

# The 2014 Reform of Universal Jurisdiction in Spain

## From All to Nothing

By Dr. Rosa Ana Alija Fernández, Barcelona\*

*In March 2014, a law reforming universal jurisdiction was passed in Spain. It was the second legal reform undertaken to restrict universal jurisdiction in Spain after a first attempt in 2009. Due to the limited impact of the 2009 reform to put a stop to politically troublesome claims, the one accomplished in 2014 is straightforward: universal jurisdiction is replaced by other jurisdictional bases in order for Spanish criminal courts to prosecute internationally-defined offences committed abroad. International legal obligations undertaken by Spain are alleged to establish jurisdiction. Here it is contended, though, that two different trends can be observed depending on who is behind the commission of the offence: a state or a non-state actor. Access to Spanish criminal courts is further blocked by additional restrictions, such as the configuration of their jurisdiction as subsidiary and the limitation of those entitled to file a claim. The result is the removal of universal jurisdiction from the Spanish legal system, intended not only for the future but also retrospectively concerning past claims currently being under examination, a worrying trend that can endanger the fight against impunity if followed by other states.*

### I. Tailoring universal jurisdiction in Spain to prevent diplomatic pressure

According to the Ley Orgánica del Poder Judicial (Organic Law 6/1985 on the Judiciary, hereinafter “LOPJ”),<sup>1</sup> the jurisdiction of Spanish criminal courts is mainly based on the principle of territoriality (art. 23 § 1, including the flag principle)<sup>2</sup>. Additionally, they may also have jurisdiction on the basis of the principle of active personality, when the alleged perpetrator is Spanish (art. 23 § 2), although this principle operates only under certain conditions.<sup>3</sup> On the other hand,

---

\* Lecturer in Public International Law at the Universitat de Barcelona. Visiting researcher at the Centro de Estudios de Derecho Penal y Procesal Penal Latinoamericano (Forschungsstelle für lateinamerikanisches Straf- und Strafprozessrecht), Georg-August-Universität Göttingen. The author would like to thank Eneas Romero, José Luis González, Sarah Deery and the anonymous reviewers of ZIS for their very valuable comments and suggestions, and José Ricardo de Prada for his helpful guidance with documentation.

<sup>1</sup> Boletín Oficial del Estado 157, 2.7.1985, 20632 ff.

<sup>2</sup> Art. 23 § 1 LOPJ reads: “Spanish courts are competent to try cases involving serious and lesser offences committed on Spanish territory or on board Spanish ships or aircrafts, without prejudice to the provisions of the international treaties to which Spain is a party” (unofficial translation at *Reydams*, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 2003, p. 183, fn. 2).

<sup>3</sup> (a) Double incrimination of the offence (unless not required by virtue of an international treaty or a normative act by an international Organisation to which Spain is member), (b)

passive personality is not included as a jurisdictional basis in the law. The LOPJ also allows domestic courts to have jurisdiction over a number of offences committed either by Spaniards or by foreigners outside the Spanish territory. Here, two different groups of offences should be distinguished:

- (i) those entailing an attack against Spanish direct interests, such as treason, rebellion, offences against the Crown or forgery (art. 23 § 3, establishing jurisdiction based on the protective principle), and
- (ii) offences of an international nature or with an international dimension (art. 23 § 4).

Whereas jurisdiction over the first group was already envisaged in the 1870 law on the judiciary,<sup>4</sup> jurisdiction over internationally defined offences was incorporated in the Spanish legal system in 1985. Broadly conceived in the beginning (as an absolute jurisdiction, no links with Spain were required and no criteria of subsidiarity applied; furthermore, anybody could file a claim), its scope has been progressively limited through two legal reforms in 2009 and in 2014.

Both reforms were arguably motivated by diplomatic pressure from states with nationals involved in investigations of core international crimes before Spanish courts. Complaints by China, Israel, the United States or lower profile countries such as Rwanda or Morocco pushed the first attempt to limit universal jurisdiction in Spain in 2009. The reform legislation, Organic Law 1/2009, introduced a set of limitations at different levels. Firstly, it subjected the exercise of universal jurisdiction by the Spanish courts to the verification of any of the following conditions:

- (i) the alleged perpetrator was in Spain,
- (ii) there were Spanish victims, or
- (iii) any other relevant link connecting the offence with Spain could be confirmed.<sup>5</sup>

---

legal action taken by the victim or the Prosecutor before Spanish courts, and (c) double jeopardy. This provision has also been modified by the last legal reform of art. 23 LOPJ. On its implications, see *Chinchón Álvarez*, *Derecho Penal y Criminología* 5 (2014), 161 (166 f.).

<sup>4</sup> Gaceta de Madrid of 15.-20.9.1870, p. 258 ff. On the historical precedents, see *Ollé Sesé*, *Justicia universal para crímenes internacionales*, 2008, p. 355 ff.

<sup>5</sup> Such relevant link has been (vaguely) described as historical, social, cultural, legal, political, and other similar relations (belonging in the past to the same political unit, sharing a common language with relevant cultural nexus, participating in political international organisations) that must be analysed on a case-by-case basis (Juzgado Central de Instrucción [JCI] No. 1, Decision of 26.2.2010 – AAN 128/2010, legal ground 2).

Secondly, subsidiarity of the Spanish jurisdiction was brought in: a case would not be admitted if proceedings involving an investigation and an effective prosecution had been initiated in another competent country or before an international court. The law required the provisional dismissal of any proceedings before Spanish courts on the basis of universal jurisdiction upon a showing that proceedings on the same facts had been initiated before any other domestic or international court.

Technically rather imperfect,<sup>6</sup> Organic Law 1/2009 did not achieve the expected results. Although one of the most controversial cases was closed (i.e., the case for crimes against humanity in Tibet – Tibet 2 –, as no link with Spain could be established<sup>7</sup>), many were kept open.<sup>8</sup> Among them, the case for genocide in Tibet – Tibet 1 –, which was presumably the ultimate reason to undertake a new legal reform in 2014. The decision in November 2013 to issue international arrest warrants against several former Chinese officers (among whom former President Jiang Zemin and former Prime Minister Li Peng)<sup>9</sup> provoked new diplomatic tensions. Responding to the pressure exerted by China, the Spanish government managed to drive an express legal reform of art. 23 § 4 LOPJ. On 21.1.2014, a draft bill presented to Congress (Spanish lower chamber) by the parliamentary group of the ruling Popular Party was given leave to proceed. Less than two months later, on 13.3.2014, Organic Law 1/2014 (hereinafter LO 1/2014),<sup>10</sup> reforming universal jurisdiction, was passed by the Congress and the Senate. Together with it universal jurisdiction virtually disappeared from the Spanish legal system.

Although the diplomatic motivations lying beneath the reform are hard to hide, the preamble of LO 1/2014 tries to justify the reform under technical needs. Indeed, its declared purpose is “to clearly delimit – with full application of the principle of legality and strengthening legal security – the occasions where the Spanish jurisdiction can investigate and try offences committed outside the sovereign territory of Spain”.<sup>11</sup> That is allegedly done by adapting the jurisdiction of Spanish criminal courts to international treaty provisions binding Spain, according to the Preamble of the law. The result is a stunningly detailed art. 23 § 4 LOPJ within which up to sixteen paragraphs specifically provide the conditions

for Spanish courts to retain jurisdiction over each particular offence.<sup>12</sup>

Notwithstanding the declared goal to adapt Spanish jurisdiction to treaty provisions, a careful analysis of the law shows that it does not really meet it in a consistent way. Two trends can be clearly identified. One concerns jurisdiction over core international crimes and serious human rights violations, usually committed through state structures or tolerated by the state. Concerning these offences, the approach to universal jurisdiction is extremely restrictive, to the extent of de facto ruling out any potential application of the principle, as it will be argued in Section II. The other trend, discussed in Section III, regards offences committed by individuals or organized criminal groups, which the law addresses in a more flexible fashion. On the other hand, a set of additional limitations to the jurisdiction of Spanish criminal courts over offences committed abroad is established. Although these limitations are generally forward-looking, some provisions in the law also intend to have an impact on already filed claims, as commented on in Section IV. Section V will provide some conclusions.

## II. Core international crimes and serious human rights violations: restricting universal jurisdiction to avoid diplomatic complaints

Without a doubt, the most diplomatically controversial offences in art. 23 § 4 LOPJ are genocide, crimes against humanity, war crimes, torture and enforced disappearances. As far as they are normally committed through state structures or tolerated by the state, criminal liability usually targets public officers, including high-ranking members of the government and the army. To invoke universal jurisdiction in these cases is often said to be an intervention into the domestic jurisdic-

<sup>6</sup> See the criticism expressed, among others, by *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*, 2009, p. 121 ff., and *Chinchón Álvarez*, *Revista de Derecho de Extremadura* 6 (2009), 13 (29 ff.).

<sup>7</sup> Juzgado Central de Instrucción (JCI) No. 1, Decision of 26.2.2010 – AAN 128/2010, legal ground 2 and decision.

<sup>8</sup> In fact, new complaints were actually filed, such as the one against some members of the Israeli government and army for the attack against the Gaza Freedom Flotilla in 2010.

<sup>9</sup> See Audiencia Nacional (AN) (Sala de lo Penal), Decision of 18.11.2013 – AAN 270/13, sole legal ground and decision.

<sup>10</sup> Boletín Oficial del Estado 63, 14.3.2014, 23026 ff.

<sup>11</sup> Preamble of LO 1/2014 (*author's* translation).

<sup>12</sup> The offences expressly mentioned in art. 23 § 4 LOPJ are: genocide, crimes against humanity, war crimes, torture, enforced disappearances, piracy, terrorism, illicit traffic in toxic drugs, narcotic drugs or psychotropic substances, trafficking in human beings, offences against foreign citizens' rights, and offences against the safety of maritime navigation committed in ocean space, terrorism, offences included in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the Convention on the Physical Protection of Nuclear Material, illicit drug traffic, offences of constitution, financing or integration in a criminal group or organization, or the offences committed within them, as far as such group or organization acts with a view to the commission in Spain of a serious offence, offences against children's sexual freedom and indemnity, offences included in the Council of Europe Convention on preventing and combating violence against women and domestic violence, trafficking in human beings, corruption among private individuals or in international business transactions, and counterfeiting of medical products and similar crimes involving threats to public health.

tion of the state where the offences were committed.<sup>13</sup> However, given the great seriousness of the abovementioned practices, they should not go unpunished. To avoid impunity has become an issue beyond the state's borders and the international community has articulated a system of international criminal justice mainly grounded on the repression of core crimes by domestic courts, complemented by the work of the International Criminal Court. Consequently, enabling universal jurisdiction at the domestic level is of the utmost importance.

LO 1/2014 implicitly assumes that universal jurisdiction is an intervention in domestic matters when it states that "the extension of the Spanish jurisdiction beyond the Spanish territorial limits must be legitimated and justified by the existence of an international treaty that provides for or authorizes it".<sup>14</sup> However, universal jurisdiction, namely, criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction,<sup>15</sup> is not imposed by international treaties. Furthermore, while the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) do expressly allow for it,<sup>16</sup> there are no treaty provisions concerning universal jurisdiction over genocide, crimes against humanity and war crimes. The only exception would be the four Geneva Conventions (GC) of 1949 (arts. 49 GCI, 50 GCII, 129 GCIII and 146 GCIV respectively) – together with Additional Protocol I thereto (art. 85) –, mandating each Party "to search for persons alleged to have committed, or to have ordered to be committed" grave breaches of the Conventions,

and to "bring such persons, regardless of their nationality, before its own courts".<sup>17</sup>

What the Spanish reform legislation omits, though, is that international law also allows the prosecution and repression of core international crimes on the basis of customary law (which also expresses the international consensus on the issue). Actually, LO 1/2014 is inconsistent as far as it states that the regulation of universal jurisdiction must adjust to the commitments resulting from the ratification of the Statute of the International Criminal Court (ICC) as an essential instrument in the fight for a more just international order based on the protection of human rights.<sup>18</sup> In fact, the preamble of the ICC Statute declares that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". It further recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", a duty that the ICC Statute itself does not impose and therefore could only be based on international customary law (which is disputable, though, as argued below). This is a duty, on the other hand, that Spain will arguably only partially fulfil from now on.

The law takes advantage of the facultative character of universal jurisdiction<sup>19</sup> to reduce its applicability over genocide, crimes against humanity and war crimes to its minimum expression. According to art. 23 § 4 para. a), jurisdiction of Spanish courts will only be allowed in three circumstances: when the alleged perpetrator is a Spanish citizen, when the alleged perpetrator is a foreigner with habitual residence in Spain, or when the alleged perpetrator is a foreigner that happens to be in Spain and his/her extradition has been denied by the Spanish authorities. Furthermore, there will be no jurisdiction if there are Spanish victims. Considering that the first hypothesis is based on the principle of active personality

<sup>13</sup> *Sammons*, Berkeley Journal of International Law 21 (2003), 111 (125). But cfr. *Henzelin*, Le principe d'universalité en droit penal international. Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité, 2000, p. 162 ff.; *Inazumi*, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law, 2005, p. 134 ff. and 198; *Kuwali*, The Responsibility to Protect: Implementation of Article 4(h) Intervention, 2011, p. 265 f. *Ryngaert* suggests the use of an interest-balancing test to determine when the exercise of universal jurisdiction becomes an intervention (*Ryngaert*, Jurisdiction in International Law, 2008, p. 144 f.).

<sup>14</sup> Preamble of LO 1/2014 (*author's* translation).

<sup>15</sup> Princeton Principles on Universal Jurisdiction, principle 1.1. See also § 1 of the resolution adopted by the Institute of International Law on 26.8.2005 (Krakow Session) and UN doc. A/65/181, The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary General Prepared on the Basis of Comments and Observations of Government, 29.7.2010, para. 12.

<sup>16</sup> Arts. 5 § 3 CAT and 9 § 3 CPED.

<sup>17</sup> *Cassese*, International Criminal Law, 3<sup>rd</sup> ed. 2013, p. 286. However, these provisions go on saying that the Party "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". It is discussed whether this provision must be interpreted as a reference to the *aut judicare aut dedere* principle – *Sánchez Legido*, Revista Electrónica de Estudios Internacionales 27 (2014), 1 (32 f.) – or as an absolute mandate to prosecute, not subsidiary to extradition – *Henzelin* (fn. 13), p. 353; *Cassese* (fn. 17), p. 286; on this discussion, *Inazumi* (fn. 13), pp. 57 ff. The fact is that, according to *Pictet*, the formula used in these provisions "s'inspirait du principe aut dedere aut punire" (*Pictet*, Les Conventions de Genève du 12 août 1949, III. La Convention de Genève relative au traitement des prisonniers de guerre, 1958, p. 653).

<sup>18</sup> Statute of the ICC, Preamble, para. 4.

<sup>19</sup> On the facultative nature of the principle of universal jurisdiction, see *Sánchez Legido*, Jurisdicción universal penal y derecho internacional, 2004, p. 66 ff. and 253 ff.; *Inazumi* (fn. 13), p. 139 f.

and that the latter is an application of the principle *aut iudicare aut dedere*, the only assumption to invoke universal jurisdiction in Spain regards foreigners with their habitual residence in Spain, what is actually an extended application of the principle of active personality.<sup>20</sup> Furthermore, the habitual residence is a rather mobile jurisdictional basis insofar as a simple change of residence would be enough to avoid criminal liability.<sup>21</sup> On the other hand, the principle of passive nationality could also be affected by fraudulent changes of nationality before a claim is filed. In the absence of further legal specifications and given the purpose of the legal reform to limit universal jurisdiction, this principle might hypothetically be interpreted in a restrictive way to exclude jurisdiction when the person no longer has Spanish nationality at the time of prosecution. Such an approach, although highly undesirable,<sup>22</sup> is not completely outlandish when compared to the cautious way the law limits jurisdiction based on passive personality regarding other offences (e.g. torture or enforced disappearances), as it excludes any possible forum shopping by specifically requiring that the victim was a Spanish national at the time the offence was committed.

Regarding torture – art. 23 § 4 para. b) – and enforced disappearances<sup>23</sup> – art. 23 § 4 para. c) –, although both the CAT and the CPED allow states to extend their jurisdiction on the basis of universal justice,<sup>24</sup> the Spanish reform legislation only establishes jurisdiction on the basis of both active and passive personality, although this second hypothesis is doubly limited: the victim must have been a Spanish national at the time the offence was committed and the alleged perpetrator must be in Spanish territory. Both treaties also impose jurisdiction on the basis of the *aut iudicare aut dedere* principle,<sup>25</sup> a mandate covered in the Spanish law by the final clause in art. 23 § 4 para. p) LOPJ, which provides for the general application of such principle whenever it is compulsory according to an international treaty.<sup>26</sup> Worryingly enough, the combination of paras. c) and p) can lead to the

absurdity that an alleged perpetrator present in Spanish territory cannot be prosecuted if the victims were not Spanish at the time the offence was committed and Spain has not rejected his/her extradition to a third state, as *Sánchez Legido* has warned.<sup>27</sup>

Concerning such crimes, the exclusion of universal jurisdiction based on a strict compliance with treaty obligations is an approach that may have undesirable effects on the consolidation of a customary norm in this field if other states adopt it too. Indeed, the divergences and variations in current state practice make it difficult to affirm the existence of a general practice accepted as law, thus, an international custom regulating the scope and application of universal jurisdiction.<sup>28</sup> In this context, Spain would somehow position itself as a persistent objector to universal jurisdiction under customary law. However, the inclusion of crimes in LO 1/2014 over which jurisdiction is not conventionally set when committed abroad (together with the references to the ICC Statute) would imply the acknowledgement and acceptance that they must be prosecuted at the domestic level.

### III. Offences usually committed by non-state actors: broadening the jurisdictional basis

LO 1/2014 also includes detailed references to other international treaties regulating offences usually committed by non-state actors, organized criminal groups comprised – paras. d) to o) of art. 23 § 4. Compared to the offences analysed in Section II, the reforming law appears to be more flexible when it comes to establish jurisdiction over this second set of offences.

Para. d) sets jurisdiction over a number of offences (piracy, terrorism, illicit trafficking in toxic drugs, narcotic drugs or psychotropic substances, trafficking in human beings, offences against foreign citizens' rights, and offences against the safety of maritime navigation) when committed in ocean space. Broadly, jurisdiction will be exercised whenever an international treaty ratified by Spain or a normative act by an international organization of which Spain is a member provides for it. Some of the offences in this paragraph (terrorism, illicit drug trafficking and trafficking in human beings) are also included elsewhere in the law. Therefore, art. 23 § 4 para. d) LOPJ is to be seen as *lex specialis*, whereas the jurisdictional basis in other paragraphs should be taken into consideration only when the conditions in para. d) cannot be fulfilled.

Terrorism is actually the offence given the broadest jurisdictional basis in LO 1/2014 – although there is no international treaty providing for a general definition of the offence and consequently establishing jurisdiction, which again contradicts the rigid statements made in its preamble. Actually, the law is giving legal force to the provisions on jurisdiction of the Council Framework Decision 2002/475/JHA of

<sup>20</sup> See *Ambos*, *Internationales Strafrecht*, 3<sup>rd</sup> ed. 2011, § 3 mn. 42 (*Domizilprinzip*); *Cassese* (fn. 17), p. 276; *Dinstein*, in: Schmitt/Green (eds), *The Law of Armed Conflict: Into the Next Millennium*, 1998, p. 17 (18); European Convention of the Transfer of Proceedings in Criminal Matters (ETS No. 073), Explanatory Report, § B (a); *O'Connor/Rausch*, *Model Codes for Post-Conflict Criminal Justice: Model Criminal Code (Volume I)*, 2007, p. 44 f. (considering it a “functional” nationality).

<sup>21</sup> *Deen-Racsmany*, *American Journal of International Law* 95 (2001), 606 (617).

<sup>22</sup> In practice, however, states seem to accept that nationality may be possessed at either moment – *Cassese* (fn. 17), p. 276; *Ryngaert* (fn. 13), p. 88.

<sup>23</sup> As *Chinchón Álvarez* reminds, the Spanish Criminal Code does not include the offence of enforced disappearances as such – *Chinchón Álvarez*, *Derecho Penal y Criminología* 5 (2014), 161 (167 f.).

<sup>24</sup> Arts. 5 § 3 CAT and 9 § 3 CPED.

<sup>25</sup> Arts. 5 § 2 CAT and 9 § 2 CPED.

<sup>26</sup> See Section III.

<sup>27</sup> *Sánchez Legido*, *Revista Electrónica de Estudios Internacionales* 27 (2014), 1 (36).

<sup>28</sup> See in particular the latest debates at the Sixth Commission of the UN General Assembly (UN doc. A/C.6/68/SR.23, paras. 93 ff.).

13.6.2002 on combating terrorism<sup>29</sup> – thus secondary EU legislation. On its basis, the law establishes up to eight jurisdictional grounds. Three of them are different versions of the active personality principle (prosecutions directed against a Spanish national, prosecutions directed against a foreigner with his/her habitual residence in Spain and commission of the offence for the benefit of a legal person established in Spain)<sup>30</sup>. All three are compulsory according to the Framework Decision, and so is passive personality, although LO 1/2014 requires that the victim had Spanish nationality at the time the offence was committed. Territoriality and the flag principle are also mandatory jurisdictional grounds in the Framework Decision. Concerning the latter, though, LO 1/2014 sets jurisdiction when the offence is committed against a vessel flying the Spanish flag or an aircraft registered in Spain. If this provision is intended as an expression of the flag principle (already covered by art. 23 § 1), then it is completely unnecessary. Otherwise, if the legislator is thinking of the vessel or aircraft as the actual target, that would mean the establishment of an additional ground for jurisdiction not included in the Framework Decision – although its art. 9 § 5 does not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.

The protective principle underlies the establishment of jurisdiction over terrorist attacks committed against Spanish official facilities, including its embassies and consulates.<sup>31</sup> Regarding the latter, although these offences are subject to prosecution in the state where they were committed, any act that needs to be done by the receiving state at the diplomatic and/or consular premises will require the consent of the head of the diplomatic mission/consular post, due to their inviolability.<sup>32</sup> Halfway between the protective principle and the effects principle,<sup>33</sup> jurisdiction is also set over terrorist attacks committed in order to influence or condition in an illicit manner any Spanish authority's actions. Again, this jurisdictional ground is not included in the Framework Decision.

Finally, only over-zealousness can explain the odd provision that sets jurisdiction over terrorist attacks against an EU institution or body based in Spain. These are basically limited to two: the European Agency for Safety and Health at Work and the Office for Harmonization in the Internal Market (Trade Marks and Designs). While the rationale of this (compulsory) jurisdictional ground<sup>34</sup> would be merely to facilitate

and guarantee the prosecution of offences committed against facilities of the EU that enjoy diplomatic privileges according to headquarters agreements,<sup>35</sup> its inclusion in art. 23 § 4 LOPJ implies that Spain assumes jurisdiction over attacks against these bodies committed abroad. “But where?”, one may well ask. The European Agency for Safety and Health at Work, for instance, operates with focal points in each Member State as well as in European Free Trade Association States and candidate and potential candidate countries.<sup>36</sup> Is Spain assuming jurisdiction over attacks committed against them? Another thorny question concerns the representations of the European Commission: can they be labelled as EU institutions or bodies too?<sup>37</sup> If so, will an attack against a European Commission delegation anywhere else in the world fall under Spanish jurisdiction? Given the general limiting spirit of the law, this would seem to confer too broad a jurisdiction to Spanish criminal courts. On the other hand, considering the law's generous approach to jurisdiction over terrorist attacks, such an interpretation cannot be excluded.

Three international conventions on terrorist acts are also mentioned in LO 1/2014: the 1970 The Hague Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the 1980 Convention on the Physical Protection of Nuclear Material. Concerning the first convention, art. 23 § 4 para. f) LOPJ sets jurisdiction when the offence has been committed either by a Spanish citizen or against an aircraft flying the Spanish flag. None of them are compulsory jurisdictional grounds according to art. 4 § 1 of the Convention, which, on the other hand, does not exclude any criminal jurisdiction exercised in accordance with national law (art. 4 § 3). Para. g) states in exceptionally broad terms that jurisdiction will be exercised in the cases authorized by the 1971 Montreal Convention.<sup>38</sup> Finally, regarding the Convention on the Physical Protection of Nuclear

<sup>35</sup> See for instance art. 2 § 2 common to both headquarter agreements between Spain and the EU.

<sup>36</sup> Focal points have been established in the Former Yugoslav Republic of Macedonia, Turkey, Albania, Bosnia and Herzegovina, Kosovo under United Nations Security Council Resolution 1244/99, Montenegro and Serbia.

<sup>37</sup> They would be an expression of the EU right to active legation (*Sobrino Heredia*, La reforma del Servicio Exterior de la Unión Europea, 2003, § 3 [available at: <http://www.realinstitutoelcano.org/especiales/europa/10.asp>; 3.7.2014]).

<sup>38</sup> Namely, “(a) when the offence is committed in the territory of the State; (b) when the offence is committed against or on board an aircraft registered in the State; (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in the State”, according to art. 5 § 1, as well as in application of the *aut judicare aut dedere* principle, in conformity with art. 5 § 2.

<sup>29</sup> Official Journal of the EU L 164/3, 22.6.2002, 3 ff.

<sup>30</sup> On the *Sitzprinzip* as an extension of active personality, see *Ambos* (fn. 20), § 3 mn. 43.

<sup>31</sup> On this particular, art. 9 § 1 para. e) of the Framework Decision simply mandates to establish jurisdiction over the institutions of the Member State in question.

<sup>32</sup> Arts. 22 of the 1961 Vienna Convention on Diplomatic Relations and 31 of the 1963 Vienna Convention on Consular Relations, respectively.

<sup>33</sup> The effects principle – *Auswirkungsgrundsatz*, see *Ambos* (fn. 20), § 3 mn. 6 – has also been seen as a corollary of the principle of territoriality – *Cassese* (fn. 17), p. 274.

<sup>34</sup> Art. 9 § 1 para. e) of the Framework Decision.

Material, para. h) just includes the active nationality principle, thus complementing the territoriality principle in art. 23 § 1 in order to comply with art. 8 § 1 of the Convention.

As with terrorism, the law establishes two different jurisdictional grounds over illicit drug trafficking (toxic drugs, narcotic drugs or psychotropic substances). Besides specific jurisdiction when the offence is committed in ocean space (discussed above), art. 23 § 4 para. i) additionally sets jurisdiction in two situations: one is active personality, the other one concerns the carrying out of acts of execution of these offences or of constitution of a criminal group or organization with a view to their commission within Spanish territory. None of them are mandatory jurisdictional grounds in view of art. 5 § 1 para. a) of the United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).<sup>39</sup> Despite the duplication of jurisdictional grounds, the decisions adopted so far by the tribunals regarding drug trafficking show that the regulation is technically deficient and has remarkable black spots where jurisdiction can be excluded, as commented in Section IV below.

The third offence with a twofold jurisdictional ground (whether committed in ocean space or elsewhere) is trafficking in human beings, in art. 23 § 4 para. m), which shows little deviation from the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>40</sup> Still, once again jurisdiction is somehow extended when established over offences committed by foreigners having their habitual residence in Spain (and not only by stateless persons, as the Convention states) as well as over offences committed by a legal person, company, organization, group or any other sort of entity or association legally established in Spain (a ground not provided for by the Convention).<sup>41</sup> The third hypothesis in the law – the victim was a Spanish citizen or had his/her habitual residence in Spain by the time the offence was committed – does not strictly follow the letter of the treaty either, as far as LO 1/2014 requires the presence of the offender in Spain (the Convention does not), but instead does not subject jurisdiction to any of the conditions in the conventional text,<sup>42</sup> namely, double incrimination regarding the place of commission or commission outside the territorial jurisdiction of any state. The latter condition would partially be covered, though, by para. d) as far as offences committed in ocean space are concerned.

The inclusion of trafficking in human beings can be seen as an improvement compared to the silence in the previous version of the law. Instead, it is somehow (negatively) surprising that smuggling of migrants has disappeared from art. 23 § 4 LOPJ, except when the offence is committed in ocean

space. However, given that Spain is Party to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementary to the UN Convention on Transnational Organized Crime,<sup>43</sup> jurisdiction over this offence could nevertheless be retained in application of para. i) of the law. Organized criminality is comprehensively addressed there, setting jurisdiction over the offences of constitution, financing or integration in a criminal group or organization, or the offences committed within it. As an expression of the effects principle, a condition must nonetheless be fulfilled, i.e., that such group or organization acts with a view to the commission in Spain of an offence punished with a maximum deprivation of liberty of at least three years or more. This provision is linked to art. 5 of the UN Convention on Transnational Organized Crime (2000), where States Parties are mandated to make all the necessary legal arrangements to define as a criminal offence the constitution of and other forms of participation in an organized criminal group. However, jurisdiction is established in LO 1/2014 in broader terms than provided by art. 15 § 2 para. c) subpara. i) of the Convention, where, besides compulsory jurisdiction based on territoriality – art. 15 § 1 of the Convention –, a State Party is further allowed to establish its jurisdiction when the offence is committed “outside its territory with a view to the commission of a *serious crime* within its territory” (emphasis added by *author*). Art. 2 para. b) of the Convention defines a serious crime as “conduct constituting an offence punishable with a maximum deprivation of liberty of at least four years or a more serious penalty”, whereas the Spanish law extends jurisdiction to offences punishable with deprivation of liberty of three years or more, thus a penalty below the conventional threshold. This extension can be problematic and breach art. 4 of the Convention (an express limit in art. 15 § 2 to the establishment of facultative jurisdiction), which states in its para. 2 that nothing in the Convention “entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law”. Therefore, despite the good intentions declared in its Preamble, LO 1/2014 not only does not adjust to treaty provisions concerning organized criminality but might be actually allowing a potential intervention in other states’ domestic issues expressly forbidden by an international convention.

Jurisdiction is also slightly broadened regarding offences against children’s sexual freedom and indemnity – art. 23 § 4 para. k) LOPJ –, compared to the provisions of Directive 2011/92/EU of the European Parliament and of the Council of 13.12.2011 on combating the sexual abuse and sexual exploitation of children and child pornography<sup>44</sup> (which, once again, is not an international treaty). Thus, it will reach not only prosecutions where the alleged offender is a Spanish citizen – a compulsory ground of jurisdiction according to art. 17 § 1 para. b) of the Directive –, but also those against foreigners with habitual residence in Spain, those against legal persons, companies, organizations, groups or any other

<sup>39</sup> Only jurisdiction based on territoriality is compulsory. The grounds in LO 1/2014 are facultative according to art. 5 § 1 para. b) subparas. i) and iii).

<sup>40</sup> CETS No. 197, signed at Warsaw the 16.5.2005, in force since 1.2.2008.

<sup>41</sup> Although the Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law (art. 31 § 5).

<sup>42</sup> Art. 31 § 1 para. d).

<sup>43</sup> UN General Assembly resolution 55/25 of 15.11.2000.

<sup>44</sup> Official Journal of the EU L335, 17.2.2011, 1-14.

sort of entities or associations established in Spain, and those where the victim is a Spanish citizen (on condition that the alleged perpetrator is in Spanish territory); all three being facultative jurisdictional grounds (art. 17 § 2 of the Directive). Another change that deserves criticism is that the law no longer sets jurisdiction over these offences when committed against disabled persons, as it did in its previous version. Given that it is not imposed by an international treaty (or EU law), the legislator feels at ease with leaving a vulnerable group unprotected.

A similar flexibility can be observed regarding the offences included in the Council of Europe Convention on preventing and combating violence against women and domestic violence<sup>45</sup> – art. 23 § 4 para. 1) LOPJ –. Three jurisdictional grounds are established, two of them compulsory according to art. 44 § 1 of the Convention (the offence has been committed by a Spanish national, or by a foreigner who has her/his habitual residence in Spanish territory). The third one would partially extend jurisdiction<sup>46</sup> when the offence has been committed against a victim having Spanish citizenship or habitual residence in Spain, under two limiting conditions, though: these requirements must be fulfilled by the time the offence is committed and the alleged offender must be in Spanish territory.

Art. 21 of the UN Convention against Corruption,<sup>47</sup> together with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), are at the basis of para. n) on corruption<sup>48</sup> among private individuals or in international business transactions. But again LO 1/2014 is not strictly attached to the letter of the international treaties on the subject. Jurisdiction is established when the offender is a Spanish citizen, a foreigner having habitual residence in Spain, the executive director, administrator, worker or contributor of a trading company, or of a society, association, foundation or organization legally established in Spain, or a legal person, company, organization, group or any other entity or association legally established in Spain. Regarding corruption among private

individuals, the UN Convention only directs to establish jurisdiction on the basis of territoriality.<sup>49</sup> The four grounds in the Spanish law are then facultative extensions of jurisdiction, either partially allowed by art. 42 § 2 of the Convention<sup>50</sup> or at least possible to subsume in its art. 42 § 6, which does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law. Concerning the OECD Convention, jurisdiction is only compulsory when it comes to territoriality and active personality.<sup>51</sup> However, art. 4 § 4 of the Convention opens the door to other jurisdictional grounds if the current ones are not effective in the fight against the bribery of foreign public officials.

The last international treaty expressly mentioned in LO 1/2014 is the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health<sup>52</sup> – art. 23 § 4 para. o) LOPJ –, although no international obligations stem from it as it is not yet in force. Such cautious anticipation by the legislator is in some way striking, particularly because it goes beyond the goal stated in the preamble to adjust jurisdiction to Spain's international conventional commitments. Five grounds are established, strictly following the Convention<sup>53</sup> when it comes to active and passive<sup>54</sup> personality (both extended to habitual residents in Spain). The only variation would be the establishment of jurisdiction over proceedings against a legal person, company, organization, group or any other sort of entity or association legally established in Spain, covered by the Convention inasmuch as it can be considered a further extension of the active personality principle, or at least a ground in accordance with its art. 10 § 6 – allowing for any other criminal jurisdiction exercised by a Party in accordance with its domestic law.

Finally, art. 23 § 4 para. p) operates as a twofold residual clause. On one hand, it sets jurisdiction of Spanish criminal courts over any other offence whose prosecution is compulsory pursuant to an international treaty in force for Spain or by a normative act stemming from an international organization of which Spain is a member, in the cases and terms therein determined. On the other hand, it incorporates the

<sup>45</sup> CETS No. 210, opened for signature the 11.5.2011 at Istanbul, in force since 1.8.2014. Offences included are psychological and physical violence (arts. 33 and 35); stalking (art. 34); sexual violence, including rape (art. 36); forced marriage (art. 37); female genital mutilation (art. 38); forced abortion and forced sterilisation (art. 39), and sexual harassment (art. 40).

<sup>46</sup> Partial insofar as, according to art. 44 § 2, “Parties *shall endeavour* to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory” (emphasis added by author).

<sup>47</sup> UN General Assembly resolution 58/4 of 31.10.2003.

<sup>48</sup> As the law expressly speaks of “*corrupción*”, here the literal translation “*corruption*” will be preferred, as bribery could also be translated in Spanish as a different concept (“*soborno*”).

<sup>49</sup> Art. 42 § 1.

<sup>50</sup> A State Party may also establish its jurisdiction over the offences in the Convention when: (a) the offence is committed against a national of that State Party; or (b) the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or (c) the offence is one of those established in accordance with art. 23 para. 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with art. 23 para. 1 subparas. a) (i) or (ii) or b) (i), of this Convention within its territory; or (d) the offence is committed against the State Party.

<sup>51</sup> Art. 4 § 1 and § 2.

<sup>52</sup> CETS No. 211, adopted in Moscow on 28.10.2011.

<sup>53</sup> Art. 10 § 1 and § 2.

<sup>54</sup> Again, the law requires that the victim had Spanish nationality by the time the offence was committed.

principle *aut judicare aut dedere* as a general jurisdictional ground, as far as an international treaty provides for it.

#### IV. Further limitations: subsidiarity, restrictions to active legal standing and a controversial transitional provision

Besides the variety of conditions imposed by LO 1/2014 concerning each specific offence in order for Spanish criminal courts to have extraterritorial jurisdiction, two new paragraphs 5 and 6 are added to art. 23 LOPJ introducing further restrictions intended not only to limit potential claims in the future, but also to get on-going cases dismissed.

To begin with, new art. 23 § 5 again takes up subsidiarity, already introduced by LO 1/2009 but now technically improved<sup>55</sup> by indicating both the relevant states of connection with the offence and the limits to their jurisdiction. Concerning the fora with priority over the offence, the law excludes the prosecution in Spain of the offences in art. 23 § 4 when the case is being investigated or prosecuted:

- (a) by an international court established in accordance with the treaties and conventions signed by Spain, or
- (b) by either the State where the offence was committed or the alleged offender's State of nationality.

This second hypothesis has not an absolute scope, though. For it to operate, the law introduces two alternative conditions. Spain will not retain jurisdiction when the case is being investigated or prosecuted by the State where the offence was committed or the alleged offender's State of nationality inasmuch as the alleged offender is not in Spain. The same will happen if an extradition procedure has been initiated to render the alleged offender to the State where the offence was committed or to the victims' state of nationality, as well as to an international tribunal, unless the extradition is not authorized. As *Sánchez Legido* points out, this is a rather bewildering way of expressing that subsidiarity does not exclude the exercise of jurisdiction when the alleged offender cannot be extradited.<sup>56</sup> Furthermore, it poses some questions on its scope. First, the extradition procedure shall presumably have been initiated in Spain, but the law does not specify so and merely refers to an extradition procedure. This lack of precision could mean that Spain declines jurisdiction as soon as a procedure is opened in a third state. Moreover, it is hard to understand why if, according to the law, the two states having a relevant connection with the offence are the locus commissi delicti and the alleged offender's state of nationality, an extradition to the victims' state of nationality can indeed interfere with the exercise of jurisdiction in Spain.

Limits to this declination of jurisdiction are established following the letter of art. 17 of the ICC Statute. Consequently, there will be no transfer of jurisdiction if the state exercising jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution. Clearly improving the previ-

ous version of the law, a thorough explanation on how to determine the unwillingness or inability of the state follows, transposing letter by letter art. 17 § 2 and § 3 of the ICC Statute. However, LO 1/2014 takes away such determination from the judge examining the case, who must refer the question to the Criminal Chamber of the Supreme Court, constituting a restriction of the examining judge's competences that has already been criticised.<sup>57</sup>

On the other hand, the new para. 6 gives active legal standing regarding the offences in art. 23 § 4 LOPJ only to victims and the Prosecutor, excluding the *actio popularis* – provided for in art. 125 of the Spanish Constitution (CE) – to activate cases involving universal jurisdiction. Although such limitation follows what seems to be the general trend in the international practice,<sup>58</sup> the constitutionality of this provision is debatable. The Constitutional Court has repeatedly considered the *actio popularis* a fundamental right due to its connection with art. 24 CE on the right to effective judicial protection. It has even stated that when a member of the society defends a common interest he or she is simultaneously holding a personal interest.<sup>59</sup> This is particularly appropriate for core international crimes, whose prosecution and punishment concern the international community as a whole.

When it comes to constitutionality, though, the most controversial part of LO 1/2014 is its sole transitional provision, imposing the dismissal of the cases that do not fulfil the legal requirements imposed by the law by the time of its entry into force. Its potential violation of art. 24 CE, both regarding the right to equality when accessing justice and the right to due process (in connection with art. 117 § 1 CE, proclaiming the independence of the judiciary) has been immediately evidenced not only by the victims, but also by several judges of the Audiencia Nacional (i.e. the Spanish court with jurisdiction under art. 23 4 LOPJ, hereinafter AN)<sup>60</sup> and the General Prosecutor. The transitional provision was meant to have an immediate impact on the on-going cases. Notwithstanding, the judicial decisions already adopted in application of the law have led to outcomes different from the ones arguably sought by the government and the parliament when passing the law.

Concerning the block of offences mentioned in Section II (core crimes and serious human rights violations), few cases have actually been dismissed, the Tibet 1 case being the most recent one<sup>61</sup> (still, the path is opened for the victims to file individual appeals for protection before the Constitutional Court). Earlier, the case against several former SS Totenkopf

<sup>57</sup> *Sánchez Legido*, *Revista Electrónica de Estudios Internacionales* 27 (2014), 1 (4).

<sup>58</sup> *Sánchez Legido*, *Revista Electrónica de Estudios Internacionales* 27 (2014), 1 (14 ff.); *Alija Fernández*, *Tiempo de Paz* 112 (2014), 13 (16).

<sup>59</sup> Tribunal Constitucional, Judgment of 11.7.1983 – STC 62/1983, legal ground 2

<sup>60</sup> See for instance JCI No. 1, Decision of 20.5.2014 – Auto, Diligencias Previas 331/99, legal ground 2

<sup>61</sup> AN (Sala de lo Penal-Pleno), Decision of 2.7.2014 – AAN 38/2014, decision

<sup>55</sup> See above Section I. See *Chinchón Álvarez*, *Derecho Penal y Criminología* 5 (2014), 161 (168 f.).

<sup>56</sup> *Sánchez Legido*, *Revista Electrónica de Estudios Internacionales* 27 (2014), 1 (4).

for complicity in the commission of genocide and crimes against humanity against Spaniards in concentration camps Mauthausen, Sachsenhausen and Flossenbürg was declared concluded and referred to the Criminal Chamber in the AN in order for it to decide whether the requirements now imposed by art. 23 § 4 para. a) are met.<sup>62</sup> In most of the causes, though, the investigating judges have retained jurisdiction (in whole or in part), under a number of arguments.

In the cases concerning offences committed in El Salvador<sup>63</sup> and in Guatemala,<sup>64</sup> and the kidnapping, tortures and murder of the Spanish Diplomat Carmelo Soria in Chile<sup>65</sup>, the investigating judges have relied on the fact that some of the alleged events had been provisionally charged as terrorism and there were Spanish victims. Yet, in all three a decision on subsidiarity has still to be taken. Another argument used to retain jurisdiction is the application of the GC. In the Couso<sup>66</sup> and Gaza Freedom Flotilla cases, jurisdiction has been retained on the basis that the offences at stake constitute a grave breach of art. 147 IV GC that shall be prosecuted by any Contracting Party pursuant to art. 146.<sup>67</sup> Consequently, the residual clause in art. 23 § 4 para. p) LOPJ shall apply, instead of para. a).<sup>68</sup> As for subsidiarity, in the Couso case the judge affirmed that art. 23 § 5 LOPJ is in breach of art. 146 of the IV GC and therefore must not be applied.<sup>69</sup> Instead, in the Gaza Freedom Flotilla case the concurrence of several jurisdictions – i.e. Israel, Turkey and the ICC (where the Prosecutor is currently conducting a preliminary examination into the events) caused the judge not to dismiss the case yet and refer it to the Supreme Court so it can decide on Spain's jurisdiction. Both the investigating judge and the Spanish

prosecutor have expressed that the referral of the case to the ICC should be preferred.<sup>70</sup> However, doing so once an investigation is already opened before Spanish courts, following what could be a "supervened unwillingness" would alter the spirit of the principle of complementarity governing the jurisdiction of the ICC according to art. 17 of its Statute.<sup>71</sup> Finally, a very specific reason, namely, territoriality has been used in the two cases concerning Western Sahara (one about offences committed by members of the Polisario Front, the other about offences committed by Morocco), under the argument that part of the events took place in a territory that was to be considered Spanish at the time of their commission.<sup>72</sup> In other cases where no decision on jurisdiction has been taken yet (crimes committed in refugee camps in Rwanda/Democratic Republic of Congo and in Camp Ashraf – Iraq –), the investigating judge is considering to refer the cases to the Constitutional Court for a preliminary ruling on the constitutionality of the law. It should be noted too that in June 2014 the Socialist Party already filed a complaint of unconstitutionality on the grounds of non-compliance of LO 1/2014 with art. 24 CE on the right to effective judicial protection, violation of the interdiction of arbitrariness (art. 9 § 3 CE), violation of the principle of exclusivity of the judicial power (art. 117 CE), and violation of the right to exercise the action popularis (art. 125 CE).

Regarding the application of LO 1/2014 over the second set of offences, a number of decisions have been adopted dismissing several cases of illicit drug trafficking by non-Spanish vessels carrying drugs (with no Spaniards in their crew) that had been intercepted in international waters, and ordering the alleged perpetrators to be released. Under the new version of the law, jurisdiction must be established following the terms of art. 23 § 4 para. d), that requires an international treaty ratified by Spain or a normative act by an international organization of which Spain is a member provides for it. Whereas both the investigating judges and the

<sup>62</sup> JCI No. 2, Decision of 14.4.2014 – Auto, Sumario 56/2009-C, decision.

<sup>63</sup> JCI No. 6, Decision of 31.3.2014 – AAN 73/2014, legal ground 3 and decision.

<sup>64</sup> See for instance JCI No. 1, Decision of 20.5.2014 – Auto, Diligencias Previas 331/99, legal ground 3 and decision.

<sup>65</sup> JCI No. 5, Decision of 23.5.2014 – AAN 106/2014, legal ground 2 and decision.

<sup>66</sup> José Couso was a Spanish cameraman reached by a US missile shot against the Hotel Palestina in Bagdad, one of the headquarters of the international media, in an attempt to prevent the broadcasting of information about US military operations during the occupation of Bagdad in April 2003.

<sup>67</sup> The second paragraph of art. 146 of the IV Geneva Convention states that "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".

<sup>68</sup> JCI No. 1, Decision of 17.3.2014 – AAN 72/2014, legal ground 2; JCI No. 5, Decision of 17.6.2014 – Auto, Diligencias Previas 197/10, legal ground 2.

<sup>69</sup> This reasoning was also put forward in the dissident opinion to the appeal decision confirming the dismissal of the Guantánamo case (AN [Sala de lo Penal-Pleno], Decision of 23.3.2012 – AAN 29/2012, dissident opinion, Section 5 subsection 2).

<sup>70</sup> JCI No. 5, Decision of 17.6.2014 – Auto, Diligencias Previas 197/10, legal ground 3 in fine.

<sup>71</sup> The same inversion of complementarity can be found at art. 7 of the Organic Law 18/2003 on cooperation with the ICC – see *Pigrau Solé* (fn. 6), p. 119 –, where judges and prosecutors are instructed to refrain from any act when a complaint is filed regarding events happened in other states whose alleged perpetrators are not Spanish nationals and over which the ICC could have jurisdiction – Ley Orgánica 18/2003, de Cooperación con la Corte Penal Internacional, Boletín Oficial del Estado No. 296, 11.12.2003, 44062 (44063). But at least the referral is intended to happen before any proceedings are initiated in Spain and Spanish courts can always be reached once the ICC Prosecutor excludes an investigation (art. 7 § 3). See also Permanent Mission of Spain to the United Nations, doc. 094 FP, 29.4.2013, para. 9 (summary in UN doc. A/68/113).

<sup>72</sup> JCI No. 5, Decision of 15.4.2014 – AAN 69/2014, sole legal ground; JCI No. 5, Decision of 15.4.2014 – AAN 68/2014, legal ground 1.

Criminal Chamber of the AN, sitting in plenary session,<sup>73</sup> have deemed that no international treaty establishes compulsory jurisdiction over offences committed in the abovementioned circumstances, the Supreme Court has rejected such interpretation. In its opinion, the conventional reference justifying the jurisdiction of Spanish courts is art. 108 § 1 of the UN Convention on the Law of the Sea (UNCLOS), combined with arts. 4 and 17 § 4 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>74</sup> However, this reasoning is far from being convincing. On one hand, the UNCLOS merely mandates all states to “*cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions*” (emphasis added by *author*), but does not impose them to exercise jurisdiction on such offence, while on the other hand, art. 17 § 4 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances subjects any measure undertaken by a state over a foreign vessel in ocean space to authorisation by the flag state and that has not been established here.

## V. Conclusions

In the last year, there has been a clear trend in international state practice to introduce restrictions to the exercise of universal justice. However, LO 1/2014 has taken limitations to universal jurisdiction to new heights by actually removing it from the Spanish legal system. No longer can Spanish criminal courts have jurisdiction over offences committed outside the Spanish territory irrespective of the perpetrator’s or victims’ nationality or any other link with Spain. From now on, other jurisdictional bases – such as (extended) active personality, passive personality, state interests, the effects principle, or the *aut judicare aut dedere* principle – shall instead apply concerning core international crimes and any other internationally defined offences.

Such an approach to jurisdiction over offences committed abroad is worrisome inasmuch as it is a setback in the regulation of universal jurisdiction through general international law. Instead of attempting to adapt the efforts to fight impunity with State sovereignty, Spain refuses to apply universal jurisdiction, thus renouncing participation in the configuration of the content of a customary norm on the issue. What is worst is the argument behind this refusal is to comply with binding legal duties arising from international treaties. The fact that it sounds rather like an alibi evidences the need for an international convention regulating the scope of universal jurisdiction. Moreover, LO 1/2014 is far from being scrupulously consistent: not only does it include offences established by international treaties not yet binding in Spain (counterfeiting of medical products and similar crimes involving threats to public health), but also offences for which

universal jurisdiction is not conventionally provided (genocide), and even offences which are not typified by international treaties whatsoever (terrorism or offences against children’s sexual freedom and indemnity, regulated by EU law) or by international treaties aiming to define the crime (that is the case with crimes against humanity or some war crimes only included in the ICC Statute, which provides for a customary but not a general conventional definition insofar as the Statute is a treaty governing the jurisdiction of the ICC). Concerning the latter, though, the fact that customary typified offences are also included in the law indicates the state conviction that such crimes must fall under its jurisdiction when committed abroad, even if the provided jurisdictional bases virtually exclude universal jurisdiction over them.

Such exclusion has little to do with technical reasons and legal considerations when it comes to offences that are generally State-sponsored. The strict limitations introduced by LO 1/2014 greatly narrow the options for victims to seek justice in Spain, to the extent that even the existence of Spanish victims is no longer a basis to set jurisdiction on core international crimes. The resulting regulation, clearly tailored to the particular features of the Tibet 1 case – that raised strong protests from China –, confirms that diplomatic and political interests have driven the legal reform. On the contrary, the law does not always restrict itself to compulsory grounds of jurisdiction according to international law regarding offences usually committed by non-state actors. Not only can some flexibility to introduce facultative jurisdictional basis be observed: three offences (terrorism, illicit drug trafficking and trafficking in human beings) fall under Spanish jurisdiction on at least two different jurisdictional grounds (three if the offence of organized criminality is also taken into consideration). What seems to be an attempt to provide the Spanish courts with a broad jurisdiction on such offences results though in a tangled and faulty jurisdictional scheme that actually fails to guarantee such jurisdiction, as several decisions on illicit drug trafficking rendered by the AN have already shown.

Moreover, other restrictions operate, in line with the dominant trends in states practice. One is subsidiarity: in case of concurrent jurisdictions the Spanish jurisdiction will always be subsidiary to the one exercised by an international tribunal or either at the *locus delicti commissi* or by the tribunals of the offender’s State of nationality. However, the law articulates subsidiarity in a way that alters the relationship with the ICC by shifting complementarity to primacy. A further restriction affects active legal standing, which is now only granted to the Public Prosecutor and the victims, thus excluding the option of an *actio popularis* concerning these offences. The third restriction, though, goes beyond reasonableness and imposes the dismissal of any on-going case not fulfilling the requirements of the new version of the law. This way, the legal reform intends to wipe away not only any troublesome future claim based on universal jurisdiction, but also past claims that are currently being investigated at the Spanish AN. However, the rough interference in judicial independence that LO 1/2014 entails has been answered by AN investigating judges with decisions leading to results contrary to

<sup>73</sup> See AN (Sala de lo Penal-Pleno), Decision of 6.5.2014 – AAN 21/2014; Decision of 13.5.2014 – AAN 25/2014; Decision of 14.5.2014 – AAN 26/2014; Decision of 9.6.2014 – AAN 31/2014; Decision of 9.6.2014 – AAN 37/2014.

<sup>74</sup> Tribunal Supremo (Sala de lo Penal), Judgment of 24.7.2014 – STS 592/2014, legal ground 5.

those expected. Indeed, although some cases concerning core international crimes have been dismissed, jurisdiction over most of them has been retained. The Constitutional Court will have the last word on whether this legal reform is in conformity with the principle of judicial independence and the victims' right to effective judicial protection. For some of them, though, the door of the Spanish criminal courts has been once again closed, and with it their last hope for justice has vanished.