its jurisdiction. Undoubtedly, there is an international consensus regarding the necessity of pursuing this sort of acts, but *the agreements between States have not established a limitless jurisdiction for any of them* as to the acts committed in the territory of another State, having resorted to other solutions" (italics added).¹⁶

According to the TS, in this case there is not such a "point of connection" – none of the alleged culprits are in Spanish territory; Spain has not refused their extradition; and genocide is not reported regarding victims of Spanish nationality either.

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to the whole of Art. IX (Jurisdiction of the International Court of Justice), occurred when Spain entered the Convention. On this matter, *see*: C. Espaliú Berdud, "The Spanish Reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide", *SYIL*, vol. X (2004), 67–95.

¹⁵ Subsequently, in the STS 712/2003, of 20th May 2003, the TS only confirms whether the principle of subsidiarity implicitly stipulated in Art. 23.4 of the LOPJ, under the rules of the Convention (Convention on the Prevention and Punishment of the Crime of Genocide of 1948), is observed or not in the case of the criminal action brought for genocide, terrorism, torture and illegal detention committed in Peru by Peruvian nationals (two former Presidents and other civil and military senior officials) against victims of that same State. The TS, *supported by the Public Prosecution Service*, holds that Spanish courts are not competent in this matter, since "we have to admit that the necessity of jurisdictional intervention according to the principle of Universal Justice is excluded when the pertinent territorial jurisdiction is pursuing efficiently the crime of universal character committed in its own country". In this case, according to the TS, there is data confirming that within the framework of the political change occurred in Peru, there have been started criminal proceedings against some of the defendants, being some of these imprisoned and others in default of appearance. Therefore, in TS' opinion, the intervention of Spanish jurisdiction is not necessary by virtue of the PUCJ, the reason why the appeal is to be dismissed (Fifth Legal Ground).

¹⁶ Seventh Legal Ground.

For the same reasons, the TS denied the competence of Spanish courts in the event of a crime of terrorism.¹⁷ Therefore, the TS only allows the application of *territorial PUCJ* – which demands the presence of the accused in Spanish territory –, as well as of the *passive personality principle* – based on the Spanish nationality of the victim –, for the crimes of genocide and terrorism, despite the fact that these two competences are not stipulated in the LOPJ of 1985.

In this sense, the TS comes to the conclusion that Spanish courts do have competence regarding the acts of torture committed in Guatemala *against Spanish nationals*, under Art. 5.1c) of the Convention against Torture of 1984,¹⁸ because of the remission of former Art. 23.4.g) of the LOPJ. It refers, specifically, to the application of the *passive personality principle* in relation to the formal complaints of the deaths of four Spanish priests and in connection with the acts committed against Spanish citizens in the Spanish Embassy in Guatemala on 30th January 1980.¹⁹ This same doctrine is confirmed by the TS in later cases.²⁰

In our opinion, on a general basis, the requirement of a “point of connection” with Spain in order to apply the PUCJ is rather reasonable. Otherwise, Spanish courts would assume a disproportionate leadership in the application of this principle. Consequently, the question will be to decide which these “points of connection” might be. The solution adopted by the TS (the presence of the accused in Spain or the Spanish nationality of the victims) *is not expressly stipulated in*

¹⁷ Seventh to Eleventh Legal Grounds. The TS settles the case in the same way, by means of STS 345/2005 of 18th March 2005, which denies the competence of Spanish courts to hear of the criminal action for the genocide and tortures committed in the People’s Republic of China, brought against several senior officials of the Chinese Communist Party. According to the TS, on the one hand, the only person of Spanish nationality mentioned in the Action would be the passive subject, at the most, of an eventual offence of Illegal Detention, or even of one of Threats, but not of Genocide or Tortures; on the other hand, neither the defendants are at the disposal of our country’s Justice nor they are likely to be, as there are not any Extradition Treaties between Spain and China. Therefore, the links necessary to confirm the competence of Spanish courts do not exist (First Legal Ground).

¹⁸ *BOE*, 9th November 1987.

¹⁹ Twelfth Legal Ground.

²⁰ In STS 319/2004, of 8th March 2004, there is confirmed the competence of Spanish courts to allow the criminal action for genocide, terrorism and torture brought against the Chilean General, Brady, former Minister for the Defence in Chile, apparently a resident with false identity in Germany. According to the TS, “. . . Spanish courts have jurisdiction to hear of those acts object of the criminal action brought against the Chilean general, logically under the doctrine established by the Plenary session of this Court through the judgment in the “Guatemala case”. In this respect, there must be highlighted the fact that, among the offences in which – according to the prosecution – the mentioned general is involved, we find the acts committed against two Spanish priests and the death of the Spanish diplomat Don Marcos” (Fifth Legal Ground). In STS 1362/2004, of 15th November 2004, in *Scilingo’s case*, the TS holds the competence of Spanish courts under Art. 23.4 of the LOPJ, since “the alleged perpetrator is within Spanish territory; there exists a direct point of connection with national interests, as there are victims of Spanish nationality; and there is no record that the perpetrator is standing trial over the same acts in Argentina. . .” (Sixth Legal Ground).

the LOPJ – in the 1985 version – for the crimes of genocide and terrorism. As the seven judges point out in their Dissenting Opinion to this Judgement, the TS’ interpretation of the Spanish legislation goes beyond its literality: Art. 23.4 of the LOPJ – in the 1985 version – allows the PUCJ to be applied on an absolute or unconditioned basis.

Nevertheless, at the same time, these seven judges in fact admit that, in practice, the existence or non existence of those “points of connection” must be taken into account, which, in their opinion, is obvious in the Guatemala case. Through this process they accept that in Art. 23.4 of the LOPJ a wide discretionary scope is allowed in order for judges and Spanish courts to decide the application of the PUCJ in every specific case.²¹ According to this group of judges, resorting to “points of connection” – as general and wide as the historical, cultural and linguistic links between Spain and Guatemala, as well as other aspects, such as the Spanish nationality of the victims – might allow the application of the PUCJ with regard to serious human rights violations committed in any Latin American State, as long as Spanish courts decide so.²² In our opinion, this solution is unacceptable in criminal proceedings, which are governed by the due guarantees in the rule of law and, in effect, by the principle of legal certainty (Art. 9.3 of the CE of 1978). We will return to this matter when addressing the reform of Art. 23.4 of the LOPJ at the end of 2009.

²¹ In their Dissenting Opinion, the seven judges who signed it held that a “*contra legem*” interpretation of Art. 23.4 of the LOPJ had been made. As they insisted, such a provision does not establish the need for a “point of connection” with a national interest, as it is required by the Judgment, for the application of the PUCJ. Therefore, the application of said principle does not rely, as it is mistakenly held by the Judgment, on the fact that the alleged offenders are within Spanish territory, or that the victims are Spanish nationals. However, at the same time, the seven judges clarified, or rather corrected, the said dissension in the following way: “The requirement of connection links between the crimes and the interests or values of the citizens in the State exercising the universal jurisdiction may be a reasonable criterion of self-restraint to prevent the proliferation of proceedings related to totally strange and/or remote crimes and places, as well as to prevent the excessive weakening of the domestic jurisdictional bodies whose competence is demanded. Nevertheless, this criterion will be met only where strictly applied as a criterion for excluding an excess or abuse of law, not as a means of repealing, in practice, the principle of universal jurisdiction, therefore turning the exception into a rule. This restraint is not expressly stipulated by the law, but it may be assumed as an emanation from the Principles of International Criminal Law, and applied as a criterion of reasonability in the interpretation of the legislation on competence” (Eleventh Legal Ground).

²² From this perspective, according to the seven Judges, the following connection criteria may be seen in the Guatemala case: a) there are obvious cultural, historic, social, linguistic, legal and other links between Guatemala and Spain; b) the acts object of the criminal action brought before the AN refer to a certain number of victims of Spanish nationality; c) we must bear in mind, as well, the assault on the Spanish Embassy in Guatemala, in 1980 (Twelfth Legal Ground). Thus, in conclusion, in this matter, the TS should have given a positive answer to the appeal brought against the aforementioned Order of the Chamber for Criminal Matters of the AN.

In this sense, the arguments offered by the TS to deny the jurisdiction of Spanish courts on the acts of genocide and terrorism committed in Guatemala are not acceptable either. From the point of view of the subsidiarity principle observance, the jurisdiction of Spanish courts must not rely on the Spanish Government's decision (at its own discretion) on whether the Guatemalan courts have acted effectively or not against the crimes of genocide, terrorism and tortures. Such an important decision must fall to the judges and courts of the judiciary.

Likewise, the actions of judges and courts shall not be conditioned by the lack of answer from the UN organs regarding the complaints of the acts of genocide committed in Guatemala, as the TS confirms supported by the general remission stipulated in Art. VIII of the Convention of 1948. As it is widely known, such organs have an intergovernmental composition and, in many occasions, they act following predominantly political criteria. What is more, on the contrary, should an international criminal court competent to hear of the crimes committed in Guatemala had been created, that would have definitely been an absolutely convincing legal reason to deny the jurisdiction of Spanish courts on acts which are or might be object of criminal proceedings before an international jurisdiction, such as the ones for the former Yugoslavia and Rwanda, in existence since 1993 and 1994, respectively.

III. THE LITERAL INTERPRETATION OF THE LOPJ BY THE TC: THE ABSOLUTE OR UNCONDITIONED UNIVERSAL CRIMINAL JURISDICTION

Through its Judgment 237/2005, of 26th September 2005, the TC settles the appeals for legal protection on the grounds of unconstitutionality issued against the already discussed Judgment of the TS (hereinafter "STS"), of 25th February 2003.²³ To sum up, the TC, *with the Public Prosecution Service in favour*, corrects the TS' interpretation and confirms the jurisdiction of Spanish Courts in the crime of genocide in the Guatemala case, in compliance with the PUCJ. The application of this principle is not conditioned by the existence of "links of connection", such

²³ The case law of Spanish TC is available in: <http://www.tribunalconstitucional.es>. The mentioned Judgment has been object of analysis by A. 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" [About Judgment 237/2005 of the Constitutional Court, of 26th September 2005, in the Guatemala Case and about its Interpretation by the Audiencia Nacional], *REDI* [Spanish Journal of International Law], vol. LVII (2005), 893–910; C. Ruiz Miguel and R. Bermejo García, "Una Sentencia incongruente, restrictiva e irresponsable (nota a la Sentencia 237/2005 del Tribunal Constitucional)" [An Incongruous, Restrictive and Irresponsible Judgment (Commentary to Judgment 237/2005 of the Constitutional Court)], *REDI*, vol. LVII (2005), 911–924; and J. Santos Vara, "La jurisdicción de los tribunales españoles para enjuiciar los crímenes cometidos en Guatemala" [The Jurisdiction of Spanish Courts to Adjudge the Crimes Committed in Guatemala], *Revista Electrónica de Estudios Internacionales* [Electronic Journal of International Studies], No. 11 (2006), 1–21.

as the presence of the accused in Spanish territory, the Spanish nationality of the victims or other direct point of connection with the national interests. As the TC insists, these are not requirements under Art. 23.4 of the current LOPJ, considering that the aforementioned STS has violated the right to the effective judicial protection of the claimants as for the access to its jurisdiction (Art. 24.1 CE). Therefore, they allow this appeal and consequently annul the mentioned Order of the AN and the STS and take the actions back to the time immediately previous to the pronouncement of the Order of the AN.

In the TC's opinion, in accordance with its literality, and also in view of the *voluntas legislatoris*, Art. 23.4 of the LOPJ establishes an *absolute PUCJ*, with the only specific limitation of respecting the principle of *res judicata*; that is, the offender has not been acquitted, accused or punished abroad.²⁴ In fact, this interpretation of the rule is very unlikely to be open to objection, since it is basically based on its own literality. Unlike the position defended by the TS, the TC demonstrates a greater attachment to the principle of legal certainty.

In connection with the observance of the *principle of subsidiarity*, the TC deems that the interpretation in the Order of the AN of December 2000 implies the violation of Art. 24.1 of the CE of 1978.²⁵ According to the TC, "...with the requirement of evidence of negative acts, the actor faces an impossible task to be fulfilled, that of providing a *probatio diabolica*". Therefore, this interpretation frustrates the purpose of the universal jurisdiction stipulated in Art. 23.4 of the LOPJ, for it shall apply just in the event of judicial inactivity of the courts in the State where the acts were committed and, consequently, Art. 24.1 of the CE is violated.²⁶

As for the interpretation of Art. VI of the Convention of 1948 made by the TS, the TC describes it as "extremely strict, as well as lacking in arguments". According to the TC, Art. VI had States assume only a "minimum jurisdictional obligation" as to the prosecution of genocide within their territory; but for the TC does not forbid the application of the PUCJ, which is left to the States' discretion. From this perspective, in the TC's opinion, the interpretation made by the TS of this precept "...is not in agreement with the principle of universal prosecution and avoidance of impunity of said crime in International Law, which [...] presides the

²⁴ Third Legal ground.

²⁵ "..., in order to activate the extraterritorial universal jurisdiction, it should suffice to provide, ex officio or on the part of the complainant, serious and reasonable evidence of the judicial inactivity which may prove the lack of, either will or capacity, to effectively prosecute the offences. Nevertheless, the Order of December 2000, making use of an extremely restrictive interpretation of the rule of subsidiarity, previously defined by the AN itself, takes this one step further and requires the complainants to fully prove the legal impossibility or the prolonged inactivity of the courts, to the point of demanding proof that the Guatemalan courts have effectively rejected the complaint (Fourth Legal Ground).

²⁶ Fourth Legal Ground.

spirit of the Convention and it is part of Customary International Law (and even of *ius cogens* [...]), but it rather clashes with it”.²⁷

With regard to the “links of connection” which the TS requires for the application of Art. 23.4 of the LOPJ, the TC considers that the TS makes an incorrect use of the means of proof in the international practice (specifically of several case law precedents in German and Belgium); and it omits, however, that the Spanish legislation is not the only one that “includes a principle of universal jurisdiction without any linkage to national interests”. Such is the case of the Belgian, Danish, Swedish and German legislations. In connection with the presence of the perpetrator in Spanish territory, according to the TC:

“It is an unavoidable requisite for the trial and eventual conviction, given the non-existence of trials *in absentia* in our legislation. . . For this reason, legal rules such as extradition are basic parts for an effective achievement of the universal jurisdiction: the prosecution and punishment of crimes that, due to their features, affect the whole of the International Community. However, such a conclusion cannot turn this circumstance into a *sine qua non* requisite for the exercise of the judicial competence and the opening of proceedings, especially given the fact that, should they act like this, the access to universal jurisdiction would be submitted to a very important restriction which is not provided by the law; a restriction which, in addition, would be contradictory to the foundations and aims inherent in the institution.”²⁸

Finally, with regard to the passive personality principle, the TC deems that the TS makes a “radically restrictive” interpretation, “which should rather be considered a teleological reduction” of Art. 23.4 of the LOPJ. This interpretation is contradictory to Art. 24.1 of the CE in that it means a *contra legem* reduction of the scope and content of this precept according to the corrective criteria which are not even implicit in the law. With this interpretation, the TS alters “the principle of universal jurisdiction to the extent of making it unrecognizable to International law, reducing the scope of application of the precept to the point of implying the *de facto* repeal of Art. 23.4 of the LOPJ”. Specifically, the TC considers “implausible” that the regulation of genocide has the purpose of protecting Spanish nationals abroad, according to the own definition of genocide stipulated in Art. 607 of the current Criminal Code.²⁹

This case law attached to the literal character of Art. 23.4 (and therefore unlikely to be refuted, in our opinion) is repeated by the TC in its Judgment 227/2007. Through this Judgment, *with the Public Prosecution Service in favour*, the TC allows the appeal and annuls, by reverting to an early stage, the TS’ Judgment and the AN’s Orders which had dismissed the criminal prosecution of the main Chinese leaders alleged responsible for the crimes of genocide and tortures committed

²⁷ Fifth Legal Ground.

²⁸ Seventh Legal Ground.

²⁹ Eighth Legal Ground.

in China since 1990 as a result of the persecution of the members of the Falun Gong group or their sympathizers.³⁰

IV. THE TS ACCEPTS, UNWILLINGLY, THE TC'S DOCTRINE

According to Art. 5.1 of the LOPJ,³¹ the TS had no alternative but to accept the literal interpretation of Art. 23.4 defended by the TC. Specifically, in its Judgment 645/2006 of 20th June 2006, the TS finds for the appellants against the AN's Order of 29th April 2005, in the proceedings brought due to crimes of genocide and tortures against several Chinese nationals – the acts committed against the members of the *Falun Gong* group in Chinese territory. However, it may seem paradoxical the fact that, on the one hand, the TS makes use of the TC doctrine; but, on the other hand, it refutes it constantly in its Judgment of 2006, defending again the theories in its first Judgments.³²

The origin of this matter is the criminal prosecution brought on 3rd September 2004, by which the Main Examining Magistrates' Court of the AN is informed that one of the defendants, a senior official of the Chinese Communist Party, would probably stay in a hotel in Madrid the week between 3rd and 7th September 2004. Both, the Order of 8th October 2004 by the Main Examining Magistrates' Court No. 2 and the Order of 25th April 2005 by the Chamber for Criminal Matters of the AN settling the appeal, reject the accuser's claims. According to the TS, "... , the inactivity of the Examining Magistrates' Court and the Chamber *a quo* has violated Art. 273 of the Rules of Criminal Procedure, since the presence in the national territory would have justified *per se*, and under our case law [See STS 327/2003], the jurisdiction of our courts, provided that the presence of the defendants in the territory had had a suitable point of connection which would have allowed

³⁰ STC 227/2007, of 22nd October 2007. Decisions submitted to appeal for legal protection are the aforementioned STS 345/2005, of 18th March; and the Order by the Chamber for Criminal Matters of the AN, of 11th May 2004. Specifically, criminal action was brought against Jiang Zemin, former President of the People's Republic of China, former President of the Central Committee of the Chinese Communist Party and Chief of the Central Military Board of the People's Republic of China; and against Luo Gan, Director of the National Commission of Politicians and the Law and Deputy Director and direct Co-ordinator of the Falun Gong 6/10 Control Office.

³¹ The Article provides the following: "The Constitution is the supreme rule of the legal system and binds all judges and courts, responsible for interpreting and applying the laws and the regulations according to the constitutional precepts and principles, and to the interpretation of these in the decisions delivered by the Constitutional Court in all kind of proceedings".

³² We must also remark that, doing an about-turn, *in this case the Public Prosecution Service requests the dismissal of the appeal*, since they think, in reference to Art. 117 of the CE, "that in such a case, this aspect of jurisdiction – to enforce *res judicata* – would lack practicability. All that without prejudice to remark that Spanish courts should not become, by relying on the principle of universality, competent bodies to do justice in the rest of the world" (Second Legal Ground).

to intervene in the case". Nevertheless, bearing in mind the fact that the defendants are not in Spanish territory anymore, the TS considers that the allowance of this plea of appeal lacks practicability, since the object is missing.³³

As for the pleas of the appeal to the Spanish Supreme Court related to the violation of Art. 24.1 of the CE (the right to effective judicial protection) – specifically, due to the *contra legem* interpretation of Art. 23.4 of the LOPJ made by the aforementioned Orders –, the TS finds for the appellants, thereby following the doctrine defended by the TC in its Judgment 237/2005, as it has already been pointed out according to Art. 5.1 of the LOPJ. Nevertheless, according to the TS, this decision “does not cut off the institutional and constructive dialogue which must exist between the TC and the TS, but encourages the former to carry out a new analysis of the matters implied in the principle of universal jurisdiction”.³⁴

In fact, in its Judgment of 20th June 2006, the TS suggests, once more, that there should be a “link of connection” with the Spanish interests as a requisite for the application of Art. 23.4 of LOPJ. On this matter, the TS reminds the TC (in connection with the STS of 25th February 2003) about the fact that both – the majority of 8 Judges, and the minority of 7 who maintained their Dissenting Opinion – defended that the presence of a “link of connection” was necessary, although they disagreed about its content.³⁵ In this sense, in the interpretation of Art. 23.4 the TS defends the “reduction of its scope to teleological grounds” so that in the application of this precept there is noticed “a connection with a national interest which makes it legitimate within the framework of the universal jurisdiction principle, modulating its extent by rationality criteria and the principle of non-intervention”. According to the TS, this “*would prevent an interpretation according to which Spanish courts shall start criminal proceedings in the event of the manifest commission of an act liable to be considered as an offence under the aforementioned precept, regardless of the State where it has been committed.*”³⁶ Likewise, the TS reiterates that Art. VI of the Convention of 1948 does not account for the principle of universal jurisdiction, and that it cannot be inferred from the Convention on Genocide that the principle of universal jurisdiction shall be considered as an absolute principle unaffected by other principles of International Law”, specifically, by the principle of non-intervention [*sic*].³⁷ With regard to the use that the TC made of the materials in international practice in its Judgment 237/2005 – specifically, of the domestic case law and legislations of third States (Germany, Belgium, Sweden) –, the TS simply holds that “the interpretation of the TC regarding this point is obviously erroneous” [*sic*].³⁸ However, despite all these

³³ First Legal Ground.

³⁴ Second Legal Ground, point 3.

³⁵ Second Legal Ground, point 3.

³⁶ Second Legal Ground, points 5 and 6.

³⁷ Second Legal Ground, point 6.

³⁸ Second Legal Ground, points 7 and 8. The TS mentions the amendment to the Belgian Act of 16th June 1993 through the one of 23rd April 2003, according to which the Federal Prosecutor, the only person legitimized to order the start of proceedings, shall not require the Examining Magistrate to hear of the case where “as a result of the

arguments, the TS eventually finds for the appellants and declares the competence of Spanish courts.³⁹

The TS had reached a blind alley when it delivered this Judgment. This was, on the one hand, due to fact that the aforesaid Art. 5.1 of the LOPJ was in force at that moment; and, on the other hand, due to the fact that, since the beginning of 2006, the AN has applied the PUCJ with the scope proposed by the mentioned STC, after an attempt to unify criteria on this matter.⁴⁰ For instance, the Order

cont.

specific circumstances of the case, in order to duly administer justice and comply with Belgium's international obligations, the case shall be judged by international jurisdictions or by the jurisdiction of the territory where the offences have been committed, or by the jurisdiction in the State of the perpetrator's nationality, or by the jurisdiction where the perpetrator may be found, and said jurisdiction shall be competent, impartial and equitable". Moreover, the amendment introduced in the Belgian legislation in August 2003 only allows the exercise of the PUCJ where the accused or the victims are Belgian nationals or have resided in Belgium for at least three years before committing the crime, or where they are Belgian residents. A similar solution is adopted in the case of the German legislation, which after the reform of 2002, accounts for a new condition for the application of the principle of opportunity, submitting the prosecution of those offences committed outside German territory to the Prosecutor's decision (Second Legal Ground, points 8 and 9).

³⁹ It must be pointed out that the Judgment was delivered relying on the favourable vote of the fifteen Judges. Although in their dissenting opinion, five of the Judges stated, to make things even more complicated, that Art. 5.1 of the LOPJ does not prevent the TS from exercising, with full jurisdiction, the powers which Art. 123.1 CE directly conferred upon it. Therefore, they held that the TS should have dismissed the appeal. In their opinion, "the majority has interpreted the binding clause of Art. 5.1 of the LOPJ in an excessively wide way, a contradiction of the constitutional role that corresponds to the Supreme Court, the reason why the appeal should have been dismissed". Dissenting opinion by His Honour Juan Saavedra Ruiz, His Honour Siro Garcea Pérez, His Honour Carlos Granados Pérez, His Honour Andrés Martínez Arrieta and His Honour Julián Sánchez Melgar (Fourth Legal Ground). Two other Dissenting Opinions are included – the one by His Honour Perfecto Andrés Ibáñez, supported by His Honour José Antonio Martín Pallín; and the one by His Honour Joaquín Giménez Garcea, where it is highlighted that the principle of non intervention is not in force so as to serve as parameter to assess the application of the PUCJ, supporting the interpretation of this principle made by the TC, under the literality of Art. 23.4 of the LOPJ.

⁴⁰ Through its Order of 3rd November 2005, the Plenary Session of the Chamber for Criminal Matters of the AN, in an attempt to apply the aforementioned STC, with the objective of unifying criteria on the PUCJ regarding criminal actions for genocide and crimes against humanity, introduces a requirement based on the notion of "reasonability", according to which, "should it be proved that the requirements by the domestic legal system are met, and should the jurisdictions of the place of the commission and of the international community be dismissed, the jurisdiction shall be accepted as a rule, unless an excess or abuse of law is seen, for being the case absolutely alien to the jurisdiction, as the offences and places are totally foreign and/or remote, and the claimant does not prove the direct interest or the link to them". With this proposal, the AN seems to contradict the literal interpretation that the TC defends. However, in subsequent decisions, the AN has been respectful towards the doctrine maintained by the TC, as it happens in the Tibet case mentioned below.

of the AN (Chamber for Criminal Matters), of 10th January 2006, subsequent to the criminal prosecution brought against several senior officials of the Chinese Communist Party, in which the competence of Spanish courts is confirmed (*with the opposition of the Public Prosecution Service*) regarding the acts described as genocide committed during the last decades in Tibet. After a reference to the STC 237/2005 (and to its contradictions in relation to the previous STS of 25th February 2003), the AN comes to the conclusion that Art. 23.4 of the LOPJ admits that the PUCJ, among others, can be applied to the crime of genocide, without further limits than the ones strictly reflected in the text of said Art. 23.2.c) – the offender shall not have been previously acquitted, accused, pardoned or convicted abroad; or, in this last case, he shall not have served the sentence. These conditions are met in this matter, since there is clear evidence of genocide crimes against the Tibetan people over the last decades; and these acts have not been the object of any criminal proceedings against the perpetrators, neither before a national jurisdiction, nor before an international court.⁴¹

On another matter, in the Order of the AN (Chamber for Criminal Matters), of 8th March 2006, it is confirmed that Spanish courts are not competent to hear of the criminal prosecution brought against three American soldiers accused of the death of two journalists (a Spaniard and a Ukrainian who were working at a hotel in Bagdad) in Iraq in April 2003. *The AN thereby agrees with the position maintained by the Public Prosecution Service in this matter.* According to the AN, no sign of mens rea can be appreciated in the act leading to the journalists' deaths. They also affirm that it is neither an excessive indiscriminate attack nor an attack against civilians. These are the requirements to consider such acts as a serious violation of the Geneva Conventions of 1949.⁴² Nevertheless, the AN holds that it would be advisable to carry out a legislative reform which “imposes some limits on the criminal action regarding its prosecution...before the Spanish judicial bodies”, probably for fear of an avalanche of criminal prosecutions against serious violations of the Geneva Conventions, under Art. 23.4. h). For this purpose, the AN refers to the legislations and practices of German, French and Belgian courts, where the prosecution of the perpetrators of serious violations of

⁴¹ Seventh Legal Ground. The same doctrine is applied in Order 178/2006 of the AN (Chamber for Criminal Matters), of 16th February 2006, in the Guatemala case, through which the aforementioned STS is enforced.

⁴² “... it is not a malicious act to cause the death of two protected civilians, but an act of war committed against an apparent enemy, mistakenly identified, and therefore the requirement of malice aforethought is not met in the deaths of civilians; or, as it is required by the definition of murder in the Spanish Criminal Code, the mens rea to kill civilians, which makes it incompatible with imprudence” (Sixth Legal Ground). See, J.M. Sánchez Patrón, “La competencia extraterritorial de la jurisdicción española para investigar y enjuiciar crímenes de guerra: el caso ‘Couso’” [The Extraterritorial Competence of the Spanish Jurisdiction to Enquiry and Prosecute War Crimes: ‘Couso case’], *Revista Electrónica de Estudios Internacionales* [Electronic Journal of International Studies], No. 14 (2007), 1–21, pp. 12–20, about the competence Spanish courts in this matter.

Humanitarian Law, under the PUCJ, relied on the presence of the accused in the territory of these States.⁴³

Through STS 1240/2006 of 11th December 2006, the TS allows the appeal brought against the aforesaid Order and annuls it. On the one hand, in the analysis of the relevant facts of the case in the AN's Order "...no legal assessment of the reported facts is carried out but the necessary provisional acknowledgement that these may be considered offences which, due to the reasons exposed, would justify the intervention of the competent Spanish courts; since it corresponds to the pre-trial proceedings to collect the necessary elements to be able to subsequently determine the legal nature of the acts". On the other hand, with regard to the competence of Spanish courts, the TS considers that, although the literal interpretation of Art. 23.4 of the LOPJ defended by the TC must apply – through the remission of section h) to the Geneva Conventions of 1949 –, specifically in this case "...there is a legal connection point that would justify as well the extraterritorial scope of the Spanish jurisdiction, ..., bearing in mind that one of the victims, ... was a Spanish citizen" [*sic*].⁴⁴

V. THE EFFECTIVE – TERRITORIAL – PUCJ APPLICATION IN SCILINGO'S CASE

Since the middle of the nineties until the end of 2009, Spanish courts have only delivered a conviction under the – territorial⁴⁵ – PUCJ, due to serious violations

⁴³ Ninth to Thirteenth Legal Grounds.

⁴⁴ Eighth Legal Ground.

⁴⁵ This terminology is used, among others, by J. Pueyo Losa, "Un nuevo modelo de cooperación internacional en materia penal: entre la justicia universal y la jurisdicción internacional", [A New Model of International Cooperation in Criminal Matters: between Universal Justice and International Jurisdiction] in S. Álvarez González and J.R. Remacha Tejada (eds.), *Cooperación jurídica internacional* [International Legal Cooperation], Madrid, 2001, 139–203, pp. 193–201. Throughout this essay, the expression "territorial" PUCJ is used to refer to the exercise of universal jurisdiction when it is conditioned by the presence of the accused within the territory of the State, as it will be provided, among other requirements, by the reform of LO 1/2009, as it will be shown below. Nevertheless, we are aware that, according to a sector of the doctrine, the foundation of universal criminal jurisdiction is based on the commission of specially serious crimes, affecting all States in the international society, the reason why the courts of all States are competent for their prosecution, their competence not being conditioned in this case by "...the concurrence of other requisites (the nationality of the offender, the victim, the presence of the alleged offender within the territory, the arrest or the rejection of the extradition to a third State) which are required in case of action under other principles. It suffices with the commission of an act for which International Law establishes universal jurisdiction". However, this principle can only be applied to a reduced group of offences defined by International Law, and with a "complementary and subsidiary character of the principle of territoriality". About the foundations of the exercise of extraterritorial criminal jurisdiction, *see*: within the Spanish doctrine, E. Orihuela Calatayud, "La cooperación internacional contra la impunidad. Llenando los vacíos de la jurisdicción territorial" ["International Cooperation Against Impunity. Filling the Vacuum in Territorial Jurisdiction"], *Cursos*

of human rights in a third State – It is Scilingo’s case, *an Argentinean citizen who appeared before the Spanish Justice voluntarily*.⁴⁶ Indeed, the Third Section of the Chamber for Criminal Matters in the AN pronounced the Judgment on 19th April 2005 and found the Argentinean officer Adolfo Scilingo guilty, being convicted to 640 years in prison. However, in our opinion, the legal grounds were not entirely convincing.

To sum up, the AN holds that the acts committed by Adolfo Scilingo during the Argentinean dictatorship must be considered crimes against humanity, despite the fact that Art. 23.4 of the LOPJ does not account for the said crimes. It is certain that after Spain had ratified the Statute of the International Criminal Court,⁴⁷ at the end of 2003, Spanish lawmakers included crimes against humanity in the Criminal Code⁴⁸ in force at that moment. However, Spanish lawmakers would not carry out the respective modification in the LOPJ in order to apply the PUCJ to this crime definition, until the reform at the end of 2009, which will be mentioned below.

cont.

de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz [Seminars on International Law and International Relations in Vitoria-Gasteiz], 2000, 159–238, p. 176, quote from p. 193; M.D. Bollo Arocena, *Derecho Internacional Penal. Estudio de los crímenes internacionales y de las técnicas para su represión* [International Criminal Law. Study of International Crimes and of the Techniques for their Repression], Bilbao, 2004, pp. 346 y ss.

⁴⁶ Adolfo Francisco Scilingo is part of the approximately one hundred members of the armed forces involved in the kidnappings, tortures and disappearances committed during the Argentinean dictatorship. In October 1997, he decided to appear before the Spanish justice to declare about those acts, within the framework of the proceedings started by the AN a year before. Thanks to his behaviour, he did not have to face preventive detention, although he was forbidden to leave Spain and his passport was taken away, as it was decided by Order of 9th January 1998 by Main Examining Magistrate’s Court No. 5 of the AN. This measure was appealed; the first appeal was dismissed by the Examining body itself, through the Orders of 19th April and 31st May 1999; and, subsequently, through the Order of 30th July 1999, made by the Third Section of the Chamber for Criminal Matters of the AN. After the appeals for legal protection submitted against these decisions, the TC held, in its Judgment of 16th July 2001, that the decision adopted by the AN against Scilingo, prohibiting him from leaving the country and taking away his passport, violated Art. 17.1 of the CE (the right to personal freedom), since this measure is not accounted for in the Spanish legal system. Likewise, the Court deemed it to be disproportionate, for its application had not been grounded or justified in the AN Decisions; and bearing in mind the length of this measure and the consequences for an Argentinean whose residence, job and family are in that State, thousands of kilometres away from Spain. Due to the aforesaid decision by the TC, in its Order of 31st July 2001, the Examining Magistrate’s Court No. 5 of the AN ordered that Adolfo Francisco Scilingo remanded in custody.

⁴⁷ See LO 6/2000, of 4th October, in *BOE* of 5th October 2000, through which the ratification of the Statute of the International Criminal Court by Spain is authorized; and, subsequently, LO 18/2003, of 10th December, of cooperation with the International Criminal Court, in *BOE* of 11th December 2003.

⁴⁸ *BOE*, 26th November 2003. See, within Spanish doctrine, M. Capellà i Roig, *La tipificación internacional de los crímenes contra la humanidad* [The International Creation of Crimes Against Humanity], Valencia, 2005, pp. 361–371.

Due to this legal vacuum, the argument of the AN's Chamber for Criminal Matters is the following: from the start it rejects the classification as crime of genocide, since it clearly admits that the definition of crime of genocide does not apply for political groups; moreover, "the partial destruction of a national group is neither an equivalent nor accounts for 'self-genocide', that is, the partial destruction of the national group itself, although there may exist 'subgroups' distinguished by their ideology". Nevertheless, the Chamber for Criminal Matters adds the following:

"It is necessary to bear in mind that the Chamber gives this very strict and limited interpretation of the crime of genocide at present time just because the type referred to crimes against humanity, of a wider nature, has been included in the Criminal Code recently, forcing to have the crime re-interpret in this sense. Nevertheless, when the act was committed and until this precept came into force, the typification of the offence as crime of genocide was correct [*sic*]."⁴⁹

In this sense, the Chamber for Criminal Matters relies on the *jus cogens* norms and *erga omnes* obligations, and on the action of international criminal courts and other domestic courts. As a consequence, the Chamber comes to the conclusion that International Law allows Spanish courts to consider the crimes committed during the Argentinean dictatorship as crimes against humanity, despite these were not included in the Spanish Criminal Code until 1st October 2004.⁵⁰ This same argument allows it to conclude that the PUCJ shall apply with regard to this type of crime, despite the silence kept in the LOPJ of 1985.

As to the observance of the "principle of subsidiarity", the Chamber for Criminal Matters of the AN is categorical when it holds that the application of the PUCJ by Spanish courts "has relied on the lack of efficient action on the part of Argentinean Justice, which has caused a situation of impunity for the criminal perpetrators of

⁴⁹ Recital 6, of Section A of Legal Grounds. In relation to the description of the acts as crimes of terrorism, "the Chamber also rejects the exclusive description as a crime of terrorism. Even if the common criminal elements in the crime of terrorism certainly occur in this case (the structural and teleological element in this sort of crimes), the acts go beyond and include other elements which are only encompassed by the definition of the unfair crime against humanity, the reason why the Chamber adopted the latter description, considering in this case that terrorism was subsumed in the crime against humanity and was not a concurring crime" (Recital 7, of Section A of Legal Grounds).

⁵⁰ In short, the Chamber for Criminal Matters held the following: "we deem that, irrespective of what may eventually occur in the internal legislative scope..., there can be no doubt that this international type of offence, which generates individual criminal liability, has been in force in International Law for decades, and it would in any case apply to the whole of the Argentinean repression, under the principle of intertemporal law, *tempus regit actum*, from the perspective of International Law" (Section B, point 2.3 of Legal Grounds). From this point of view, according to the Chamber for Criminal Matters: "in the analysis of the problem of the definition of crimes, we must remark that the classic formulation of the principle of criminal legality, *nullum crimen nulla poena sine lege*, in International Law becomes *nullum crimen sine iure*, which allows a much wider interpretation of the requirements derived from this principle, as the consideration as a crime by International Law would suffice, even if it had not been defined by internal law" (Recital 4, of Section B of Legal Grounds).

the acts”.⁵¹ However, the Chamber for Criminal Matters adds that “in this case the action of the Spanish jurisdiction in the criminal prosecution of the acts is also justified in a complementary way, due to the existence of Spanish victims”.⁵² Again, there arise new uncertainties about the “complementary” scope of this last circumstance – the fact that there are Spanish victims – for the effective application of the PUCJ by Spanish courts.

Once the appeal to the Spanish Supreme Court against the decision of the Chamber for Criminal Matters of the AN has been brought, in the STS 798/2007 of 1st October 2007, Scilingo is convicted as the perpetrator of 30 crimes of murder and one illegal detention, and as the accomplice of other 255 illegal detentions – custodial sentences reaching a 1084-year imprisonment, although he will serve a maximum of 25 years. Such crimes, in TS’s opinion, cannot be considered as genocide, but they are, in fact, crimes against humanity, according to Customary International Law, already in force at the time such crimes were committed in Argentina.⁵³ In this respect, the TS gives an argument with which it tries to save the principle of legality. For this purpose, it defends the application of the types of crime stipulated in the Spanish Criminal Code in force at the moment the crimes were committed.⁵⁴ However, the TS, to claim the competence of Spanish courts,

⁵¹ Recital 6.1, of section B of Legal Grounds.

⁵² Recital 6.3, of section B of Legal Grounds (*italics added*).

⁵³ According to the TS, “Nothing hinders... the pursuit of those acts which, even considered according to Internal Law as ordinary offences of murder and illegal detention, shall be considered as crimes against humanity under International Criminal Law” (Eighth Legal Ground). In the TS’ opinion, “... the circumstances described (very similar to those provided in the international instruments), superimposed to acts already considered as crimes, are the ones which turn these crimes into crimes against humanity, increasing the degree of injustice, which leads to a heavier sentence. The question of their non-expiration therefore arises; and allows the confirmation that States shall proceed to their pursuit and punishment. In other words, those circumstances, together with the murder and illegal detention offences in the case, even if they do not allow to apply a type of offence included in a subsequent precept which is not more favourable, or they do not authorize, for the same reason, a sentence of longer length, may be taken into account to justify their universal pursuit” (Sixth Legal Ground).

⁵⁴ According to the TS, “Article 93 and subsequent ones in the Spanish Constitution account for rules, which shall be observed, aimed at the inclusion of International Law in Internal Law. In this sense, Spanish courts are not or may act as international courts, only subject to the rules of this character and to their own statutes, but they are internal courts which must apply their own legal system. Their jurisdiction does not emanate either from International Customary Law or from the rules of the conventions, but from the democratic principle, the Spanish Constitution and the Acts passed by the Parliament. Thus, the exercise of the Judicial Power is legitimized by its origin. Therefore, it is not possible to exercise the Judicial Power beyond the limits allowed by the Constitution and the law, or in a manner contrary to their own provisions either”. According to the TS, the fact that Art. 7.2 of the European Convention on Human Rights allows criminal sentences based on the General Principles of Law recognized by civilized nations, “... does not impede that each State expresses the principle of legality in a more demanding way in relation to the application of their own criminal rules by their own national courts”. Furthermore, Customary International Law does not account for a description of types of

simply turns to the *scope of the jurisdiction through the method of analogy*, since it deems “that it is not reasonable to interpret that Spanish Law excludes the jurisdiction of domestic courts regarding crimes against humanity, when it actually recognizes it as to genocide and war crimes”. Therefore, in analogy with this two type of crimes, the TS enlarges the jurisdiction of Spanish courts to encompass crimes against humanity, under Art. 23.4 of the LOPJ.⁵⁵ As it was said, this argument is very feeble, since “in our legal system, the lawmaker is the only one that may establish the scope of the jurisdiction of Spanish courts by means of laws. A court itself cannot claim jurisdiction where it is not granted by the Law, not even by applying analogy”.⁵⁶

Once more, the TS takes advantage of this case to question *unconditioned or absolute* universal jurisdiction. According to the TS, “unconditioned universal jurisdiction is indisputable when originated in an International Convention or in a decision by the United Nations’ organs. Otherwise, there should exist a connection element with national interests which prevents disproportionate actions and which justifies sufficiently, at an international level, the intervention of the Judiciary organs of a State with regard to acts occurred in a territory subjugated

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offences allowing its direct application, or for a specific provision about the sentences, which also prevents its direct application by internal courts (Sixth Legal Ground).

⁵⁵ According to the TS, “the prohibition of the analogy in criminal matters is exclusively referred to the substantive framework related to the description of offences and to their punishable character, without affecting procedural or organic legislation. Likewise, between the crime of genocide and the crimes against humanity there can be noticed a strong similarity, not only regarding the nature and seriousness, but even as to the definition of the crime in Spanish Internal Law. As it will be seen below, when the acts judged took place, the crime of genocide was already punishable by Spanish courts regardless of the place of the commission. Thus, nothing impedes an interpretation of Art. 23.4 of the LOPJ as to the delimitation of the jurisdiction of Spanish courts” (Seventh Legal Ground).

⁵⁶ A. Gil Gil, “Principio de legalidad y crímenes internacionales. Luces y sombras en la Sentencia del Tribunal Supremo en el caso Scilingo” [Principle of Legality and International Crimes. Lights and Shadows in the Judgement of the Supreme Court in Scilingo’s Case], in A. Cuerda Riezu y F. Jiménez García (Dirs.), *Nuevos desafíos del Derecho penal internacional. Terrorismo, crímenes internacionales y derechos fundamentales* [New Challenges for International Criminal Law. Terrorism, International Crimes and Fundamental Rights], Madrid, 2009, 391–409, pp. 405–407, p. 407. See, in this sense, the Dissenting Opinion by Judge D.L. Varela Castro, who deemed the analogy supported by the majority of Judges in favour of this Judgment to be a flagrant violation of the principle of legality in the criminal field (Art. 9 of CE), since in his opinion, “the assumption of jurisdiction by a State to adjudge a crime is not only a question of procedural nature, not even of organic nature”, as, among other reasons, it affects fundamental rights. See also the Dissenting Opinion by Judge J.M. Maza Martín, who describes the argument maintained by most judges as: “a sequence of forced interpretations about the principle of legality”, the reason why, in his opinion, the TS should have allowed the appeal, due to the lack of jurisdiction from the Spanish courts. In his Dissenting Opinion, Judge J. Marchena Gómez criticizes “the relativization of the principle of legality” defended by the STS.

to the sovereignty of another State”. However, the TS refers to STC 237/2005, in which the “systematic and teleological” interpretation of Art. 23.4 of the LOPJ is not shared. Nevertheless, according to the TS “..., in the current case such a connection unquestionably exists. There are Spanish victims in the context of the widespread attack and in the pursuit, and the accused is in Spain”.⁵⁷

VI. THE MODIFICATION OF ART. 23.4 OF THE LOPJ: ORGANIC LAW 1/2009

1. The legislative process and the aims of the reform

Over the last few years, Art. 23.4 of the LOPJ has been object of several legislative reforms, the first ones being exclusively aimed at increasing the list of crimes under the PUCJ. Specifically, such reforms refer to the inclusion of those crimes related to female genital mutilation (although in this last case on the specific condition that perpetrators are in Spain),⁵⁸ and to illegal immigration or smuggling.⁵⁹ More recently, on last 4th November 2009, Organic Law 1/2009 was published on the Spanish Official Gazette (*BOE*), to which the Spanish lawmaker, apart from including another type of crime – crime against humanity –, has added new conditions for the application of the PUCJ, with the aim of establishing limits to an absolute or unconditioned interpretation of Art. 23.4 in its version of 1985.⁶⁰

⁵⁷ Seventh Legal Ground.

⁵⁸ *BOE*, 10th February 2006.

⁵⁹ *BOE*, 20th November 2007. Error correction in *BOE* of 12th November 2007. In STS 788/2007, of 8th October 2007, the TS applied the PUCJ to the smuggling of migrants, despite the silence in Art. 23.4 of the LOPJ in relation to this type of offence at that time. According to the TS, the obligations under the UN Convention against Transnational Organized Crime of 2000 must be taken into account, as well as the fact that the “cayuco” (a small Indian canoe) is not protected under the UN Convention on the Law of the Sea of 1982, the fact that transportation is very risky for the lives of migrants and, finally, the fact that part of the members of the network smuggling illegal migrants is found in Spain. Therefore, through this Judgment, the TS makes an extensive interpretation of Art.23.4.h), which corrects the omission of the lawmaker; an omission which was to be corrected soon after. *See* also STS 582/2007 of 21st June, STS 554/2007 of 25th June and STS 1092/2007 of 27th December.

⁶⁰ The Spanish lawmaker modifies Art. 23.4 of the LOPJ of 1985 with the following literal character: “4. Likewise, Spanish courts will be competent to hear of those acts committed by Spaniards or foreigners outside national territory which are liable to be defined, according to Spanish Law, as one of the following crimes: a) Genocide and crimes against humanity. b) Terrorism. c) Piracy offences and the unlawful seizure of aircrafts. d) Crimes related to prostitution and the corruption of minors or the disabled. e) Illegal trafficking of psychotropic, toxic and narcotic drugs. f) Illegal human trafficking or clandestine immigration of persons, either workers or not. g) Crimes related to female genital mutilation, provided that the perpetrators are in Spain. h) Any other crime which, under the international treaties and conventions (specially the Conventions on International Humanitarian Law and on the Protection of Human Rights), shall be prosecuted in Spain.

As it is shown in the Preamble, the immediate origin of this legislative modification is found in the Decision approved, by a very large majority, in the Spanish Congress of Deputies, on 19th May 2009, on the occasion of the Debate of General Politics on the State of the Nation.⁶¹ This Decision led soon after to the

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Without prejudice to the provisions in international treaties and conventions ratified by Spain and in order for Spanish Courts to hear of the previous crimes, it shall be duly proved that the alleged perpetrators are in Spain; or that there are victims of Spanish nationality; or the existence of a relevant connection link with Spain; and, in any case, the non existence of other competent country or of other proceedings started before an International Court elsewhere, which may constitute the effective enquiry and prosecution of the punishable facts.

Criminal cases started before the Spanish jurisdiction shall undergo the provisional stay of proceedings when there is notice that new proceedings on the acts reported have been started in the country or by the Court mentioned in the paragraph above” (LO 1/2009, of 3rd November, complementary to the Law for the Reform of Procedural Legislation for the Establishment of a New Judicial Office, through which LO 6/1985, of 1st July, on the Judicial Branch, is modified, in *BOE*, 4th November 2009).

⁶¹ 339 votes in favour, 8 against and 1 abstention. Decision with the following literal character: “The Congress of Deputies urges the Government to:...Urgently promote the reform of article 23 of the LOPJ, in order to determine and clarify the scope of the principle of criminal universal jurisdiction, according to the principle of subsidiarity and to the case law of the Constitutional and the Supreme Courts; that is to say, there shall be accredited the presence of the alleged perpetrators in Spain, or the existence of victims of Spanish nationality and, in any case, the non existence of ongoing criminal proceedings involving the enquiry and effective prosecution of said punishable acts, either in the country where offences were committed or before an International Court. Criminal cases started before the Spanish jurisdiction shall undergo a provisional stay of proceedings where there is notice of the start of proceedings on the acts reported, in the country or before the Court mentioned in the paragraph above” (full text available in *BOCG-Congreso.D*, IX Leg. No. 208, p. 91). Likewise, this decision had its origin in the proposal for a Decision put forward by the Popular Group, after the introductory confirmation that “...the evolution of Courts of Justice in the ‘universal justice’ scope requires an important reflection in order to satisfy constitutional requirements, but without the undue extension of said principle, which may put national interests at risk and inexorably cause the inefficiency of Judgments”. They tried to reach the following objectives by means of the proposal: “1. To enlarge Spanish jurisdiction as to include those crimes not provided yet (crimes against humanity) and to exclude others which are actually included (the counterfeit of currency). 2. To link universal jurisdiction to those cases where there is a connection point with Spanish courts. 3. To demand a connection point with the Spanish jurisdiction, either the location of the perpetrators in Spain, or the Spanish nationality of the victim. 4. To establish the principle of subsidiarity of the universal jurisdiction, clarifying that the crime inquiry in the foreign country must be real, not fictitious. 5. In any case, should criminal proceedings occur in Spain, the decision from previous proceedings in the country where the crime was committed would be taken into account” [*Ibid.*, p. 59 and p. 60, on which the proposal for reformed Art. 23.4 is available; a proposal where war crimes are not included and where there is no reference made to the third criterion regarding the existence of “relevant connection links with Spain”, as it was to be passed eventually. For the votes in the mentioned Decision, see *DSC-P*, IX Leg. No. 83, p. 26 (Proposal 72, object of Compromise Amendment)]. All documents emanated from the Spanish Parliament mentioned below are available in <http://www.congreso.es> and in <http://www.senado.es>.

presentation of an Amendment to the Bill for a Reform of Procedural Law, for the Implementation of the New Judicial Office,⁶² which the Congress had been negotiating since the end of 2008.⁶³ Through this means, legislative procedures could be speeded up in order to carry out this reform, which was object of criticism by some members of Parliament, who regretted the lack of a public parliamentary debate on such an important matter and highlighted the fact that the legislative reform was a consequence of the political pressure exercised on the Spanish Government on the part of the American and Israeli Governments, among others, due to the procedures started before the AN in reference to Guantanamo, China (Tibet) and the occupied Palestinian territories.⁶⁴

According to the Preamble, this legislative reform pursues a double aim: on the one hand, “to include types of offences that were not included yet and whose prosecution is protected by International Law conventions and customs, such as

⁶² Jointly presented by the Socialist, the Popular, the Catalan (Convergència i Unió) and the Basque (EAJ-PNV) Groups in Parliament, by means of which crimes against humanity were accounted for – except war crimes –, and through which the wording of paragraphs second and third of Art. 23.4 was proposed; said wording was finally passed by the Spanish Congress (*BOCG-Cortes Generales*, IX Leg., No. 17–17, p. 213).

⁶³ Due to the character of the LOPJ, as a result of the amendments put forward in relation to it, the Bureau of the Spanish Congress decided to have these amendments classified into differentiated types, in order for them to be processed as separate Bills of Organic character, opening a new file (121/000028) [*BOCG-Cortes Generales*, IX Leg., No. 17–19, p. 1].

⁶⁴ In this sense, the Member of Parliament representative for *Izquierda Unida* (“United Left”, the Spanish coalition of left-wing parties), Mr. Llamazares Trigo, in relation to the passage through Congress of the aforementioned amendment, declared that: “Today is a sad day for universal justice, it’s a sad day for the protection of human rights and also for the Spanish jurisdiction, as well as for the Spanish judicial leadership in this matter. Today is a sad day for victims, for doves. Today, only hawks in Guantanamo will toast with Champagne, or the hawks, for example, in Gaza..., in addition, we do this on the quiet, we do it without the pertinent parliamentary debate. An express reform is made, through the introduction of such an important element as this one, a very important restriction in a proposal on the judicial office. And this happens to avoid public debate and to reduce parliamentary debate... The worst thing... is that all this leads us to a conclusion, the conclusion that a double standard exists. There is an international justice for the Third World, and we have been very clear on this respect; but there is an international justice or an international injustice as to the targets in the First World. When this has occurred to the Israeli Government, when this has occurred to the American Government, they have ordered a halt and have replaced the rule of Law with the State’s reason” (*DSC-P*, IX Leg., No. 95, pp. 40–41). In this same sense, Senator Bofill, from the Parliamentary Group *Entesa Catalana de Progrés*, declared that: “... it is beside the point... to introduce a reform of Article 23.4 in relation to something as important and serious as universal justice. I feel it to be a dreadful political style, especially on the part of a Government and a party which, few days ago, supported a plan related to human rights, and which have ended up putting forward an amendment together with the Popular Group (the opposition), which, on top of that, has been secretly presented,... in spite of being obviously submitted for debate, but I do not consider these conditions to be the most appropriate. I think this should have been the object of a different reform, with a different bill and with a particular debate, since now this debate has been corrupted” [*DSS-C*, IX Leg., No. 202, p. 9].

crimes against humanity and war crimes” [*sic*]. On the other hand, “the reform allows to adapt and clarify this precept, according to the principle of subsidiarity and to the doctrine emanated from the TC and TS’ case law”; which, as it has just been proved, is not an easy aim to reach, since both jurisdictional organs hold very contrary theses about the scope of the PUCJ. The spokespeople of the Popular Group (the Spanish conservative party), promoter of this legislative reform, pronounced themselves in much more direct terms during the parliamentary debates, and counted on the support of the Socialist Group (the Spanish party currently in power), as well as of other political forces. This may explain why the final passage relied on an overwhelming parliamentary majority.⁶⁵ In this respect, we can mention, among others, the speech of the Popular Group member, Mrs. Montserrat Montserrat:

“...Spanish Justice shall be effective, not a mere declaration. What’s the point of starting criminal proceedings against the perpetrator of a crime of genocide if we do not have either the perpetrator in our territory or the possibility of bringing him before the courts, of punishing him with imprisonment, or even of undertaking a careful inquiry, just because the offence has not been committed in our territory? It’s no use for the Spanish State...What the Popular Party intended with universal justice was that whenever the perpetrators of such offences were in Spain, or whenever the victims had Spanish nationality, or whenever there was a relevant link with Spain, then, we would be able to judge them. We do not intend to shirk justice or to create impunity gaps for anyone. We intend that Spanish Justice deals with which it has to deal. Justice is neither a declaration of principles nor an institutional declaration. Justice means much more than that, because what is promised shall be fulfilled; otherwise, in some cases, we would offer a quite embarrassing spectacle, and in others, we would create a lot of false expectations for the victims of atrocities who think that, as the machinery of justice has started, they’ll obtain justice, when in the end that’s entirely false.”⁶⁶

2. The substantive content of the reform

Taking this general objective into account, firstly the Spanish lawmaker has added crimes against humanity to the list of crimes to which the PUCJ can be applied, and he has achieved that through the inclusion of this type of crime in the same section as genocide, which deserves a positive evaluation. Nevertheless, we reckon that the Spanish lawmaker should have accounted for war crimes in the same section⁶⁷ as well, in coherence with the Spanish ratification of the Statute of the

⁶⁵ Specifically, in Congress, the Bill was passed by 319 votes in favour, five against and three abstentions (*DSC-P*, IX Leg., No. 113, p. 43).

⁶⁶ *DSC-P*, IX Leg., no. 113, p. 21.

⁶⁷ Apart from the regulation provided in the Military Criminal Code (*BOE*, of 11th December 1985), the Spanish Criminal Code of 1995 (*BOE*, 24th November 1995), in force at that moment, carried out an intensive application of those international obligations

International Criminal Court. In accordance with the principle of complementarity, which presides over the International Criminal Court competences, the Spanish lawmaker should have placed these three types of crime at the same level of importance, in order to implement the PUCJ.⁶⁸

In this respect, it must be pointed out that the Bill for Organic Law sent by the plenary session of the Congress of Deputies to the Senate did include war crimes in Section 23.4. a), together with genocide and crimes against humanity, as it is explained in Section III of its Preamble.⁶⁹ However, in its passage through the Spanish Senate, there was passed a compromise amendment proposed by the Popular Group jointly with the Socialist Party, through which reference to war crimes in Section 23.4. a) was eliminated. Nevertheless, there was included an express reference to “the Conventions on International Humanitarian Law and Human Rights Protection” in Section 23.4.h), where a general reference states that Spanish courts shall also be competent with regard to any other crime which, under international treaties and conventions, shall be prosecuted in Spain.⁷⁰ Section

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sanctioning the violation of the obligations under the four Geneva Conventions of 1949 and of its Additional Protocols of 1977. This was thanks to the inclusion of Chapter III [“De los delitos contra las personas y bienes protegidos en caso de conflicto armado” (About Crimes against Persons and Commodities to be protected in the event of Armed Conflict)] within Title XXIV [“Delitos contra la Comunidad Internacional” (Crimes against the International Community)], where articles from 608 to 614 *bis* are included. After Spain had ratified the Statute of the International Criminal Court, LO 15/2003, of 25th November 2003 (*BOE*, 26th November 2003), introduced in the said criminal legislation new provisions which define and regulate certain crimes and which allow the coordination of Spanish domestic Law with the competences of the International Criminal Court; such a competence, as it is widely known, is currently restricted to genocide, crimes against humanity and war crimes.

⁶⁸ In this respect, there must be pointed out Art. 7 of the mentioned LO 18/2003, of 10th December 2003, of Cooperation with the International Criminal Court, whose second and third sections provide the following: “2. When a complaint or a criminal action is brought before a judicial body or the Public Prosecution Service, or a request is submitted before a ministerial department, with regard to acts occurred in other States, whose alleged perpetrators are not Spanish nationals and where the International Criminal Court is competent for their prosecution, the said bodies shall refrain from all proceedings, being restricted to inform the complainant, the claimant or the petitioner about the possibility to turn directly to the Prosecutor of the International Criminal Court, who may, where appropriate, start an enquiry, without prejudice to adopt, if necessary, the urgent legal measures for which the body is competent. In the same circumstances, the judicial bodies and the Public Prosecution Service shall refrain from acting *ex officio*. 3. Nevertheless, should the Prosecutor of the International Criminal Court reject to start the enquiry or should the Court dismiss the case, the complaint, the criminal action or the request may be brought before the respective bodies again”.

⁶⁹ See *BOCG-Cortes Generales*, IX Leg., No. 28–3, pp. 2–3.

⁷⁰ Supported by the spokesperson of the Socialist Group, Mr. Díaz Tejera, as follows: “... Clarification made regarding letter h) of Article 23 is very correct. Since, in any case, instead of a concern *ad nauseam* – which implies a very detailed list... accounting for all the matters –, I consider that a reference to all conventions on international humanitarian law and on the protection of human rights subscribed by Spain and integrated within our

III of the Preamble, where war crimes are mentioned, was not modified, which explains the incoherence between said section of the Preamble and the regulation finally included in Art. 23.4.⁷¹

In fact, the types of crime list to which the PUCJ shall apply ends with a general reference to the Conventions which provide the obligation of Spain to prosecute certain punishable conducts, in particular, to the Conventions on International Humanitarian Law and the Protection of Human Rights, among which we find the four Geneva Conventions of 1949 and its Additional Protocols of 1977. Moreover, the conditions to which the PUCJ is submitted, which will be mentioned below (namely, the presence of the alleged perpetrator in Spain; the existence of Spanish victims; or the existence of other important connection link), can be also applied without prejudice to what it is stipulated in such Conventions. Therefore, it might occur that Spain had to apply the absolute or unconditioned PUCJ – following TC’s terminology – in relation to a particular type of crime not included in Art. 23.4, for it is thereby established as a conventional obligation under the international treaties entered by Spain, provided that the type of crime is reflected in the Spanish Criminal Code. However, generally, the rules of the conventions do not usually provide the obligation to apply the PUCJ with this unconditioned or absolute scope: the obligation to prosecute certain criminal behaviours is normally submitted to the presence of the accused in the territory of the State party or to the perpetrator’s nationality being that of the State party.

In a panoramic view of these rules of the conventions,⁷² and particularly of the latest conventions, Spain feels compelled to make its courts competent where the crime has been committed within Spanish territory or aboard ships or aircrafts with the Spanish flag or registered in Spain, and where the accused is of Spanish nationality. Therefore, Spain shall apply the *territoriality and the active personality principles*, respectively. Likewise, Spain is *authorized* – not bound – to establish, where appropriate (as it is regulated, for instance, in the Convention Against Torture of 1984), the competence of Spanish courts when the victim is a Spanish national or a stateless person who is a usual resident in Spain (*passive personality principle*). Moreover, there provides the obligation to grant competence to Spanish courts should the accused be within Spanish territory and where he is not to be extradited to another State party requesting his extradition in accordance with the aforementioned competence titles (*aut dedere aut judicare*). Finally, it is also frequent that these rules of the conventions are closed with an open formula aimed at not banning any criminal jurisdiction exercised in accordance with the domestic legislation, provided that the objective is to achieve the main goal pursued by these

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legal system proves to be very suitable to raise this matter. And the practice is the one to show its efficiency, development and potential” (DSS-C, IX Leg., No. 202, p. 10).

⁷¹ *BOCG-Senado.II*, IX Leg., No. 18, pp. 66–67.

⁷² Cf. A. Sánchez Legido, *Jurisdicción universal penal y Derecho internacional*, [Universal Criminal Jurisdiction and Internacional Law], Valencia, 2004, pp. 57–74; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford, 2009, pp. 153–187.

international conventions, that is, the criminal punishment of the perpetrators of the behaviours accounted for in these conventions.⁷³

From this point of view, in the event of serious violations of human rights within the territory of third States, where neither the perpetrator nor the victims are Spanish nationals, reference made in Art. 23.4.h) to the rules of the conventions must be understood as the Spanish compliance with the obligation *aut dedere aut judicare*. For instance, in those situations where *the accused is within Spanish territory and Spanish authorities do not allow the request of extradition by a third State party to the Convention, in accordance with the Convention provisions*. As it has already been proved, territoriality and active personality principles, *as well as the passive personality principle with regard exclusively to crimes included in Art. 23.4*, are expressly reflected in the current LOPJ. Eventually, in relation to the open clause included in the majority of these conventions, devised for the protection of other competence titles in domestic legislations, we consider that such a clause cannot apply to the “without prejudice” clause stipulated in the second paragraph of Art. 23.4 of the LOPJ.⁷⁴ Otherwise, there would exist a double reciprocal reference to blank competence clauses (not specifying their content), which is an unacceptable solution from the point of view of the due guarantees in all criminal proceedings. In our opinion, *this supposed reciprocal reference does not account for the absolute or unconditioned universal jurisdiction, since neither Spanish legislation nor the particular Convention expressly provide so*.

More specifically, in the case of the Geneva Conventions of 1949⁷⁵ and of its Additional Protocols of 1977,⁷⁶ we agree with the interpretation carried out by F.J. Bariffi, in accordance with the literality and legislative history of common Articles 49 (Convention I), 50 (Convention III), 129 (Convention III) and 146

⁷³ See, among others, Art. 5 of the Convention against Torture of 1984 (*BOE*, 9th November 1987); Art. 4–2 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*BOE*, 10th September 1990); Art. 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (*BOE*, 15th January 1973); Art. 5 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (*BOE*, 10th January 1974); Art. 3 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 (*BOE*, 7th February 1986); Art. 6 of the European Convention on the Suppression of Terrorism of 1977 (*BOE*, 8th October 1980); Art. 8 of the Convention on the Physical Protection of Nuclear Material of 1980 (*BOE*, 25th September 1991); Arts. 5 and 8 of the International Convention Against the Taking of Hostages of 1979 (*BOE*, 7th July 1984); Art. 6 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (*BOE*, 24th April 1992); Art. 3 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf of 1988 (*BOE*, 24th April 1992); Art. 7 of the Convention for the Suppression of the Financing of Terrorism of 1999 (*BOE*, 23rd May 2002).

⁷⁴ “Without prejudice to what may be provided by the treaties and international agreements ratified by Spain...”.

⁷⁵ *BOE*, of 23rd August 1952, 26th August 1952, 5th September 1952 and 2nd September 1952.

⁷⁶ *BOE*, of 26th July 1989 and 7th October 1989.

(Convention IV), in the sense that the State parties to these conventions are not bound to apply the PUCJ in an absolute or unconditioned manner. Under the Conventions of 1949 and the I Additional Protocol, the obligation to examine and sanction serious violations of International Humanitarian Law committed in international armed conflicts is limited to the two following situations: a) in the event of armed conflict, the obligation becomes active from the beginning of the hostilities, applying to all warring parts and to the events occurred *within the geographical area where the conflict is taking place*; b) as to neutral States, the obligation becomes active either where events occur within their territories or where offenders are within their territories. Furthermore, in the latter situation, extradition may be considered as an alternative (*aut dedere aut judicare*).⁷⁷

This is the reason why, where war crimes derived from domestic armed conflicts, State parties to the aforesaid conventions are not bound either to apply the PUCJ in an absolute or unconditioned manner, since war crimes derived from domestic armed conflicts are not typified in the Geneva Conventions and its Additional Protocol II. However, the creation, at both the international and domestic levels, of such crimes committed during domestic armed conflicts, has been consolidated in the last two decades thanks to the Rome Statute coming into force, among other developments in legislation.⁷⁸ Thus, State parties to the Rome Statute are bound to carry out the pertinent criminal prosecution at their domestic courts, under the conditions provided by their respective legal systems, not being bound to apply the PUCJ in an absolute or unconditioned manner. In Spain's case, the PUCJ shall

⁷⁷ F.J. Bariffi, "Jurisdicción universal sobre crímenes de guerra: evolución histórica y su codificación en el Derecho de Ginebra", [Universal Jurisdiction on War Crimes: Historical Evolution and Codification in the Geneva Law], *Revista Electrónica de Estudios Internacionales* [Electronic Journal of International Studies], vol. 17 (2009), 1–44, pp. 32–33. As it was remarked by this author: "However, it is not a question of granting them the right, but of binding all States parties, even if they are neutral States without access neither to the accused nor to the evidence and the witnesses; even if they are not likely to know neither the culture nor the language of the accused or the victims; and even if all seems a burden which, in the majority of cases, in spite of the willingness and availability of the States, cannot be assumed by them. Cf. in this respect, Jorge Urbina, "Crímenes de guerra..." [War crimes...], *loc. cit.*, pp. 258–268. The literal content of the article shared is: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to commit, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to commit, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case".

⁷⁸ Cf. E. Orihuela Calatayud, "Crímenes de guerra y justicia universal: avances y retrocesos en la lucha contra la impunidad", [War Crimes and Universal justice: The Advances and Steps Backwards in the Struggle against Impunity], in C. Ramón Chornet (ed.), *Derechos y libertades ante las nuevas amenazas a la seguridad global* [Rights and Freedoms before the New Threats to Global Security], Valencia, 2005, 152–198, pp. 158–166.

be applied by Spanish courts as to those war crimes committed during domestic armed conflicts in third States, provided that the alleged offender is within Spanish territory, the victim is a Spanish national or there exists a relevant connection link with Spain, as it will be addressed below.

In short, in our opinion, the general reference to the rules of the conventions in section 23.4.h) does not account for absolute or unconditioned universal jurisdiction. Said reference must be interpreted so as to include other types of offence in the scope of the PUCJ application, provided that these types of offence are already typified in Spanish Criminal Law and that the general conditions in the second paragraph of this provision are met.

3. The requirement of “connection links”

The lawmaker has, in effect, taken into account arguments in TS’ case law, subordinating the application of the PUCJ by Spanish courts to the three following suppositions: a) the alleged perpetrators are proved to be in Spain; b) the existence of Spanish victims is proved; or c) the existence of “some relevant connection link with Spain” is proved.

Some proposals of amendment were submitted to parliamentary debate with the aim of enlarging the scope of the first two suppositions and of removing the latter. Specifically, as to the first supposition, it was proposed that Spanish courts were to be also competent, should perpetrators “actually be or be able to be within European territory or within any other territory with which there would exist an agreement of direct delivery of prosecuted or accused persons; or should the accused be within any other territory with which Spain had entered an extradition treaty”. With regard to the second supposition, it was proposed that the Spanish courts were to be competent, should victims or their family be of Spanish nationality. However, together with these two amendments, it was also suggested that the third supposition, the one allowing Spanish courts to be competent in the event of the existence of any relevant connection link, was to be rejected. These amendments were dismissed by a vast majority.⁷⁹

⁷⁹ See Amendments numbers 9 and 13 presented by the Senator Pere Sampol i Mas, from the *Grupo Mixto* (Joint Group); and by the Parliamentary Group, *Entesa Catalana de Progrés*; both available in *BOCG-Senado.II*, IX Leg., No. 18 (c), pp. 14–15 and 16–17. The former explained their proposal as follows: “...the criterion of the presence of the defendant or the accused within national territory is not provided in the agreements signed with Europe on the Arrest Warrant Scheme (for the direct extradition of suspects, led by Spain in the case of the conflict occurred in Belgium as to the prosecution of a member of the Spanish terrorist group, ETA). Therefore, it should be logical to enlarge this criterion as to encompass the presence of the accused within any of the countries with which Spain has subscribed extradition treaties. The concept of territorialism, in the 21st century, has been clarified by these international treaties signed by Spain” (*Ibid.*, p. 15). The votes on these amendments were as follows: 15 votes in favor, 221 votes against and 6 abstentions (*DSS-P*, IX. Leg., No. 54, p. 2584).

It is worth mentioning that, according to the legal text passed in November 2009, it is the plaintiff who shall provide the burden of proof as to the existence of any of these three suppositions. He or she shall “prove” or “confirm” one of these three legal “suppositions” so as to begin criminal proceedings under the PUCJ. In our opinion, as it will be mentioned in the next section, the text should only refer to the existence of evidence, so as to have the examining magistrate consider whether the perpetrator is in Spain, there are Spanish victims or “any relevant connection link with Spain” can be confirmed. Although the latter may seem, a priori, a rather vague supposition.

Actually, with such an open criterion as the latter, Spanish judges and courts are the ones to determine the scope of the PUCJ in all those cases where the first two suppositions do not occur (*territorial PUCJ and passive personality principle*). As it has just been proved, unlike in Comparative Law, Spanish legislation establishes them as alternative criteria.⁸⁰ Needless to say that the decisions adopted by the AN on this matter will be the object of appeals before the TS, and that, subsequently, TS’ decisions will be the object of appeals for legal protection before the TC. Thus, the Spanish lawmaker has granted, without reservation, such a great responsibility to Spanish jurisdictional bodies, which is highly reprehensible under the principle of legal protection in the CE of 1978 (Art. 9.3). In this respect, it must be pointed out that, during the passage through Parliament of this reform, they never specified what these “relevant connection links with Spain” would be, to justify the application of the PUCJ, even where the other two suppositions did not occur.⁸¹

⁸⁰ In Comparative Law, there must be mentioned in this respect Art. 9 of the Swiss Military Criminal Code, object of the reform of 2003, in force since 1st June 2004. According to this provision, the competence of Swiss Military Criminal Courts is restricted to those cases where the accused of war crimes “ont un lien étroit avec la Suisse”. *However, in order to start criminal proceedings, the presence of the accused in Switzerland is required*, as well as the impossibility of extradition to other State and the prosecution before an international criminal court. According to Kolb’s explanations: “la raison de ce nouveau critère restrictif était la crainte de plaintes politiquement motivées contre des personnalités internationales de premier plan venant régulièrement en Suisse. La situation dont on chercha à se prémunir aurait été potentiellement gravement nuisible au rôle diplomatique de la Suisse, siège de plusieurs organisations internationales et place précieuse pour des négociations de paix. Concrètement, le précédent de la loi belge, mentionnée plus haut, pesait sur les consciences” [R. Kolb, *Droit international pénal. Précis* (International Criminal Law. A Manual), Bruxelles, 2009, pp. 224–231, quotation in p. 228]. Moreover, Kolb, apart from his emphasis on the requirement of the presence of the accused within Swiss territory, and on the opportunity principle in force under Swiss Law, points out “des difficultés d’interprétation d’un concept vague et peu clair, comportant une grande dose de subjectivité et donc d’arbitraire”; suggesting its abolition (p. 229).

⁸¹ More in particular, in the parliamentary debates nobody explained why the second part in Section 23.4.g) would be respected. In accordance with its literal character, those crimes related with female genital mutilation committed within the territory of third States may only be prosecuted before Spanish courts where the alleged perpetrator is in Spain; moreover, as *lex specialis*, the two criteria of general character stipulated in Art. 23.4 shall not apply: neither the Spanish nationality of the victim nor the existence of relevant connection links with Spain.

However, we reckon that said “relevant connection links with Spain” are to be specified by means of the rules of the conventions, to which Art. 23.4 refers twice. Firstly, taking as a starting point the regulation under the aforementioned Geneva Conventions of 1949, and in general, the principle of effectiveness, Spanish courts’ competence may be justified as to the acts of genocide, crimes against humanity or war crimes committed within the territory of third States, where victims are not Spanish nationals, but where Spanish troops have been deployed, under the UN Security Council authorization, provided that the principle of subsidiarity in Art. 23.4 is enforced.

Likewise, another relevant connection link may be the existence of victims who were Spanish originally, but who, after living in a third State for some decades, have obtained the nationality of that State. In this case, although the Spanish nationality of the victims might be discussed – according to the effectiveness principle, since during the last decades they have enjoyed the nationality of a third State –, they may resort to the third criterion, which allows Spanish courts’ competence.⁸²

In this respect, they may defend the existence of “a relevant connection link” where victims are close relatives of a Spanish national (the spouse, or a first-degree ancestor or descendant).

Finally, the victims’ condition of regular residents in Spain for a certain period of time, either nationals of third States or stateless persons, might also justify the competence of Spanish courts.⁸³

On the contrary, we do not believe that the existence of “relevant connection links” can be assumed simply relying on the historical, cultural or linguistic relations between Spain and its former colonies, as it has been discussed in some of the Judgements delivered by the TS mentioned *supra*. In our opinion, these are very general “links” so as to be considered as “relevant” in order to exercise the PUCJ. Otherwise, we would thereby carry out an absolute or unconditioned

⁸² Regarding this matter, on 13th November 2008, criminal action was brought before the AN against Alfredo Cristiani, former President of the Republic of El Salvador, and against other 14 senior officials and Salvadorean Army soldiers for crimes against humanity and terrorism committed by State agents in the so-called “Jesuits’ Massacre” in El Salvador, on 16th November 1989. In this massacre, Spanish Jesuits and Salvadorean nationals were murdered, among whom, Ignacio Ellacuría. The Examining Magistrate allowed the criminal action through the Order of 12th January 2009; although he dismissed the action against Cristiani, since he considered Cristiani had not committed said acts, but had covered them up.

⁸³ This connection criterion applies in the Belgian legislation since the reform passed in April 2003, as a result of which it is required to have resided in the State for a period of at least three years when the crime is committed so that Belgian courts apply the PUCJ where victims are not nationals. *See*, P. D’Argent, “L’expérience Belge de la Compétence Universelle: Beaucoup de Bruit pour rien?” (The Belgian Experience as to Universal Jurisdiction: So much Noise for Nothing?), *RGDIP*, t. 108 (2004), 597–632, p. 612; and J. Ríos Rodríguez, “La restriction de la compétence universelle des juridictions nationales: les exemples belge et espagnol” (The Restriction of the Universal Jurisdiction of Domestic Courts: Belgium and Spain’s instances), *RGDIP*, vol. 114 (2010), 563–595, pp. 582–585.

application – always following TC’s terminology – of the PUCJ regarding this whole group of States, which, as it has just been proved, was not the objective pursued by the Spanish lawmaker when the reform of the LOPJ was passed at the end of year 2009.

4. The compliance with the principle of subsidiarity

Furthermore, through the reform of 2009, the *subsidiary* – not complementary – character of Spanish courts’ competence in the application of the PUCJ is remarked. Through this means, Spanish courts shall only be competent should one of the aforesaid suppositions be met or should there not be started proceedings “which imply an effective examination and prosecution”, either before the courts⁸⁴ of another competent country, or before an international court. This reform does not provide criteria for the establishment of other States’ competences to hear of these criminal acts, and it does not make any particular reference to the principle of territoriality either, whose compliance is generally the best option for the prosecution of serious human rights violations. In the same sense, this legislative reform also accounts for the supposition that Spanish courts should comply with the principle of subsidiarity, even when criminal proceedings have already been started in Spain, where “effective examination and prosecution” has in fact started before the courts of another State or before an international court, which would imply the stay of criminal proceedings before Spanish courts.⁸⁵

⁸⁴ The literality of the third paragraph in Art. 23.4 does not establish that the “effective” enquiry and prosecution shall be carried out necessarily before a judicial body in a third “competent country”. Therefore, there exists the possibility that an administrative, governmental or parliamentary body might be the one responsible for the “effective” enquiry and prosecution. Nevertheless, it must be pointed out that the mentioned paragraph makes reference to the start of “proceedings” in a third competent country, which implies that such actions shall be developed and at least supervised by the judicial bodies in the third “competent” State.

⁸⁵ Several amendments were put forward, suggesting “a new wording of the point on the concurrence of jurisdictions so as to avoid the great problems of the wording passed in Congress, and to establish a criterion respectful towards international rules, case law and the criteria of objective and subjective identities of the case (in order to prevent the fraudulent neutralisation of the process)”. These therefore supported the principle of concurrent jurisdiction and not the subsidiarity principle, defended by the majority who fostered the reform of Art. 23.4 of the LOPJ. On this matter, *see* the identical amendments number 9 and 13 presented by Senator Pere Sampol i Mas, from the *Grupo Mixto* (Joint Group) and by the Parliamentary Group *Entesa Catalana de Progrés*, available in *BOCG-Senado.II*, IX Leg., No. 18 (c), pp. 14–15 and 16–17. Their literal content is the following: “In the event of concurrent jurisdiction with an International Court, the latter shall have the preferential competence, unless this Court decides to waive jurisdiction or not to prosecute the same offences or the same perpetrators. In the event of concurrent jurisdiction with a domestic court other than the one in charge of the acts committed, preferential competence shall be given to the first one starting the enquiry on the criminal acts, being the second one bound to refer to them their own preparatory enquiries”. The results of the votes on these amendments, already mentioned: 15 votes in favor, 221 against and 6 abstentions (*DSS-P*, IX. Leg., No. 54, p. 2584).

With regard to the queries which may be posed in the practice as to the compliance with the principle of subsidiarity, when applying this principle stipulated by the LO 1/2009 in the text of the LOPJ, there shall be considered, *mutatis mutandis*, the subsidiarity criteria provided by the Rome Statute for the International Criminal Court in relation to state jurisdictions. In this sense, the universal jurisdiction of Spanish courts shall only apply where the States more directly affected – that is, the State of the territory within which the crime was committed, and the State from which the alleged perpetrator comes – do not want to prosecute the alleged perpetrators or do not have the capacity to do so according to the due guarantees required by International Law for all criminal proceedings.⁸⁶

As to international criminal courts, Art. 7 of the LO 18/2003, cited *supra*, intends to regulate complementarity relations between the Spanish courts' competence and the competence of the International Criminal Court.⁸⁷ On the occasion of the passage of LO 1/2009, the Spanish lawmaker should have amended the aforementioned Art. 7 so as to achieve a coherent and harmonious regulation thanks to the latter and Art. 23.4 of the LOPJ. The regulation currently offered by Art. 7 does not clarify the complementarity relations between the International Criminal Court and Spanish courts' competence as to the exercise of the PUCJ. The text of Art. 7 of LOPJ 18/2003 seems to reverse these complementarity relations in favour of the International Criminal Court and to the detriment of the exercise of the PUCJ by Spanish courts,⁸⁸ even where the conditions stipulated in the LO 1/2009 are met. It would be advisable to include, in a coordinated manner in said Art. 7, a reference to the criteria limiting the PUCJ according to LO 1/2009, in order to specify whether these are exclusive or non-exclusive criteria for the International Criminal Court's preferential competence. According to the literality of Art. 7, it may occur that Spanish Public Prosecution Service and judicial bodies shall refrain from intervention in the event of genocide, war crimes or crimes against humanity, even where the alleged perpetrator is within Spanish territory or there exists victims of Spanish nationality or there exists a relevant connection link with Spain (Art. 7.2, *a sensu contrario*), at least as long as the Prosecution Service of the International Criminal Court decides not to carry out examinations on the matter or the Court decides to dismiss the case (Art.7.3). In our opinion, where one of the three criteria above may occur, it should be clear that in those cases the intervention of Spanish courts is preferential, and the competence of the International Criminal Court is seen as complementary to the Spanish court's one. At least in the case where the alleged perpetrator is within Spanish territory, as a concession to the principle of effectiveness in the prosecution on the part of our courts.

⁸⁶ Cf. Pigrau Solé, *La jurisdicción universal...*, *op. cit.*, pp. 71–74.

⁸⁷ See footnote No. 68.

⁸⁸ Cf. C. Rodríguez Yagüe, "Criterios de resolución de conflictos entre la Corte Penal Internacional y Tribunales *Ad hoc* y la jurisdicción española: a vueltas con la justicia universal", [Criteria for the Settlement of Conflicts between the Internacional Criminal Court and *Ad hoc* Courts, and the Spanish jurisdiction: Frictions as to Universal Justice], *Revista Electrónica de Estudios Internacionales* [Electronic Journal of International Studies], No. 14 (2007), 1–24, p. 12 and subsequent ones.

5. The first judicial decisions under the application of LO 1/2009

Anyhow, the interpretation and subsequent application of Art. 23.4, with the new text provided by Law 1/2009, fall to the Spanish courts. Their first decisions already reveal that this legislative reform has not clarified all the queries regarding the PUCJ application. Specifically, AN's Order of the Examining Magistrate's Court No. 4 of 26th November 2009, allows, with the opposition of the Public Prosecution Service, the criminal action brought against Iraqi Lieutenant General, Abdol Hossein Al Shemmari, due to the deliberate and planned attack performed by 2,000 Iraqi soldiers under his mandate. It was an indiscriminate attack against unarmed Iraqi civilians, which caused 11 deaths and hundreds of seriously injured persons, in contravention to the IV Geneva Convention of 1949. According to the Examining Magistrate, the interpretation of the connection links with Spain shall be carried out "without prejudice to the provisions in international treaties and conventions entered by Spain". He also considers that "in the present case, the IV Geneva Convention establishes in Art. 146 the obligations that those States parties to the convention shall have as to the examination, prosecution and conviction of persons committing serious violations of the Convention". Therefore, he deems the Spanish jurisdiction to be competent regarding the prosecution of the reported facts. Thus, the Magistrate issued International Letters Rogatory to the competent Iraqi judicial authorities, in order to obtain information regarding the current or former existence of any proceedings related to the said facts and, if existent, regarding its results. All this shall prove the compliance with the subsidiarity principle under the Spanish jurisdiction in relation to the competence of the courts in the State within which territory facts occurred. In short, the judicial body defends the absolute or unconditioned interpretation of the PUCJ – always following Spanish TC's terminology –, in accordance with the Geneva Conventions, thanks to the reference established in Art. 23.4. h). Such an opinion, as it has just been mentioned, is however rather arguable, and dissociates from the will of the lawmaker responsible for LO 1/2009.⁸⁹

⁸⁹ The same trend towards a wider or more extensive interpretation of Art. 23.4 of LOPJ can be seen in the Order of Examining Magistrate's Court No. 5 of the AN, of 27th January 2010, through which they confirmed the competence of Spanish courts to enquire the alleged tortures and ill-treatment suffered in Guantanamo in the hands of US authorities, by four of the inmates in this American base, one of whom was a Spanish national. According to the Examining Magistrate, the Competence of the Spanish courts relies on Art. 23.4.a) (crime against humanity), and 23.4.h), with reference to the Convention against Torture of 1984. The Examining Magistrate grounds the Spanish courts competence, firstly, on the Spanish nationality of one of the victims and on the fact that four of the inmates in Guantanamo had been prosecuted before the AN for alleged crimes committed in Spain or related to a Spanish inquiry. Specifically, one of them was prosecuted, convicted and subsequently acquitted by Spanish courts, precisely for having suffered torture and ill-treatment in Guantanamo. More in particular, the Examining Magistrate considers in the case of one of inmates in Guantanamo that: "he is in Spanish territory, where he remains without protection after his acquittal and where he faces the impossibility of leaving the country due to judicial decision, the reason why he shall

On another matter, Mr. Santiago Pedraz, judge for the AN, through the Order of 26 February 2010, decided to file the case started to examine the crimes against humanity and genocide allegedly committed in Tibet, for which the former Chinese president, Jiang Zemin, and other six ministers and high position officials were charged. This was a consequence of applying the reform of the LOPJ of the end of 2009, according to which the alleged perpetrators were not in Spain, the victims were not Spanish nationals and there was not a “relevant connection link” that justified the competence of Spanish courts.⁹⁰ It is worth mentioning that, in the assessment of the existence of “relevant connection links”, the Order concluded that there were neither historical, cultural, social, legal, political, nor linguistic (the sharing of a common language) relations between Spain and Tibet. This leaves an open door for the future assessment of the (non-) existence of these circumstances of very general character in future cases, particularly in those cases related to Latin American States, where, according to the Examining Magistrate, the application of Art. 23.4 of the LOPJ may be justified.

VII. FINAL CONSIDERATIONS

1. Evaluation of Spanish courts’ case law

From a legal-technical perspective, this brief review on Spanish case law as to the application of the PUCJ shows that Spanish jurisdictional bodies have had to confront the incomplete domestic legislation and the complexity of a set of rules developed within a scope where international practice has been scarce, at least until the late nineties. In this context, Spanish courts have attempted to assume a leading role, despite the great number of difficulties as to the specification of

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be actually considered a Spanish victim”. He also insists on the “connection of facts” and on the application of certain international treaties (Geneva Conventions, Convention against Torture...), to justify the jurisdiction of Spanish courts, since “otherwise this would mean accepting the non-existence of some [competent jurisdiction] and opting for impunity”. Before, on 17th March 2009, criminal action was brought before the AN due to serious violations of human rights and torture, against the former Attorney General of the United States, Alberto González, and against other five legal advisers of the Bush’s Administration, for having created a set of laws which allowed the justification and implementation of acts of torture in Guantanamo. The Public Prosecution Service was against the allowance of the action. Before its allowance, Court No. 6 of the AN submitted, in May 2009, a letter of request to the United States, in order to be informed by American authorities as to the existence of enquiries or criminal proceedings before their Courts on this case.

⁹⁰ The same opinion is found in the Order of 23rd December 2009, by AN’s Examining Magistrates Court No. 3, which filed the criminal actions brought against the war crimes and the crimes against humanity committed by members of Myanmar’s Military Board, since it was considered that there was not any “connection links” under Art. 23.4 of the LOPJ which allowed the Spanish courts’ competence.

the scope and content of the PUCJ in particular cases of genocide, crimes against humanity, war crimes and tortures beyond Spanish borders.

In this respect, our attention is attracted by the public disagreement between the TS and the TC as to the interpretation of Art. 23.4 of the LOPJ. To a certain extent, these disagreements may be caused by the diverse natures and competences of both judicial bodies. The former is the last resort within criminal jurisdiction and, therefore, the ultimate responsible for the prosecution and conviction within the Spanish legal system. On its part, the TC has, among other competences, the competence of hearing of the appeals for legal protection brought against fundamental rights violations; however, it is not competent as for the prosecution and conviction of those offences under the Spanish Criminal Code of 1995. From this point of view, TC's role seems much more bearable and easier than the TS'one. In accordance with the PUCJ, there falls to the latter the complex task of prosecuting crimes committed hundreds or thousands of kilometres away from Spain; in some cases the accused will be in Spain, in others the presence of the accused within Spanish territory will not be required – namely, should the victims be Spanish nationals or should there exist a “relevant connection link” with Spain. Needless to say that this general reflection is not intended to justify the *contra legem* interpretation of Art. 23.4 of the LOPJ in its version of 1985, which was defended by the TS in its case law and duly corrected by the TC through a literal interpretation of the said law.

Likewise, as it has just been proved, due to the lack of legislation mentioned above as well as to political matters, the legal position of the Spanish Public Prosecution Service⁹¹ has not been coherent regarding legal actions started in Spain. On the one hand, it has defended the application of the principle of absolute or unconditioned universal jurisdiction in some cases (i.e. Guatemala, Argentina); but, on the other hand, it has rejected it in some others (i.e. Tibet, Iraq, Western Sahara, Guantanamo...). According to the LOPJ of 1985, the performance of the Spanish Public Prosecution Service does not show the application of objective criteria, based either on Spanish domestic law or on current International Law, which does not provide a legal justification for this two-faced performance.

From a more general point of view, the Spanish courts' attempts to apply the PUCJ in the cases of Argentina, Chile, Guatemala, China and other countries, are a good example of the difficulties faced in the exercise of said jurisdiction, due

⁹¹ According to Art. 124 of the CE of 1978, “1. The Public Prosecution Service, without detriment to the duties given to other bodies, is responsible for the promotion of justice, ex officio or at the request of the victims, in a struggle for legality, the rights of citizens and the public interest protected by the Law. Likewise, it is in charge of the safeguard of the independence of courts the satisfaction of the social interest before them. 2. The Public Prosecution Service exercises its duties through its own entities, *in accordance with the principles of unity of action and hierarchical dependence*, and in accordance with the legality and impartiality principles. 3. The Law shall regulate the Organic Statute of the Public Prosecution Service. 4. *The Public Prosecutor will be appointed by the King, at the suggestion of the Government, after the opinion of the General Council of the Judiciary.*” (Italics added).

to a context of scarce, fragmentary and rather heterogeneous international practice regarding this matter. Actually (fourteen years after the start of proceedings), apart from *Scilingo's case*, and previous to the vicissitudes before UK authorities in the *Pinochet case*, four Argentinians have been arrested and have appeared before Spanish judicial authorities so far, and have subsequently been extradited to Argentina. The accused are: R.M. Cavallo, arrested in Mexico and extradited to Spain in 2003, and subsequently extradited to Argentina;⁹² and J.C. Fotea Dimieri, R. Taddei and J.A. Poch, all of them arrested when they were in Spain, and subsequently extradited to Argentina. As it has been proved, only one conviction has been delivered – in *Scilingo's case*. Therefore, except for the mentioned conviction, and for the arrest and extradition of the Argentinian nationals, the study of Spanish courts' case law within this sector of rules does not provide a positive evaluation of said case law, from the point of view of the principle of effectiveness. Nevertheless, as it has been mentioned above, Spanish courts have had a positive influence in third States, in favour of the consolidation of democracy, the rule of law and the respect for human rights, particularly in States such as Argentina and Chile.⁹³

2. Evaluation of Spanish rules on the PUCJ

As for the evaluation of the legal reform recently introduced by LO 1/2009, *on the one hand*, Spain, as a Member State of the Council of the Europe and the European Union (EU) – among other IO –, committed as it is to the defence of democracy, the rule of law and the respect for human rights, must be situated among the group of States advocating the formation of an international public order within the human rights field. Such an order is to be materialized through the particular intervention of courts in the prosecution of the perpetrators of genocide, crimes against humanity and war crimes, as well as of other types of offence, punishable by the Spanish criminal system, under conventions to which Spain is party, as it is the case of torture, regardless of the nationalities of the perpetrators and the victims,

⁹² After a bizarre legal route. In fact, the Chamber for Criminal Matters of the AN made the Order of 20th December 2006, which allowed the jurisdiction waiver promoted by Cavallo's defence, in favour of the criminal jurisdiction of Argentina, in application of the criterion according to which priority shall be given to the jurisdiction of the "locus delicti". After the appeal before the TS, through STS 705/2007 of 18th July 2007, said Court found for the appellants and annulled the mentioned Order. On the whole, the TS warns that the "waiver of jurisdiction" provided in the Rules of Criminal Procedure is not devised for the settlement of all conflicts arising among the jurisdictions of different States; its aim is not to settle "conflicts on International Jurisdiction", but to settle those conflicts arising between Spanish jurisdictional bodies, at a domestic level. Furthermore, according to the TS, said decision of the Chamber for Criminal Matters of the AN is, in practice, an equivalent to the extradition of the accused to Argentina, and therefore it violates the competences of the Spanish Government in this field, under the Passive Extradition Act of 1985; especially through the violation of the Extradition Treaty between Spain and Mexico, which subordinates to the authorization of the Mexican Government the re-extradition of Cavallo to a third State.

⁹³ See footnote No. 9.

or of the place where criminal acts have occurred. With this aim, our procedural and criminal legislations should account for the crimes of genocide, crimes against humanity and war crimes, as well as for other crimes of unquestionable universal implication, such as torture. The universal jurisdiction of our courts should also be expressly provided. In this sense, as it has already been remarked, we deem that, on the occasion of the reform at the end of year 2009, the lawmaker has proved to be very conservative, since he did not include an express reference to war crimes in Art. 23.4.a), together with genocide and crimes against humanity. Likewise, he could have included an express reference to torture as well.

However, *on the other hand*, in order to determine the scope of the PUCJ application – in the context of a legal system essentially decentralized and hardly organized as the international one –, the start of proceedings under this principle shall rely on the existence of evidence that the perpetrator is within Spanish territory, as regulated by the Spanish lawmaker at the end of year 2009. On the meeting of this requirement, our courts should avoid excessive prominence which may affect the role performed by international criminal courts and, especially, the one to be performed by the domestic jurisdiction in the State where the perpetrator is.

Pinochet's and especially *Cavallo's* cases show that this last requirement may not be *conditio sine qua non* to start criminal proceedings under the PUCJ, thanks to the existence of police and judicial mechanisms of cooperation between States which allow the enforcement of international warrants of arrest as well as the implementation of extradition procedures, which as a last resort would allow the application of the universal jurisdiction previously applied *in absentia* of the accused. However, such mechanisms of cooperation devised for extradition present a double nature, both judicial and governmental, being therefore submitted to the discretion of the Governments affected, as provided in Spanish legislation.⁹⁴ Such is the current situation, despite the efforts appreciated in the conventions on the matter, aimed at reducing the discretionary scope of the States' Governments when allowing or rejecting extradition. On another matter, this is closely linked to the rules of the conventions regulating the principle *aut dedere aut judicare* as for certain crimes of international implication. This is, for instance, the case of

⁹⁴ Arts. 6, 17 and 18 of Act 4/1985, of 21st March, on Passive Extradition (*BOE*, of 26th March 1985). However, as to active extradition, STS 3470/2005, of 31st May 2005 needs mentioning (Chamber for Contentious Administrative Proceeding), it revokes the Decision of the Council of Ministers, of 29th August 2003, which agrees not to bring before Argentinean authorities the AN's request for the active extradition of the 40 Argentinean nationals accused of genocide, terrorism and tortures committed during the Argentinean dictatorship. The mentioned Decision of the Council of Ministers highlights that the repeal of Argentinean "Due Obedience" and "Full Stop" Acts allows the exercise of the criminal competence of Argentinean courts to hear of the crimes committed, by Argentineans, in Argentina; therefore, the prosecution of said offences does not fall to Spanish courts. However, according to the TS, Spanish legislation – Arts. 831 to 833 of the Rules of Criminal Procedure – establishes that the Government shall allow the requests for active extradition brought before Spanish judicial bodies; and, therefore, it does not fall to the Government to decide on the allowance or dismissal of these request for extradition, unlike what is provided for the cases of passive extradition.

the Convention Against Torture of 1984 (Art.5.2); and, more in particular, of the developments within the scope of the European integration process, materialized in the European Arrest Warrant (EAW).⁹⁵ *However, the study of international practice reveals that States do not generally accept the extradition of their own nationals in order to be judged by the courts in third State in relation to acts committed within the national's State, as it is the case of Argentina, Chile, Guatemala and China, among others.*⁹⁶

For all these reasons, always bearing in mind the deeply decentralized structure of the international legal system, the Spanish lawmaker has established criteria allowing to systematize the application of the PUCJ, by means of the reform at the end of year 2009. According to these criteria, Spanish judges and courts shall refrain from starting legal proceedings under the PUCJ *where there is no evidence* that the perpetrator is within Spanish territory or there is no actual knowledge that he is to travel to Spain. In such a case, in our opinion, preparatory inquiries may be started. In fact, from our point of view, the Spanish lawmaker has adopted a highly restrictive criterion in the text of Art. 23.4, by requiring actual evidence that the alleged perpetrator is within Spanish territory. Actually, some difficulties may arise should the accused be just passing through the State's territory, since some time is necessary so as to bring criminal action and to start proceedings under the Examining Magistrate's orders – during this lapse of time, the accused may take the opportunity to leave the State's territory. Therefore, this requirement should

⁹⁵ See Framework Decision 2002/584/JAI by the Council, of 13th June 2002, on the European Arrest Warrant and the Surrender Procedures between Member States (*DO L* 190, 18th July 2002).

⁹⁶ See Art. 7 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between Spain and Argentina, of 3rd March 1987, in *BOE*, of 17th July 1990. According to it: "where the perpetrator is from the requested State, this State may refuse to allow the extradition, under its own Law... Where the requested State does not allow the extradition of a national due to his or her nationality, they requested State shall, at the request of the requesting State, bring the case before the competent authorities, in order to allow the start of proceedings against him or her...". In this direction, see Art. 7 of the Convention on the Reciprocal Extradition of Criminals between Spain and Chile, of 30th December 1895, in *G.M.* (Madrid's official gazette), of 12th and 19th May 1897; and its successor, the Treaty on Extradition and Mutual Assistance in Criminal Matters between Spain and the Republic of Chile, of 20th November 1994, in *BOE*, of 10th January 1995. Likewise, there must be highlighted, in this respect, the Treaty, of 7th November 1895, on the Extradition between Spain and Guatemala (*G.M.* of 10th and 23rd June 1897), and its Additional Protocol for the clarification of Art. 6. The same is provided by Art. 6 of the extradition treaty between the Kingdom of Spain and the Republic of Honduras, of 13th November 1999 (*BOE*, 30th May 2002). Art. 6 within it, entitled "Refusal to the Extradition of Citizens", establishes the following: "Each Contracting Party shall be eligible to refuse to the extradition of its own citizens"; however, Art. 7.2 warns that, in the event of refusal, the requested State shall, "at the request of the requesting State, bring the case before its pertinent authorities in order to start proceedings which are appropriate". For an analysis of Spanish practice in this field, see E.M. García Rico, "International Cooperation in Criminal Matters between Spain and Latin America", *SYL*, vol. XII (2006), 19–50.

not imply evidence, on the part of the plaintiff, that the accused is within Spanish territory. There should be enough with the presentation of *prima facie* evidence which allows the Examining Magistrate to start committal proceedings and, more specifically, to issue a warrant of arrest for the domestic scope against the accused, which would help to prevent him from leaving the country.

Through this means, such a requirement – the presence of the accused within Spanish territory – should not hinder either the bringing of criminal actions or the subsequent start of preparatory measures by the Examining Magistrate, so as to carry out the enquiry of facts and to gather evidence. All this will occur parallel to the enquiries about the presence of the perpetrator within Spanish territory, which in an affirmative case, will lead to a national warrant of arrest issued by the Examining Magistrate, should evidence support so. Where the absence of the perpetrator within Spanish territory is proved, the Examining Magistrate shall dismiss the action and file the proceedings. Needless to say that, should the absence of the perpetrator within Spanish territory be widely known, there would be no reason to start proceedings.

From the perspective of the international legal system, should this condition for the application of the PUCJ be met, Spanish authorities will have the legal legitimacy already established by Classic International Law: the principle of sovereign equality together with the principle of territorial sovereignty inherent in it, as recognized by the Permanent Court of International Justice in the *Lotus Case*, in its Judgement of 7th September 1927.⁹⁷ With this remedy, any perpetrator of genocide, crimes against humanity, war crimes and torture, exposes himself to prosecution by Spanish courts where within Spanish territory (*territorial PUCJ*). Taking as reference the international obligations assumed by Spain, it must not become a sanctuary for the perpetrators of those crimes.

From the view of Spanish internal legal system, the attitude supporting territorial universal jurisdiction may be reprehensible for being excessively conservative. There shall be alleged the existence of extradition mechanisms, under conventions in force, which allow the implementation of universal jurisdiction even when started *in absentia*. Although there exists the clear tendency of not extraditing the own nationals for crimes committed in their very own State, it is actually more feasible to extradite the accused persons remaining in third States. Such were the cases of Pinochet, while he was in the United Kingdom; and of Argentinean national, Cavallo, detained for more than two years in Mexico until his extradition to Spain was granted. In this sense, as an exception to *territorial PUCJ*, there should be established the jurisdiction of Spanish courts where the perpetrator is in a third State other than the one of his same nationality, provided that such third State has entered a bilateral or multilateral convention with Spain which allows the perpetrator's extradition; also where the perpetrator is in a EU Member State bound to comply with the European Arrest Warrant. The existence or non-existence of this exception should be assessed and decided by the corresponding Examining

⁹⁷ Permanent Court of International Justice (PCIJ), Series A, No. 9, pp. 18–19.

Magistrate and not by the Public Prosecution Service, so as to avoid any possible interference of governmental bodies.

Nevertheless, in this subject, we have to bear in mind the most recent legislative and case law practices in European neighbouring States, with which Spain has shared an important leading role in this legislative scope – France, Belgium or Netherlands, where the presence of the accused is indispensable for the application of the PUCJ; or the United Kingdom or Germany, whose legislation grants, with some differences, a wide margin of discretion to the Public Prosecution Service as to start proceedings under the PUCJ *in absentia* of the accused.⁹⁸ According to this comparative law, *we declare ourselves in favour of territorial PUCJ as the most realistic and viable solution*. A solution that, for instance within the European territory, if effectively applied by all our neighbouring States, would mean no less than the European continent would no longer shelter the perpetrators of genocide, war crimes, crimes against humanity and other crimes under current conventions, such as torture, as it has occurred in many cases during the last decades.

In short, we consider that, when applying the PUCJ, Spanish courts' intervention should not make up for the inactivity of the jurisdictions of third States where the perpetrators are, as it happened in the United Kingdom regarding *Pinochet's case*, and in Mexico regarding *Cavallo's case*. As far as we are concerned, the same legal legitimacy to start proceedings under the PUCJ falls on the United Kingdom as on other EU Member States and other States in other parts of the world with a long democratic tradition such as Mexico. In coherence with the ratification of the Statute of the International Criminal Court, States parties are bound to start criminal proceedings against the accused persons of genocide, crimes against humanity and war crimes who are in their territory.⁹⁹

The application of *territorial PUCJ* does not prevent the Spanish lawmaker from accounting for the *passive personality principle*, with the aim of making our courts competent to hear of criminal offences committed abroad against Spanish citizens, provided these are as serious as the ones in Art. 23.4 of the LOPJ. In addition, said competence shall be subsidiary to the action of the courts in the State where criminal acts have been committed. Given Spain's direct interest in protecting its citizens, when applying the principle of passive personality, the start of proceedings *in absentia* of the accused shall be allowed, as well as the resort to extradition

⁹⁸ For a more recent study of Comparative Law on this subject *cf.* I. Blanco Cordero, "Universal Jurisdiction. General Report", *International Review of Penal Law*, 2008, 1–2, 59–100, and the CD-ROM gathering national reports for each State; A. Pigrau Solé, "*La jurisdicción universal...*" [Universal Jurisdiction...], *op. cit.*, pp. 38–58.

⁹⁹ At the beginning of 2010, 110 States ratified the Statute of the International Criminal Court, among them, all the Member States of the EU and Mexico. As it is widely known, this group of States is engaged as to the prosecution of the perpetrators of genocide, crimes against humanity and war crimes before their domestic courts, under the principle of complementarity which presides over the relations between the International Criminal Court and the domestic jurisdictions in the States parties to the Statute. For further information *see* <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

(European Arrest Warrant in the EU scope) in order to arrest the accused in third States and bring them before Spanish courts.

Nevertheless, it would have been preferable not to have the PUCJ – either territorial or with another relevant connection link – and the passive personality principle regulated in the same section of Art. 23 of the LOPJ. Both principles present very different natures and foundations. In our opinion, there should be included, under the scope of the principle of passive personality, all crimes against the lives, physical integrity, freedoms and security of Spanish citizens. However, there shall be highlighted that Art. 23.4 of the LOPJ accounts for a reduced group of crimes, all characterized for their extreme seriousness and/or for their nature of crimes to be prosecuted by Spain under international agreements. In this sense, there could be found the paradox that, on the one hand, Spanish courts were competent to hear of the crimes of torture committed within the territory of a third State against a Spanish citizen, in accordance with the Convention against Torture of 1984; but that, on the other hand, they were not competent to hear of the crimes of murder and manslaughter committed within the territory of a third State against a Spanish citizen. It must be highlighted that the latter are not punishable acts unless they occur together with genocide, crimes against humanity or war crimes, or unless there exists an international convention in force ratified by Spain that stipulates their prosecution.

Finally, the lawmaker chose to leave an open door so that judges and courts could be competent, not only as to the territorial PUCJ and the passive personality principle, but also in the event of other cases of serious violation of human rights with some “relevant connection link” with Spain. This solution deserves criticism from the point of view of the legal certainty principle. It would have been preferable that the lawmaker had specified those cases in which the “relevant connection link” could apply. A proposal about what those “relevant connection links” could be has already been expressed *supra*. In any case, nowadays, Spanish legislation allows the PUCJ application in cases where the two mentioned criteria are not met: the presence of the accused in Spain and the Spanish nationality of the victim. Therefore, it is to be hoped that, in future, Spanish judges and courts duly found their decisions as to the existence of some “relevant connection link”.

ABSTRACT

Since the middle of the nineties, there has been developed a set of legal actions before Spanish courts under the PUCJ, with the aim of pursuing the impunity of the perpetrators of serious violations of human rights committed within third States. Both the TS and the TC have delivered judgements on the scope and content of this principle, in accordance with the international obligations assumed by Spain and the domestic legislation regulating the jurisdiction of Spanish courts (LOPJ of 1985). Due to the very different views supported in this respect by the TS and the TC respectively, the Spanish Parliament, at the end of 2009, managed to reform the LOPJ by a wide parliamentary majority, with the declared objective of limiting the PUCJ application. As it was made clear in the parliamentary debates, this

new regulation aims to prevent the start, before Spanish courts under the PUCJ, of those criminal proceedings for which judgement will not be delivered. In this sense, the Spanish lawmaker corrects the absolute or unconditioned conception of the PUCJ maintained by the TC, and establishes three “connection points” which may justify the competence of Spanish courts, thereby supporting TS’ position. In fact, from now on, Spanish courts will be competent to exercise the PUCJ should one of these three suppositions occur: the presence of the perpetrator in Spain, the Spanish nationality of the victim, or the existence of any “relevant connection link” with Spain. Furthermore, the competence of Spanish courts is subordinated to the observance of the principle of subsidiarity, in relation to the competence of the domestic courts within other States or of other international courts.

RESUMEN

Desde mediados de los años noventa se vienen desarrollando un conjunto de actuaciones judiciales ante los tribunales españoles, en aplicación del PUCJ, con el objetivo de evitar la impunidad de los autores de violaciones graves de los derechos humanos cometidas en terceros Estados. Tanto el TS, como el TC, han dictado jurisprudencia sobre el alcance y contenido de este principio, de conformidad con las obligaciones internacionales asumidas por España y la legislación interna que regula la jurisdicción de los tribunales españoles (LOPJ de 1985). Ante los muy distintos puntos de vista manifestados sobre este tema por el TS y por el TC, a finales de 2009 las Cortes españolas, contando con una amplísima mayoría parlamentaria, han reformado la LOPJ, con el objetivo declarado de limitar la aplicación del PUCJ. Como se puso de manifiesto en los debates parlamentarios, con esta nueva regulación se pretende evitar que se inicien ante los tribunales españoles procedimientos penales en aplicación del PUCJ que no tengan ninguna posibilidad de concluir con una sentencia. En este sentido, el legislador español corrige la concepción absoluta o incondicionada del PUCJ mantenida por el TC, y establece tres “puntos de conexión” que pueden justificar la competencia de los tribunales españoles, dando la razón en buena medida al TS. En efecto, a partir de ahora los tribunales españoles serán competentes en el ejercicio del PUCJ si se da uno de estos tres supuestos: presencia del inculpado en territorio español, nacionalidad española de las víctimas o existencia de algún “vínculo de conexión relevante” con España. Además, la competencia de los tribunales españoles se supedita al cumplimiento del principio de subsidiariedad, respecto de la competencia de los tribunales internos de otros Estados o de otros tribunales internacionales.

Keywords

Principle of universal criminal jurisdiction. Case law in Spanish courts: TS and TC. Genocide, crimes against humanity, war crimes and torture. Reform of the LOPJ of 1985: LO 1/2009. Principle of *territorial* universal criminal jurisdiction. Passive personality principle. “Relevant connection link with Spain”. Principle of subsidiarity.

Palabras Clave

Jurisdicción penal universal. Jurisprudencia de los tribunales españoles: TS y TC. Genocidio, crímenes contra la humanidad, crímenes de guerra, y torturas. Reforma de la LOPJ de 1985: LO 1/2009. Jurisdicción penal universal *territorial*. Principio de personalidad pasiva. “Vínculo de conexión relevante con España”. Principio de subsidiariedad.