



**MEMORANDUM**

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DATE: 10 February 2012

RE: **Spain’s Universal Jurisdiction Law**

**Note: This is an excerpt from a longer memorandum which applied these legal principles to a particular case. Due to confidentiality and the ongoing nature of the case, all references to the particular case have been removed.**

This memorandum was prepared by a law student who does not read or speak Spanish and could not access an official English translation of the amended Spanish law. It is not legal advice and is not exhaustive. The information provided herein is not a substitute for legal advice.

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## 1. Introduction

**This is an excerpt from a longer memorandum which applied these legal principles to a particular case. Due to confidentiality and the ongoing nature of the case, all references to the particular case have been removed.**

Prior to November 2009, Spain had a very broad universal jurisdiction law. Article 23.4 of the *Fundamental Law of the Judiciary (Ley Organica del Poder Judicial)* [*“LOPJ”*]<sup>1</sup> provided wide scope for the exercise of universal jurisdiction. In November 2009, the *LOPJ* was amended to include a number of new conditions. The most significant change to the law was the imposition of nexus requirements to ensure that prosecutions brought under the *LOPJ* have a connection to Spain. There have been few applications of the amended law to date, which may provide room for novel arguments regarding the exercise of universal jurisdiction.

The *LOPJ* specifies the types of crimes that may be prosecuted under universal jurisdiction. This memorandum focuses on the possibility of using the *LOPJ* to launch criminal prosecutions for crimes against humanity, torture, and war crimes. The ability to initiate a criminal investigation will largely depend on the Spanish court’s interpretation of the new nexus requirements, particularly the requirement that the case have a “relevant” connection to Spain. There is currently no conclusive jurisprudence on how this requirement should be interpreted. Subsidiarity, statute of limitations, and immunity are additional issues that will influence whether future criminal prosecutions can be brought in Spain for these international crimes.

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<sup>1</sup> The name of the Spanish law is also translated as the “*Judicial Power Organization Act*” and the “*Organic Law of the Judiciary*”.

## 2. Spanish Judicial Structure

The National High Court (*Audiencia Nacional*) is the competent Spanish court for national and transnational crimes.<sup>2</sup> The Criminal Chamber of the National High Court has jurisdiction to prosecute serious crimes committed outside Spain when Spanish law and/or international treaties give Spanish courts jurisdiction over those crimes.<sup>3</sup> National High Court judgments are subject to appeal before the Spanish Supreme Court and the Spanish Constitutional Court.<sup>4</sup>

Spanish judges have the power to investigate criminal offences.<sup>5</sup> The investigating judge gathers evidence and evaluates whether the case should be brought to trial.<sup>6</sup> The National Prosecution Office decides whether to prosecute on the basis of the evidence collected by the investigating judge in this preliminary investigation, and reports to the Attorney General, who is appointed by the national government.<sup>7</sup> The investigating judge does not try the case himself; the case is transferred to a tribunal, normally a panel of three judges, who preside over the trial.<sup>8</sup>

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<sup>2</sup> *Ley Organica del Poder Judicial* art 65(1) (Act No. 6/1985) (Spain) [*LOPJ*]; (Article 65 (1) of the *Ley Organica del Poder Judicial (LOPJ)* states that the Audiencia Nacional (National High Court) is competent, inter alia, for extraterritorial offences); Spanish Submissions to the United Nations Sixth Committee (Legal), UN General Assembly at 3 (released on 7 November 2011); Kai Ambos, “Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the “Torture Memos” be held Criminally Responsible on the Basis of Universal Jurisdiction?” (2009) 42 Case Western Journal of International Law at 432.

<sup>3</sup> *Ley Organica del Poder Judicial* art 65(1)(e) (Act No. 6/1985) (Spain) [*LOPJ*]; “The Spanish National Court: An Overview of La Audiencia Nacional”, The Center for Justice and Accountability <<http://www.cja.org/article.php?list=type&type=332>>; Maximo Langer, “The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes” (2011) 105 American Journal of International Law at 33.

<sup>4</sup> Spanish Submissions to the United Nations, *supra* note 2; Richard J. Wilson, “Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity”, (30 January 2008) 12 ASIL Insights; (the Constitutional Court is higher than the Supreme Court).

<sup>5</sup> *Constitucion Espanola* art 117 (unofficial English translation of the Spanish Constitution).

<sup>6</sup> “Profile: Judge Baltasar Garzon” *BBC News* (7 April 2010) online: BBC News <<http://news.bbc.co.uk/2/hi/europe/3085482.stm>>.

<sup>7</sup> *Ley De Enjuiciamiento Criminal (Code of Criminal Procedure)* arts 105, 271, 306, 31; Langer, *supra* note 3 at 33 (each new government appoints its own head of the Office of the Prosecutor).

<sup>8</sup> BBC Profile: Judge Baltasar Garzon, *supra* note 6.

### **3. Procedure to Initiate a Criminal Prosecution**

There are several different mechanisms to launch a criminal prosecution in Spain. A judge can initiate an investigation on his or her own motion.<sup>9</sup> Every Spanish citizen also has the constitutional right to initiate criminal proceedings by way of a private complaint (*querrela*), even if they are not directly affected by the offence.<sup>10</sup> This is called a people's or private prosecution. The right to press criminal charges is not limited to natural persons, but includes associations like human rights organizations and public interest groups.<sup>11</sup> Non-Spanish citizens or organizations can launch private prosecutions if they are the alleged victims of the offence.<sup>12</sup>

Under the rule of compulsory prosecution, a judge may only dismiss the private prosecution if the alleged facts don't constitute a crime or if the judge determines that he or she lacks jurisdiction.<sup>13</sup> If the prosecutor disagrees with the judge on the jurisdictional issue, the prosecutor may appeal, but the court makes the final decision.<sup>14</sup>

The universal jurisdiction cases brought before the National High Court to date have been based on complaints or disputes involving private individuals.<sup>15</sup> For example, the Center for Justice and Accountability (CJA) worked with the Spanish Human Rights Association (APDHE) to launch a criminal prosecution against perpetrators of the Jesuit massacres in El Salvador.<sup>16</sup>

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<sup>9</sup> *Ley De Enjuiciamiento Criminal (Code of Criminal Procedure)* arts 303, 308.

<sup>10</sup> *Ley De Enjuiciamiento Criminal (Code of Criminal Procedure)* arts 101, 270; *Ley Organica del Poder Judicial* art 19.1 (Act No. 6/1985) (Spain) (unofficial English translation) [LOPJ]; Ambos, *supra* note 2 at 433 – 434.

<sup>11</sup> Spanish Submissions to the United Nations, *supra* note 2 at 3; Tribunal Constitucional, STC Dec 21, 1992 (241/1992)(Spain); Ambos, *supra* note 2 at 434; “The Spanish National Court: An Overview of La Audiencia Nacional”, *supra* note 3.

<sup>12</sup> *Ley De Enjuiciamiento Criminal (Code of Criminal Procedure)* Art 24; arts. 270(I), (II), 280-81; Langer, *supra* note 3 at 33.

<sup>13</sup> *Ley De Enjuiciamiento Criminal (Code of Criminal Procedure)* art 313; Langer, *supra* note 3 at 33.

<sup>14</sup> *Ibid.*

<sup>15</sup> Spanish Submissions to the United Nations, *supra* note 2 at 3; *Report of the UN Secretary General: The scope and application of the principle of universal jurisdiction*, UNGA, 66<sup>th</sup> Session, UN Doc A/66/93 (20 June 2011) at 9.

<sup>16</sup> “Spanish Judge Issues Indictments and Arrest Warrants in Jesuits Massacre Case”, The Center for Justice and Accountability <<http://cja.org/article.php?id=1004>>.

## **4. Universal Jurisdiction Law Prior to the 2009 Amendment**

The Spanish Constitution of 1978 does not contain any provisions related to universal jurisdiction.<sup>17</sup> The exercise of universal jurisdiction is based on domestic legislation, under the general jurisdiction granted by Article 117.3 of the Constitution, which allows Spanish judges and courts to issue and enforce judgments “in accordance with the rules of jurisdiction and procedure established [by law]”.<sup>18</sup>

Spain’s original universal jurisdiction provision was passed in 1985 as Article 23.4 of the *Fundamental Law of the Judiciary (Ley Organica del Poder Judicial)* [“*LOPJ*”].<sup>19</sup> The law recognized universal jurisdiction as one of the bases of jurisdiction of Spanish judges and courts.<sup>20</sup> The *LOPJ* extended the jurisdiction of Spanish courts over certain specified crimes such as genocide, terrorism, and piracy.<sup>21</sup> A residual clause (Article 23.4(h)) also granted jurisdiction over “any other crime which should be prosecuted in Spain pursuant to international treaties or conventions”.<sup>22</sup> This residual clause was interpreted to include the ability to prosecute torture, crimes against humanity, and grave breaches of the Geneva Conventions.<sup>23</sup>

Under Article 23.4 of the *LOPJ*, Spain’s national criminal courts were able to investigate and prosecute individuals suspected of serious international crimes committed outside Spain, regardless of the alleged perpetrator’s or the victim’s nationality or where the crimes were committed.<sup>24</sup> The relevant issue for exercising universal jurisdiction was the alleged commission

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<sup>17</sup> Spanish Submissions to the United Nations, *supra* note 2.

<sup>18</sup> *Report of the UN Secretary General*, *supra* note 15 at 8.

<sup>19</sup> *Ley Organica del Poder Judicial* art 23.4(a) (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*]: “4. Spanish jurisdiction shall also apply to acts committed by Spaniards or foreigners outside the national territory when those acts are classified as one of the following offences under Spanish criminal law: (a) Genocide; (b) Terrorism; (c) Piracy or unlawful seizure of aircraft; (d) Counterfeiting of foreign currency; (e) Crimes related to prostitution; (f) Trafficking in psychotropic, toxic or narcotic drugs; and (g) Any other crime which should be prosecuted in Spain pursuant to international treaties or conventions.”

<sup>20</sup> *Report of the UN Secretary General*, *supra* note 15 at 8.

<sup>21</sup> “The Spanish National Court: An Overview of La Audiencia Nacional”, *supra* note 3.

<sup>22</sup> *Ley Organica del Poder Judicial* art 23.4(Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*]

<sup>23</sup> “The Spanish National Court: An Overview of La Audiencia Nacional”, *supra* note 3; S.T.S [Tribunal Supremo], Dec 11, 2006 (No. 1240/2006) (on grave breaches of the Geneva Conventions of 1969 and Additional Protocol I); Langer, *supra* note 3 at 33; Wilson, *supra* note 4.

<sup>24</sup> Amnesty International Espana “La Lucha contra la impunidad a traves de la juridiccion universal” (2008) at 7; “Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union” Redress and the International Federation of Human Rights (FIDH) (December 2010).

of one or more of the crimes listed in Article 23.4.<sup>25</sup> The one restriction was the principle of *res judicata*, under which Spanish courts could not exercise jurisdiction if “the perpetrator [had] been acquitted, pardoned or convicted abroad”.<sup>26</sup>

There were three amendments to the *LOPJ* prior to the November 2009 amendment at issue in this memorandum. On 10 December 2003, *Organization Act No. 18/2003*, on cooperation with the International Criminal Court (ICC), added the requirement of subsidiary universal jurisdiction for crimes that may fall within the jurisdiction of the ICC.<sup>27</sup> The ICC has the first option to exercise jurisdiction over these crimes.<sup>28</sup> Spain can prosecute the crimes under the *LOPJ* if the ICC chooses not to exercise its jurisdiction.<sup>29</sup>

On 8 July 2005, *Organization Act No. 3/2005* added female genital mutilation to the list of crimes that could be prosecuted under universal jurisdiction.<sup>30</sup> Unlike other crimes that fall under the universal jurisdiction provision, perpetrators of female genital mutilation must be present in Spain in order to be prosecuted.<sup>31</sup>

On 19 November 2007, *Organization Act No. 13/2007* added human trafficking or smuggling of persons to the list of crimes that could be prosecuted under universal jurisdiction.<sup>32</sup>

The following cases were brought under the universal jurisdiction law prior to the 2009 amendment to the *LOPJ*:<sup>33</sup>

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<sup>25</sup> Spanish Submissions to the United Nations Sixth Committee, *supra* note 2 at 4.

<sup>26</sup> Spanish Submissions to the United Nations, *supra* note 2 at 5; *Ley Organica del Poder Judicial* arts 23.2(c), 23.5 (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*].

<sup>27</sup> Spanish Submissions to the United Nations, *supra* note 2 at 4, 8; Organization Act No. 18/2003 (Dec 10 2003) art 7: “2. When a complaint or dispute is brought before a judicial body or a body of the Office of the Public Prosecutor or when a ministerial department receives a request relating to acts that have taken place in other States, the alleged authors of which are not Spanish nationals and in the prosecution of which the [International Criminal] Court may have jurisdiction, those bodies shall not open any proceedings and should limit themselves to informing the author of the complaint, party to the dispute or requesting party of the possibility of applying directly to the Court Prosecutor, who may, in turn, initiate an investigation without prejudice to the taking, where necessary, of any urgent preliminary measures for which they have competence. In the same circumstances, the judicial bodies and the Office of the Public Prosecutor shall refrain from prosecuting *ex officio*. Nevertheless, if the Court Prosecutor does not initiate an investigation or if the Court decides that the matter is inadmissible, the complaint, dispute or request may be brought before the relevant authorities a second time.”

<sup>28</sup> Spanish Submissions to the United Nations, *supra* note 2 at 9.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* at 3; Organization Act No.3/2005 of 2 July (Official Gazette No. 163 of 9 July 2005).

<sup>31</sup> Spanish Submissions to the United Nations, *supra* note 2 at 9.

<sup>32</sup> *Ibid* at 4; Organization Act No.13/2007 of 19 November (Official Gazette No. 278 of 20 November 2007).

- *Pinochet* case (Chile, 1996)
- *Scilingo and Cavallo* cases (Argentina, 1998)
- *Guatemala* case (1999)
- *Falun Gong* case (China, 2003)
- *Rwanda* case (2004)
- *Tibet* case (China, 2006 and 2008)
- *Sahara* case (2006)
- *Atenco* case (gender-based murders in Mexico, 2008)
- *Nazi concentration camps* case (2008)
- *Gaza* case (2008)
- *United States Torture Program* case (2009)
- “*Bush 6*” case (2009)

The only person convicted before the National High Court under the universal jurisdiction law is retired Argentine naval officer Adolfo Scilingo. Scilingo was convicted for his role in 30 murders, one arbitrary detention, and 225 arbitrary detentions (as an accomplice) during Argentina’s “dirty war” between 1976 and 1983.<sup>34</sup> Scilingo brought unsuccessful appeals before the Spanish Supreme Court and the Constitutional Court.<sup>35</sup> The Supreme Court upheld Scilingo’s conviction for crimes against humanity despite the absence of an explicit provision for crimes against humanity in the Spanish Criminal Code at the time of the offence.<sup>36</sup> The Court affirmed Spanish extraterritorial jurisdiction over crimes against humanity by analogy and cited the importance of customary international law, which covered such crimes.<sup>37</sup> The Supreme Court did overturn the National High Court’s conviction of Scilingo for torture, genocide, and terrorism.<sup>38</sup> Scilingo is currently serving his 25 year sentence in Spain.<sup>39</sup> The maximum amount of time a

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<sup>33</sup> Spanish Submissions to the United Nations, *supra* note 2 at 13 (There are two pending investigations against Americans accused of torture: the investigation into the U.S. torture program (Court 5) and the “Bush 6” case (Court 6)).

<sup>34</sup> Spanish Submissions to the United Nations, *supra* note 2 at 15; Wilson, *supra* note 4; “Universal Jurisdiction: UN General Assembly should support this essential international justice tool” Amnesty International (October 2010) at 41 (Index: IOR 53/015/2010); Langer, *supra* note 3 at 34; Ignacio de la Rasilla del Moral, “The Swan Song of Universal Jurisdiction in Spain” (2009) *International Criminal Law Review* 777 at 806.

<sup>35</sup> Spanish Submissions to the United Nations, *supra* note 2 at 15.

<sup>36</sup> Wilson, *supra* note 4 (See further discussion at pages 10-12 of this memorandum).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* Different sources cite different lengths for Scilingo’s original sentence. Spain’s submissions to the UN General Assembly say 1084 years [Spanish Submissions to the United Nations, *supra* note 2 at 3], but the BBC says the sentence was for 640 years [BBC Profile: Judge Baltasar Garzon, *supra* note 6]. On 1 December 2008, Scilingo filed a complaint with the European Court of Human Rights for alleged violation of his right to a fair trial.

person convicted of a non-terrorist offence in Spain can spend in jail is 30 years, regardless of the original sentence.<sup>40</sup>

## 5. 2009 Amendment to the Universal Jurisdiction Law

*Organization Act No. 1/2009* amended the *Fundamental Law of the Judiciary* (“*LOPJ*”). The amendment to Article 23.4 of the *LOPJ* was approved by the Counsel of Deputies in June 2009, passed by the Senate in October 2009, and came into force on 3 November 2009 (“2009 Amendment”).<sup>41</sup> The 2009 Amendment imposed new requirements on initiating a criminal prosecution under Spain’s universal jurisdiction law. The amendment was intended to redefine and narrow the scope of the universal jurisdiction principle in Spain.<sup>42</sup>

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<sup>40</sup> “‘Dirty war’ officer found guilty” BBC News (19 April 2005) online BBC News <<http://news.bbc.co.uk/2/hi/europe/4460871.stm>>

<sup>41</sup> *Ley Organica del Poder Judicial* art 23.4(a) (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*]: “Article 23(4) Spanish jurisdiction will be likewise competent to know the actions committed by Spanish or foreign people out of national territory which can be categorized, according to Spanish law, as any of the following crimes: a) Genocide and crimes against humanity b) Terrorism c) Piracy and illegal aircraft seizure d) Crimes regarding prostitution and corruption of children and incapable people e) Illegal trafficking in narcotic drugs, psychotropic and toxic substances f) Illegal immigration or trafficking of human beings, regardless of whether they are workers or not g) Crimes regarding female ablation, when the people responsible are in Spain h) Any other crime that, according to international treaties and conventions, especially the Conventions on humanitarian international law and protection of human rights, a person must be prosecuted for in Spain; Without prejudice to the provisions of international treaties and agreements signed by Spain, in order for Spanish courts to have jurisdiction over the [...] offences [listed in art. 23.4 of Act No. 6/1985], it must be established that the alleged perpetrators are present in Spain, that there are victims of Spanish nationality or that there is some relevant link with Spain and, in any event, that no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes. The criminal proceedings initiated in a Spanish court shall be temporarily stayed where it has been established that proceedings based on the alleged acts have been initiated in the country or by a Court referred to in the previous paragraph.”]; Spanish Submissions to the United Nations, *supra* note 2 at 4, 10; “Extraterritorial Jurisdiction in the European Union”, *supra* note 24.

<sup>42</sup> Spanish Submissions to the United Nations, *supra* note 2 at 3. (The 2009 law also removed the crime of counterfeiting foreign currency.)



## 5.1 Laws Covered by the Amendment

Under the amended Article 23.4 of the *LOPJ*, the following crimes can be prosecuted under the universal jurisdiction provision:

- (a) Genocide and crimes against humanity;
- (b) Terrorism;
- (c) Piracy or unlawful seizure of aircraft;
- (d) Crimes related to the prostitution or corruption of minors and legally incompetent persons;
- (e) Trafficking in psychotropic, toxic or narcotic drugs;
- (f) Trafficking or smuggling of persons, including workers;
- (g) Crimes relating to female genital mutilation if the perpetrators are present in Spain;
- (h) Any other crime that should be prosecuted in Spain under international treaties and conventions, especially international humanitarian law and human rights treaties.<sup>43</sup>

### ***Crimes against humanity: Article 23.4 (a)***

Prior to the 2009 Amendment, crimes against humanity were not explicitly listed in the *LOPJ*, but were admissible as a criminal act in violation of international treaties under the residual clause of the *LOPJ* (Article 23.4(h)).<sup>44</sup> However, the Spanish Supreme Court had affirmed Spanish extraterritorial jurisdiction over crimes against humanity in the October 2007 *Scilingo* decision.<sup>45</sup>

The 2009 Amendment officially added crimes against humanity to the specified crimes under Article 23.4 of the *LOPJ*. Article 607 bis of the *Spanish Criminal Code* incorporates crimes against humanity into the domestic criminal code.<sup>46</sup> The definition of crimes against humanity found in Article 607 bis states:

1. Those who commit the offences set out below as part of a generalized or systematic attack against the whole or part of the civilian population shall be guilty of crimes against humanity,  
In any event, the commission of such offences shall be considered to be crimes against humanity:

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<sup>43</sup> *Ley Organica del Poder Judicial* art 23.4 (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*]; Spanish Submissions to the United Nations, *supra* note 2 at 11.

<sup>44</sup> *Ley Organica del Poder Judicial* art 23.4(g) (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*] (“Any other crime which should be prosecuted in Spain pursuant to international treaties or conventions”).

<sup>45</sup> Wilson, *supra* note 4. (See further discussion at pages 10-12 of this memorandum).

<sup>46</sup> *Ibid*; *Spanish Criminal Code*, Chapter II bis, Article 607 bis.

1<sup>st</sup>. Where they take place because of membership of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognized as impermissible under international law.

2<sup>nd</sup>. In the context of institutionalised oppression and systematic domination of one racial group over one or more racial groups and where it is intended to maintain this situation.<sup>47</sup>

Under Article 607 bis, the following offences constitute crimes against humanity where they meet the above requirements: murder; rape; sexual assault; subjecting people to living conditions where their lives are endangered; forcible deportation or transfer which is unauthorised under international law of one or more persons to another State or place, by way of expulsion or other coercive acts; forced pregnancy of any woman with the intent of affecting the ethnic composition of the population; detaining any person and subsequently refusing to recognise such deprivation of physical liberty or give information on the fate or whereabouts of the detained person; detaining another, depriving him of his physical liberty, in violation of the rules of international law; torture of persons under your custody or control (for the purposes of this Article, torture means subjecting people to physical or mental suffering); transfer of people from one place to another, for the purpose of sexual exploitation, using violence, intimidation or deceit, or by abusing a situation of superiority, or the need or vulnerability of the victim; and slavery.<sup>48</sup>

Unlike war crimes, crimes against humanity need not occur during armed conflict. In the *Scilingo* case, the Spanish Supreme Court noted the removal of the armed conflict requirement for crimes against humanity.<sup>49</sup>

The inclusion of requirements related to membership of “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds” is more akin to international definitions of genocide. International legal definitions of crimes against humanity do not include such a requirement.<sup>50</sup> The key difference between the Spanish definitions of

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<sup>47</sup> *Ibid*; “Extraterritorial Jurisdiction in the European Union”, supra note 24.

<sup>48</sup> *Código Penal (Spanish Criminal Code)*, chapter II bis, art 607 bis (unofficial English translation).

<sup>49</sup> Wilson, supra note 4.

<sup>50</sup> *Rome Statute of the International Criminal Court: Article 7, Crimes against humanity:*

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

genocide and crimes against humanity is likely that genocide requires the intention to destroy that identifiable group, whereas crimes against humanity does not require that intention.<sup>51</sup>

There is as yet no judgment which interprets the Spanish definition of crimes against humanity, so it is unclear how Spanish courts will treat this issue. If the court strictly interprets the “identifiable group” addition to the crimes against humanity definition, it will be more difficult to bring a charge on these grounds. However, it may be possible to argue that the Spanish definition should be interpreted in line with the definition of crimes against humanity found in international treaties and conventions to which Spain is a signatory. These definitions do not include an “identifiable group requirement”.

#### *Relevant Cases:*

Article 607 bis did not enter into force until 1 October 2004, after Spain adopted the *Rome Statute* of the International Criminal Court.<sup>52</sup> In the *Scilingo* case, Scilingo’s counsel argued that his conviction for crimes against humanity violated the legality principle, which requires adequate notice to the accused that such conduct is illegal.<sup>53</sup> At the time Scilingo allegedly committed the offences, an explicit prohibition regarding crimes against humanity did not exist in the Spanish *Criminal Code*. However, Scilingo’s argument was dismissed on a number of

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- (c) Enslavement;
  - (d) Deportation or forcible transfer of population;
  - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - (f) Torture;
  - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
  - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
  - (i) Enforced disappearance of persons;
  - (j) The crime of apartheid;
  - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>51</sup> *Codigo Penal (Spanish Criminal Code)*, Chapter II – Offences of Genocide, Article 607 (unofficial English translation) (“1. Those who carry out any of the following acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group...”).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

grounds. The Chamber held that Article 607 bis incorporated previously established norms of customary international law.<sup>54</sup> The majority noted that Article 10.2 of the *Spanish Constitution of 1978* requires Spanish courts to interpret domestic law in light of international human rights law.<sup>55</sup> The Chamber did not accept “that the accused appellant could not foresee the criminal character of his acts in the moment of their commission and the consequent possibility that a penalty would be imposed.”<sup>56</sup> The 2009 Amendment added crimes against humanity to the explicit list of offences covered by the *LOPJ*.

In a 2008 decision in the *Martinez de Peron* case, the National High Court held that no investigation could take place because the alleged crimes committed in Argentina were not part of a widespread or systematic practice and therefore did not qualify as crimes against humanity; prosecution was thus barred by statutory limitations.<sup>57</sup>

The preliminary investigation into the U.S. torture program began in April 2009.<sup>58</sup> On 27 January 2010, Judge Garzón found that Spain had jurisdiction over this case and allowed it to proceed.<sup>59</sup> The Court held that the sole requirement at the time of initiating the preliminary investigation is defining the crime as one of the offences under Article 23.4.<sup>60</sup> Judge Garzón held that the burden is on the defendant to prove that jurisdiction is not proper.<sup>61</sup> Judge Garzón referenced Article 23(4)(a) and (h)<sup>62</sup> since the alleged crimes constitute crimes against humanity and are covered by international treaties, including the *Third and Fourth Geneva Conventions*, the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, and the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>63</sup> The

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid* (“Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”); Wilson, *supra* note 4.

<sup>56</sup> Decision, Fundamentos, Sexto; Wilson, *supra* note 4.

<sup>57</sup> Audiencia Nacional, Sala de lo Penal, Seccion Segunda, Rollo de Sala 12/2007, Extradicion 1/2007, Juzgado Central de Instruccion no 3, 28 April 2008; “Universal Jurisdiction” Amnesty International (October 2010), *supra* note 34.

<sup>58</sup> There are two pending investigations against Americans accused of torture: the investigation into the U.S. torture program (Court 5) and the “Bush 6” case (Court 6).

<sup>59</sup> “*The Spanish Investigation into U.S. Torture*” Center for Constitutional Rights <<http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture>>

<sup>60</sup> National Court Madrid Decision, Jan 27, 2010 at 15 (unofficial English translation).

<sup>61</sup> National Court Madrid Decision, Jan 27, 2010 at 14 (unofficial English translation).

; “*The Spanish Investigation into U.S. Torture*” Center for Constitutional Rights, *supra* note 59.

<sup>62</sup> “*The Spanish Investigation into U.S. Torture*” Center for Constitutional Rights, *supra* note 59.

<sup>63</sup> *Ibid.*

January 2010 decision stated that the limitations imposed in Article 23(4) would always be subordinated to the international conventions and treaties ratified by Spain, which impose the obligation to prosecute crimes against humanity and torture.<sup>64</sup>

The *Ashraf* case is an investigation of Iraqi soldiers and police officers for alleged indiscriminate violence against unarmed civilians in the Ashraf Camp in Iraq on 28-29 July 2009, which resulted in 11 deaths, multiple injuries, and the detention of 36 people.<sup>65</sup> The defendant is Lieutenant General Abdol Hossein Al Shemmari, who was in command of the 9<sup>th</sup> Badr Brigade, which allegedly launched a deliberate and planned attack against the camp.<sup>66</sup> The complaint included allegations of crimes against humanity (Article 607 bis of the Spanish *Criminal Code*), offences against protected persons and property during armed conflict (Articles 608 – 614 bis) in conjunction with murder (Articles 139, 1 and 3), serious injury (Article 174), illegal detention (Article 163), torture (Article 174), and damage (Article 263), which all relate to violations of the *Fourth Geneva Convention* concerning the protection of civilians during war.<sup>67</sup> With reference to Article 146 of the *Fourth Geneva Convention*, Judge Andreu held that Spanish courts did have jurisdiction over the case.<sup>68</sup>

### ***Applying international treaties and conventions: Article 23.4(h)***

Article 23.4(h) of the 2009 Amendment provides jurisdiction over, “Any other crime that should be prosecuted in Spain under international treaties and conventions, especially international humanitarian law and human rights treaties.”<sup>69</sup>

Articles 27 and 28 of the *Vienna Convention on the Law of Treaties*, state that every treaty in force is binding upon its parties and must be performed by those parties in good faith.<sup>70</sup> Spanish accession to the *Vienna Convention on the Law of Treaties* occurred on 16 May 1972.<sup>71</sup>

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<sup>64</sup> National Court Madrid Decision, Jan 27, 2010 at 13 (unofficial English translation).

<sup>65</sup> Audiencia Nacional, Central Investigation Court Number 4, Madrid, *Ashraf* case at 1 (27 December 2010).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention); Langer, *supra* note 3 at 40.

<sup>69</sup> *Ley Organica del Poder Judicial* art 23.4(h) (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*].

***Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture)***

In the *Pinochet*, *Scilingo*, and *Cavallo* cases, the National High Court held that the *Convention against Torture* would constitute a treaty recognized under Article 23.4 since Spain is a party to the convention.<sup>72</sup> Article 1 of the *Convention against Torture* defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>73</sup>

The *Convention against Torture* provides for universal jurisdiction if a state decides not to extradite the individual concerned to another state.<sup>74</sup> Article 5.2 states, “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him...”<sup>75</sup> Article 6.1 states, “[A]ny State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence.”<sup>76</sup> Article 7.1 states that if the State Party does not extradite the person alleged to have committed the offence, it must “submit the case to its competent authorities for the purpose of prosecution.”<sup>77</sup>

In the *Furundzija* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that torture was subject to universal jurisdiction by any state, as a consequence of the

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<sup>70</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS (entered into force 27 January 1980). <<http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTS&no=XXIII~1&chapter=23&Temp=mt&lang=en>>

<sup>71</sup> *Ibid*

<sup>72</sup> “Universal Jurisdiction: A Preliminary Survey of Legislation Around the World” Amnesty International (October 2011) Index: IOR 53/004/2011 at p. 105; Ambos, *supra* note 2 at 442.

<sup>73</sup> *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, UNTS, art 1 (entered into force 26 June 1987) [*Convention against Torture*].

<sup>74</sup> *Ibid.* arts. 5.2, 6.1 and 7.1.

<sup>75</sup> *Ibid.*, art. 5.2.

<sup>76</sup> *Ibid.*, art. 6.1.

<sup>77</sup> *Ibid.*, art. 7.1.

peremptory character of the prohibition of torture under international law. The ICTY Trial Chamber stated that:

... [O]ne of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.<sup>78</sup>

*Relevant Cases:*

In the *Scilingo* case, the Spanish Supreme Court overturned Scilingo's conviction for torture because the offence of torture did not appear in Spanish law until it was incorporated into the *Criminal Code* under Article 204 bis on 17 July 1978. Scilingo's alleged torturous acts took place before that date.

***War Crimes and the Geneva Conventions***

In the 2009 amendment of the *LOPJ*, the Spanish Senate removed war crimes from the list of applicable crimes under Article 23.4(a).<sup>79</sup> Despite the narrowing of the universal jurisdiction law, it should still be possible to prosecute grave breaches of the *Geneva Conventions* under Article 23.4(h), which concerns Spain's obligations under international treaties and conventions.<sup>80</sup> According to Spain's submissions to the 64<sup>th</sup> Session of the United Nations General Assembly,

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<sup>78</sup> "Universal Jurisdiction" Amnesty International (October 2010), *supra* note 34 at 59.

<sup>79</sup> Ambos, *supra* note 2 at 436.

<sup>80</sup> *Ibid* at 436-437.

war crimes are included in the reference to international humanitarian law treaties under Article 23.4(h).<sup>81</sup>

The *Geneva Conventions* of 12 August 1949 provide for universal jurisdiction with regard to war crimes in international armed conflict which are defined as grave breaches of the *Geneva Conventions*.<sup>82</sup> The *Additional Protocol to the Geneva Conventions* (1977) provides for universal jurisdiction over grave breaches of that Protocol.<sup>83</sup> In its opinion of 26 May 2010, the United Nations International Law Commission held that the obligation to prosecute serious violations described in the *Fourth Geneva Convention* under the principles of universal jurisdiction “is not conditioned by any jurisdictional consideration of the States”.<sup>84</sup>

The presence of armed conflict remains a requirement for the *Geneva Conventions* to apply. According to Common Article 2 of the *Geneva Conventions*, “grave breaches” of the *Conventions* may only be committed in an international armed conflict, where “international armed conflicts” are defined as conflicts between states.<sup>85</sup>

Common Article 3 of the *Geneva Conventions* covers cases of “armed conflict not of an international character” occurring in the territory of one of the High Contracting Parties.<sup>86</sup> The

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<sup>81</sup> Spanish Submissions to the United Nations, *supra* note 2 at 12.

<sup>82</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention), art. 49; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), art. 50; *Geneva Convention relative to the Treatment of Prisoners of War* (Third Geneva Convention), art. 129; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), art. 146.

<sup>83</sup> *Additional Protocol I*, art. 85.1 (entered into force on 7 December 1978).

<sup>84</sup> UN International Law Commission, 26 May 2010, Ashraf Case: Audiencia Nacional, Central Investigation Court Number 4, Madrid (27 December 2010) at 5.

<sup>85</sup> *Geneva Conventions*, Common Article 2 (“Art. 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”).

<sup>86</sup> *Geneva Conventions*, Common Article 3 (“Article 3: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;  
(b) taking of hostages;



precise threshold of conflict at which Common Article 3 becomes applicable is not defined.<sup>87</sup>

There does not appear to be a universally accepted definition of internal armed conflict. However, international jurisprudence provides some characteristics to distinguish armed conflict from internal disturbances. The ICTY and the International Criminal Tribunal for Rwanda (ICTR) have emphasized that since an armed conflict suggests “the existence of hostilities between armed forces organized to a greater or lesser extent,” it is “necessary to evaluate both the intensity of the conflict and the organization of the parties.” The ICTY and ICTR have looked at the following factors to determine whether the intensity of the conflict and the organization of the parties indicates the presence of armed conflict:

- the seriousness of the attacks;<sup>88</sup>
- their spread over territory and over a period of time;<sup>89</sup>
- the increase in the number of government forces;<sup>90</sup>
- the organized nature of the rebel group (taking into account such factors as the existence of headquarters, designated zones of operation and the ability to procure, transport and distribute arms);<sup>91</sup> and
- whether the conflict attracted attention from the United Nations Security Council.<sup>92</sup>

The *Tablada* case before the Inter-American Commission on Human Rights<sup>93</sup> also discussed the characteristics of armed conflict. The Commission held that the level of violence rather than the conflict’s duration is the main distinguishing feature between armed conflicts and internal

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(c) outrages upon personal dignity, in particular humiliating and degrading treatment;  
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.  
(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”)

<sup>87</sup> Fionnuala Ni Aoláin, “*Hamdan* and Common Article 3: Did the Supreme Court Get It Right?” (2007) *Minnesota Law Review* at 1528.

<sup>88</sup> *Prosecutor v Tadic*, IT-4-1-T, trial judgment, 7 May 1997 at para 565.

<sup>89</sup> *Ibid* at para 566.

<sup>90</sup> *Prosecutor v Milosevic*, IT-02-54-T at para 30-31.

<sup>91</sup> *Ibid* at para 23-24.

<sup>92</sup> *Prosecutor v Mrkscik and Sljivancanin*, Case No IT-95-13/I-T at paras 28-31.

<sup>93</sup> *Abella v Argentina* (1997), Inter-Am Comm HR, No. 55/97, Case No 11,137.

disturbances. Internal armed conflicts do not “require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory.”<sup>94</sup> Despite the fact that the armed confrontation in the *Tablada* case lasted only 30 hours, the Inter-American Commission on Human Rights concluded that it amounted to an armed conflict due to the “concerted nature of the hostile attacks undertaken by the attackers, the direct involvement of governmental armed forces and the nature and level of violence attending the events.”<sup>95</sup>

Recognition of an “armed conflict” would also affect the application of specific sections of the Spanish *Criminal Code*. Articles 608 – 614 bis of the Spanish *Criminal Code* cover “Offences against Protected Persons and Property in the event of armed conflict”.<sup>96</sup> Each of these articles requires the presence of armed conflict. However, “armed conflict” is not defined under Spanish law.<sup>97</sup>

#### *Relevant Cases:*

In two cases, Spanish judges have interpreted the “residual” clause in Article 23.4(h).

In the United States torture case, Judge Garzón held that Article 23.4(h) was applicable since the alleged crimes constitute crimes against humanity and are covered by international treaties, including the Third and Fourth *Geneva Conventions*, the *Convention against Torture*, and the *ICCPR*.<sup>98</sup>

In the *Ashraf* case, Judge Andreu Merelles held that the amended *LOPJ* specifies that it should not bar proceedings authorized by treaties and conventions ratified by Spain. With reference to Article 146 of the *Fourth Geneva Convention*, Judge Andreu held that Spanish courts did have jurisdiction over the case.<sup>99</sup> The National High Court noted that under Article 146 of the *Fourth Geneva Convention*, state signatories have an obligation to investigate, prosecute, and sentence

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<sup>94</sup> *Ibid* at para 153.

<sup>95</sup> *Ibid* at para 155.

<sup>96</sup> *Codigo Penal (Spanish Criminal Code)*: Article 609 (mistreatment); Article 610 (prohibited methods of warfare); Article 611 (indiscriminate attacks); Article 612 (violation of the right to health); Article 613 (attacks against property); Article 614 (acts contrary to the provisions of international treaties).

<sup>97</sup> Interview with Hugo Relva, Legal Advisor, Amnesty International (November 2011).

<sup>98</sup> “*The Spanish Investigation into U.S. Torture*” Center for Constitutional Rights, *supra* note 59.

<sup>99</sup> *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention); Langer, *supra* note 3 at 40.

persons who have committed serious violations of the Conventions, and make them appear before their Courts, “regardless of their nationality”.<sup>100</sup>

## 5.2 Nexus Requirements

The 2009 Amendment introduced nexus requirements to Article 23.4 and Article 23.5 of the *LOPJ*. The 2009 amendment states that, “without prejudice to the provisions of the international treaties and agreements signed by Spain, in order for Spanish courts to have jurisdiction...it must be established that the alleged perpetrators are present in Spain, that there are victims of Spanish nationality or that there is some relevant link with Spain.”<sup>101</sup>

What constitutes a “relevant link” to Spain is not defined in the law.<sup>102</sup> Since the law is still relatively new, there could be room to interpret this provision in an expansive way.

In submissions to the United Nations General Assembly, Spain explained that the, “Without prejudice to the provisions of international treaties and agreements signed by Spain”<sup>103</sup> wording means the restrictions on universal jurisdiction will not apply where Spain has an obligation under an international treaty to prosecute certain crimes, regardless of where the crimes were committed or the nationality of the perpetrator.<sup>104</sup> This explanation supports the previous analysis regarding Article 23.4(h). A broad interpretation of the “without prejudice” phrase could provide scope to bring charges related to breaches of the *Convention against Torture, Geneva Conventions*, or other international treaties signed by Spain. However, it is important to note that the purpose of adding the nexus requirements was to narrow the scope of the universal jurisdiction law.

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<sup>100</sup> Ashraf Case: Audiencia Nacional, Central Investigation Court Number 4, Madrid (27 December 2010) at 5.

<sup>101</sup> *Ley Organica del Poder Judicial* art 23.4 (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*]; Spanish Submissions to the United Nations, *supra* note 2 at 10; Rasilla del Moral, *supra* note 34 at 778.

<sup>102</sup> “Extraterritorial Jurisdiction in the European Union”, *supra* note 24.

<sup>103</sup> Spanish Submissions to the United Nations, *supra* note 2 at 10-11.

<sup>104</sup> *Ibid* at 11.

*Relevant Cases:*

The preliminary investigation into the United States' torture program began in April 2009.<sup>105</sup> On 27 January 2010, Judge Garzón found that Spain had jurisdiction over the case and allowed it to proceed.<sup>106</sup> The Court held that the sole requirement at the time of initiating the preliminary investigation is defining the crime as one of the offences under Article 23.4.<sup>107</sup> Judge Garzón held that the burden is on the defendant to prove that jurisdiction is not proper.<sup>108</sup> Judge Garzón's decision to allow the case to proceed was partially based on the Spanish citizenship and residency of two of the victims.<sup>109</sup> Judge Garzón also cited Spain's previous request for their extradition as evidence of a link between the victims and Spain. However, Judge Garzón found that even in the absence of these links between the victims and Spain, Spain would still have jurisdiction over the case under Article 23(4)(a) and (h)<sup>110</sup> since the alleged crimes constitute crimes against humanity and are covered by international treaties, including the *Third and Fourth Geneva Conventions*, the *Convention against Torture*, and the *ICCPR*.<sup>111</sup> The January 2010 decision stated that the limitations imposed in Article 23(4) would always be subordinated to the international conventions and treaties ratified by Spain, which impose the obligation to prosecute crimes against humanity and torture.<sup>112</sup>

The *Ashraf* case involves an investigation of Iraqi soldiers and police officers for alleged indiscriminate violence against unarmed civilians in the Ashraf Camp in Iraq on 28-29 July 2009, which resulted in 11 deaths, multiple injuries, and the detention of 36 people.<sup>113</sup> The Prosecutor initially sought dismissal of the complaint for its failure to meet the nexus requirements: the perpetrators were not in Spain, the victims were not Spanish, and there was no other relevant link between the case and Spain.<sup>114</sup> Judge Andreu Merelles held that the amended *LOPJ* specifies that it should not bar proceedings authorized by treaties and conventions ratified

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<sup>105</sup> There are two pending investigations against Americans accused of torture. This investigation into the U.S. torture program (Court 5) is distinct from the "Bush 6" case (Court 6).

<sup>106</sup> "The Spanish Investigation into U.S. Torture" Center for Constitutional Rights, *supra* note 59.

<sup>107</sup> Jan. 27, 2010 National Court Madrid Decision at 15 (unofficial English translation).

<sup>108</sup> Jan. 27, 2010 National Court Madrid Decision at 14 (unofficial English translation); "The Spanish Investigation into U.S. Torture" Center for Constitutional Rights, *supra* note 59.

<sup>109</sup> Jan. 27, 2010 National Court Madrid Decision (unofficial English translation).

<sup>110</sup> "The Spanish Investigation into U.S. Torture" Center for Constitutional Rights, *supra* note 59.

<sup>111</sup> *Ibid.*

<sup>112</sup> Jan. 27, 2010 National Court Madrid Decision at 13 (unofficial English translation).

<sup>113</sup> *Ashraf* Case: Audiencia Nacional, Central Investigation Court Number 4, Madrid (27 December 2010) at 1.

<sup>114</sup> *Ibid.*; J.C.I. No. 4, A.N. Madrid, Diligencias previas 211/2009, Auto, Nov. 26, 2009; Langer, *supra* note 3 at 40.

by Spain. With reference to Article 23.4(a) and (h) of the *LOPJ* and Article 146 of the *Fourth Geneva Convention*, Judge Andreu held that Spanish courts did have jurisdiction over the case.<sup>115</sup> This decision still needs to be reviewed by higher Spanish courts.

In an order from 4 November 2010, the Criminal Branch of the National High Court agreed to halt proceedings against Chinese officials in the *Tibet* case because of a lack of any link between the crimes allegedly committed in Tibet in 2008 and Spain.<sup>116</sup>

### 5.3 Subsidiarity

The Spanish Supreme Court read a subsidiarity principle into the old universal jurisdiction law, but after the 2009 Amendment, subsidiarity is explicitly part of the written law.<sup>117</sup> For Spain to have jurisdiction under Article 23.4, it has to be proved that “no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes.”<sup>118</sup> Criminal proceedings initiated under Spanish jurisdiction “shall be temporarily stayed where it has been established that proceedings based on the alleged acts have been initiated in the country or by a Court referred to in the previous paragraph”.<sup>119</sup>

#### *Relevant Cases:*

The *Bush 6* case involved the investigation of six high level American government officials.<sup>120</sup> On March 17, 2009, a criminal complaint was filed against David Addington (former Counsel to

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<sup>115</sup> *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention); Langer, *supra* note 3 at 40.

<sup>116</sup> Spanish Submissions to the United Nations, *supra* note 2 at 11; J.C.I. No. 1, A.N. Madrid, Diligencias previas 242/2008, Auto, Feb. 27, 2010; Langer, *supra* note 3 at 41.

<sup>117</sup> Ambos, *supra* note 2 at 440.

<sup>118</sup> *Ley Organica del Poder Judicial* art 23.4 (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*]; Spanish Submissions to the United Nations, *supra* note 2 at 10.

<sup>119</sup> *Ibid.*

<sup>120</sup> There are two pending investigations into the U.S. torture program: the open investigation into the U.S. torture program (Court 5) and the “Bush 6” case (Court 6).

and Chief of Staff for former U.S. Vice President Cheney), Jay S. Bybee (former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice), Douglas Feith (former Under Secretary of Defense for Policy, Department of Defense), Alberto Gonzales (former Counsel to former President George W. Bush, and former Attorney General of the United States), William J. Haynes (former General Counsel, Department of Defense), and John Yoo, (former Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice).<sup>121</sup> The “Bush Six” were alleged to have participated in or aided and abetted the torture and abuse of individuals detained at Guantánamo Bay and other overseas locations,<sup>122</sup> and to have committed numerous violations of international law, including violations of the *Geneva Conventions* and the *Convention against Torture*.<sup>123</sup>

The *Bush 6* case was initially handled by Judge Garzón, but was transferred to Judge Eloy Velasco on 23 April 2009. On 7 April 2010, Judge Velasco issued an order asking the parties to submit briefs as to the effect of the 2009 Amendment to the *LOPJ* on the investigation.<sup>124</sup> The U.S. indicated it was investigating the *Bush 6* claims and the subsidiarity principle in the *LOPJ* requires Spanish proceedings to be stayed when proceedings have been initiated in another competent country or court. On 13 April 2011, Judge Velasco issued a ruling where he “temporarily stayed” the case in Spain and transferred it to the U.S. Department of Justice “for it to be continued, urging it to indicate at the proper time the measures finally taken by virtue of this transfer of procedure.”<sup>125</sup> Judge Velasco’s decision was appealed on 19 April 2011.<sup>126</sup>

Subsidiarity was also at issue in the *Ashraf* case. After the complaint was brought, the Spanish National High Court sent out an International Rogatory Letter to the judicial authorities of the Republic of Iraq, asking whether there exists or previously existed, any legal procedure for the investigation of the facts set out in the complaint, and if applicable, what the outcome was.<sup>127</sup> Iraq responded and said that it had already carried out a legal investigation into the case.<sup>128</sup> However, the plaintiffs produced reports from United Nations rapporteurs which indicated that

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<sup>121</sup> “*The Spanish Investigation into U.S. Torture*” Center for Constitutional Rights, *supra* note 59.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ashraf* Case: Audiencia Nacional, Central Investigation Court Number 4, Madrid (27 December 2010).

<sup>128</sup> *Ibid.* at 2.

there had been no investigation or prosecution.<sup>129</sup> The National High Court held that for a report to sufficiently establish the existence of an effective investigation and prosecution, it must state what authority is conducting the investigation, the date the investigation started, the steps that have been taken, and the outcome, if any.<sup>130</sup> The decision to grant the Spanish court jurisdiction in the *Ashraf* case still needs to be reviewed by a higher court.

## 5.4 Statute of Limitations

Under Article 131.4 of the Spanish *Criminal Code* (amended June 2010), crimes against humanity, genocide, crimes against protected persons and property during armed conflict, and acts of terrorism that have caused the death of at least one person, are exempt from limitation periods.<sup>131</sup>

## 5.5 Immunity

Spanish legislation incorporates general rules of public international law on immunities.<sup>132</sup> Article 21.2 of the *LOPJ* states, “Exceptions [to prosecution] are cases of immunity from legal process established by the rules of public international law.”<sup>133</sup>

Spain is a signatory to the *Vienna Convention on Diplomatic Relations* (“*Vienna Convention*”).<sup>134</sup> Article 29 of the *Vienna Convention* states that, “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.” Under the

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<sup>129</sup> *Ibid* at 5.

<sup>130</sup> *Ibid*.

<sup>131</sup> Boletín Oficial del Estado, Número 152, June 23, 2010 p 54837.

<sup>132</sup> *Ley Organica del Poder Judicial* art 21.2 (Act No. 6/1985) (Spain) (unofficial English translation) [*LOPJ*].

<sup>133</sup> *Ibid*.

<sup>134</sup> Vienna Convention on Diplomatic Relations, UNTS, (18 April 1961)

<[http://unog.ch/80256EDD006B8954/%28httpAssets%29/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20%281961%29%20-%20E.pdf](http://unog.ch/80256EDD006B8954/%28httpAssets%29/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20%281961%29%20-%20E.pdf)>

*Vienna Convention*, a "diplomatic agent" is defined as "the head of the mission or a member of the diplomatic staff of the mission."<sup>135</sup> In the *Djibouti v. France* case, the International Court of Justice ruled that Article 29 of the *Vienna Convention* is a rule of customary international law which is applicable to heads of state.<sup>136</sup>

There do seem to be exceptions to this rule for certain types of international crimes. Article 4 of the *Convention on the Prevention and Punishment of the Crime of Genocide* states that, "Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."<sup>137</sup> Spain is a signatory to this convention.

Article 27 of the *Rome Statute* of the International Criminal Court concerns the irrelevancy of official capacity when prosecuting crimes that fall within the *Statute*. Article 27 states that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>138</sup>

Despite these exceptions, the Spanish National High Court has refused to hear numerous cases involving foreign heads of state. The court ruled that it did not have competence to prosecute Fidel Castro (Cuba), Teodoro Obiang Nguema (Equatorial Guinea), Hassan II (Morocco), Slobodan Milosevic (Serbia; the former Republic of Yugoslavia), Alan Garcia (Peru), Alberto Fujimori (Peru), Silvio Berlusconi (Italy), and Hugo Chavez (Venezuela) because they each benefited from head of state immunity.<sup>139</sup>

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<sup>135</sup> *Ibid.*

<sup>136</sup> Amnesty International 2008, 'Espana: "La lucha contra la impunidad a traves de la juridiccion universal"', *supra* note 24 at 20.

<sup>137</sup> *Ibid*; *Convention on the Prevention and Punishment of the Crime of Genocide*, UNTS (9 December 1948).

<sup>138</sup> *Rome Statute of the International Criminal Court*, 2187 UNTS art. 27 (entered into force on 1 July 2002).

<sup>139</sup> Spanish Submissions to the United Nations, *supra* note 2 at 14; Rasilla del Moral, *supra* note 34 at 784-785.



In 2008, the Spanish National High Court refused to try Paul Kagame, the current president of Rwanda, for his alleged involvement in genocide, crimes against humanity, war crimes, and terrorism because the court ruled that Kagame benefited from head of state immunity under international law.<sup>140</sup> However, the court held that it was competent to prosecute the other accused persons in the case, who were RPF soldiers.<sup>141</sup>

Spain does not recognize the functional immunity of state representatives once they have left office. In the *Pinochet* case, Spanish courts had competence to prosecute Pinochet since he no longer benefitted from head of state immunity.<sup>142</sup>

## **6. Civil Complaint**

Spanish law provides that any criminal complaint filed by a victim is also a civil claim unless the claimant expressly renounces the civil claim.<sup>143</sup> It is also possible to file a separate civil action after criminal responsibility has been proven in a process based on universal jurisdiction.<sup>144</sup>

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<sup>140</sup> Spanish Submissions to the United Nations, *supra* note 2 at 14; Amnesty International 2008, ‘Espana: “La lucha contra la impunidad a traves de la juridiccion universal”’, *supra* note 24 at 20.

<sup>141</sup> Spanish Submissions to the United Nations, *supra* note 2 at 14.

<sup>142</sup> *Ibid* at p. 5.

<sup>143</sup> *Codigo Penal (Spanish Criminal Code)* arts 109, 112.

<sup>144</sup> Amnesty International 2008, ‘Espana: “La lucha contra la impunidad a traves de la juridiccion universal”’, *supra* note 24 at 20.

## 7. Political Considerations

### 7.1 The Spanish Judiciary

Some of the judges who presided over investigations and cases under the pre-2009 universal jurisdiction law are still in place. Spanish judges have life-time tenure.<sup>145</sup>

Spain's most high profile judge, Baltazar Garzón, was behind the investigations of Pinochet, Adolfo Scilingo, and the two investigations into the U.S. torture program.<sup>146</sup> Judge Garzón was suspended from the National High Court in 2010 for allegedly violating his jurisdiction by investigating the execution and disappearance of civilians by supporters of General Franco, despite an amnesty declared in 1977.<sup>147</sup> No date has been set for judgment in that case, but a guilty verdict could result in disciplinary action.<sup>148</sup> On 9 February 2012, the Spanish Supreme Court convicted Judge Garzón and sentenced him to an 11 year suspension from the judiciary for his role in ordering illegal wiretaps of conversations between jailed suspects and their lawyers in a corruption probe.<sup>149</sup> The Supreme Court held that the wiretapping constituted an abuse of Judge Garzón's authority.<sup>150</sup> A third case against Judge Garzón concerns a potentially improper financial relationship he had with a Spanish bank called Santander.<sup>151</sup>

Judge Garzón's removal from the judiciary means the Spanish courts are without their most vocal advocate for universal jurisdiction. It is unclear whether Judge Garzón's removal will affect other members of the Spanish judiciary, who may be increasingly reluctant to engage in investigations that could be deemed political.

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<sup>145</sup> *Constitucion Espanola* art 117 (unofficial English translation of the Spanish constitution); Langer, *supra* note 3 at 33.

<sup>146</sup> BBC Profile: Judge Baltasar Garzon", *supra* note 6. (The first investigation into the U.S. torture program was initially pending before Judge Garzon, but is now pending before Judge Gutierrez. The "Bush 6" case was initially admitted by Judge Garzon, but is now pending before Judge Velasco.)

<sup>147</sup> *Ibid*; Langer, *supra* note 3 at 41.

<sup>148</sup> "Spain's leading human rights judge Baltasar Garzon convicted of wiretapping," *The Telegraph* (9 February 2012) online: The Telegraph <http://www.telegraph.co.uk/news/worldnews/europe/spain/9072324/Spains-leading-human-rights-judge-Baltasar-Garzon-convicted-of-wiretapping.html>; Rick Gladstone, "Prominent Rights Judge is Convicted in Spain", *The New York Times* (9 February 2012) online: The New York Times <http://www.nytimes.com/2012/02/10/world/europe/baltasar-garzon-prominent-rights-judge-convicted-in-spain.html>.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid*.

## 7.2 International Pressure

Spain faced significant political backlash for pursuing the *Guantanamo*,<sup>152</sup> *Falun Gong*,<sup>153</sup> and *Israeli* cases<sup>154</sup> brought under the pre-2009 universal jurisdiction law. The United States, China, and Israel respectively, pressured Spain to drop those cases. This international pressure was one factor which led to the narrowing of Spain's universal jurisdiction law. Similar international pressure may influence the prospect of future criminal prosecutions for international crimes in Spain.

## 8. Conclusion

Despite the 2009 amendment to the *LOPJ*, Spain continues to have a relatively broad universal jurisdiction law. The ability to initiate criminal investigations and prosecutions for international crimes under the *LOPJ* will largely depend on the interpretation of the nexus requirement which requires a relevant link to Spain in the absence of Spanish perpetrators or victims. Since the amended law is new, it is still unclear how Spanish courts will interpret this requirement.

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<sup>152</sup> Langer, *supra* note 3 at 39.

<sup>153</sup> *Ibid* at 37 – 38.

<sup>154</sup> The Israeli case involved seven Israeli military officials, including a former minister of defence.