

## Spain, Universal Jurisdiction over Grave Breaches of the Geneva Conventions

**INTRODUCTORY TEXT:** In 2014, Spain adopted a piece of legislation (LO1/2014) which restricted the scope of the exercise of universal jurisdiction by Spain. The law excluded the possibility of conducting trials *in absentia*, thus limiting the exercise of universal jurisdiction to the circumstance that the suspect is present in the territory of Spain. The Spanish Supreme Court held that the legislation was not unconstitutional. It argued that, although a State is free to start criminal proceedings against individuals who do not find themselves on its territory, no international instrument obliges the State to do so. In the case of grave breaches of the Geneva Conventions, the Court notes that IHL obliges States to prosecute individuals only if they are present in the territory of the State.

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

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### SUPREME COURT, CRIMINAL DIVISION, JUDGMENT NO. 797/2016

[**Sources:** Supreme Court, Criminal Division, Judgment No. 797/2016, Universal Jurisdiction. Article 23, paragraphs 4–6, and the Single Transitional Provision of Act 1/2014 of 13 March, partially reforming the Judiciary Organization Act 6/1985 of 1 July. Judgment of 25 October 2016 does not uphold the assertion of unconstitutionality; available at: <https://supremo.vlex.es/vid/652491549> (unofficial translation, footnotes omitted).]

## LEGAL BASIS

[...]

**[1]** In this case it should be borne in mind that [...] the reform enacted by Act 01/2014 [...] relies on a restricted model of universal jurisdiction, which as a general rule excludes investigation and prosecution *in absentia*, thereby requiring that the accused be Spanish or located in Spain.

This restrictive model [...] rules out Spanish jurisdiction over the cases that have been dismissed [in this case]. As recognized by the Appellant, none of the alleged perpetrators of the crimes of genocide, torture or crimes against humanity tried in these proceedings is Spanish or located in Spain.

[...]

**[2]** Universal jurisdiction means [...] that in accordance with certain international treaties, a State's courts must exercise extraterritorial jurisdiction over certain types of crimes to prevent the perpetrators seeking a place of refuge and enjoying impunity. It does not, however, mean that States are necessarily obliged to extend that jurisdiction to persons who are not located on their territory, or within the scope of their sovereignty, by initiating an investigation *in absentia* into international crimes committed in any part of the world, even if the alleged perpetrators are not within their reach. But States may choose to extend their jurisdiction to those alleged perpetrators if their domestic legislation so provides. The grounds for empowering States to try these crimes lie in the particularly harmful nature of the crimes for the fundamental interests of the international community. This is backed up in international law by international treaties that specifically authorize States to extend their jurisdiction to trying these crimes. These treaties [...] generally establish a clause permitting the exercise of extraterritorial criminal jurisdiction in accordance with domestic legislation, adding that every State must undertake to prosecute such crimes, regardless of where they were committed, when the alleged perpetrator is found on their territory and extradition is not granted [...].

[...]

**[3]** As a result, there has been no violation of treaty law, which means that the first allegation made in this case must be rejected.

[...]

**[4]** We add that the Appellant considers that there is a difference in how grave breaches of the Geneva Convention are treated compared to the other crimes to which universal jurisdiction applies, given that for crimes against protected civilians in armed conflicts the Fourth Geneva Convention states in Article 146 that each State 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", which implies the duty to incorporate the principle of universal jurisdiction, without restriction. [...] Article 146 of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War makes the principle of universal jurisdiction mandatory for the High Contracting Parties inasmuch as it imposes the obligation to try or extradite those responsible for grave

breaches of the Convention, regardless of where the crime was committed and of the nationality of the accused. However, that obligation applies to cases in which the alleged perpetrators are found in the territory of the High Contracting Party, as its substance and purpose is to prevent any of those perpetrators seeking refuge in a High Contracting Party to the Convention. The Convention does not expressly set forth an obligation to extend the search for any of those responsible beyond the borders of the High Contracting Party, anywhere in the world, even when those countries have no connection with the armed conflict in which the breach occurred. An interpretation of the rule according to the strict sense of the words does not give rise to such an obligation; if the intention was to oblige the High Contracting Parties to search for those responsible beyond their territory, in order to bring them to justice in their territory, grammatically speaking the rule should have included an additional verb construction – claim jurisdiction over them or obtain extradition. Between the actions of searching for the perpetrators and bringing them before their own courts, there would have to be another action: extraditing the person located abroad. If the person sought is located in the territory of the High Contracting Party, the search can result in an appearance in court, with no need for extradition, which is what can be deduced from the grammatical construction used in the Convention. Consequently, the expression search for and bring before its own courts must, as per a literal or grammatical interpretation of the rule, refer to searching in the State's own territory. Search for, obtain extradition and bring before its own courts would be the correct formulation if the intention was to establish a general obligation to search in any country of the world, including for non-belligerent countries that have nothing to do with an armed conflict where the crime was allegedly committed.

What the Convention does set forth, as an imperative, is that a High Contracting Party must search for persons alleged to have committed, or to have ordered to be committed, any grave breach, if those persons have taken refuge or are hiding in the country, and must bring them before its own courts, regardless of their nationality and the place where the crime was committed. The rule adds that the High Contracting 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”. This assumes that the alleged perpetrator is in the territory of the High Contracting Party, within its reach, in order to be able to hand them over. A systematic interpretation, taking account of the context of the rule, therefore leads to the same conclusion.

**[5]** In short, it is true that the Geneva Convention, unlike other treaties, establishes an imperative universal jurisdiction system. But it does so insofar as it imposes an obligation on the High Contracting Parties to locate war criminals hiding on their territory and bring them before their courts, exercising extraterritorial jurisdiction in order to try them, regardless of where the crimes took place and of their nationality, solely on the grounds of the nature of the crime. This imperative jurisdiction does not extend to the obligation to search for war criminals beyond their territory, or to claim jurisdiction over them under any circumstances, especially when the obligation to claim jurisdiction over them cannot be complied with and fulfilled simultaneously by all the High Contracting Parties to the Convention. The established regime is one of cooperation between States, not competition. All this is regardless of the fact that a State may choose, in its domestic legislation, to extend its jurisdiction to suspected offenders who are not within its reach. But that broad exercise of its jurisdiction, as adopted in the initial version of our Judiciary Organization Act, is not a requirement imposed by the Geneva Convention.

**[6]** To sum up, the initial version of the Judiciary Organization Act established a system based on absolute,

unconditional universal jurisdiction. But that system [...] is not imperatively and universally imposed by international treaties or by customary international criminal law in general, nor is it imposed specifically by the Geneva Convention for crimes against protected persons and property in armed conflict. Consequently, lawmakers may restrict it [...]

[...]

## JUDGMENT

[...]

[7] In light of the above, [...] this Court has decided to **REJECT THE APPEALS FOR ANNULMENT** on the grounds of breach of constitutional rules and breach of the law [...].

## Discussion

### I. Universal Jurisdiction and the Grave Breaches regime

1. What is universal jurisdiction? What is the difference between the regime of “mandatory universal jurisdiction” for grave breaches under the Geneva Conventions and other regimes which foresee universal jurisdiction for international crimes? What are the details of the regime established over grave breaches in the Geneva Conventions and the First Additional Protocol? What has Additional Protocol I added? Why do you think Additional Protocol II does not contain a similar provision? (GC I, Arts 49 and 50; GC II, Arts 50 and 51; GC III, Arts 129 and 130; GC IV, Arts 146 and 147; P I, Art. 85)
2. (*Paras [2], [4] – [5]*) What is, according to the Court, the object and purpose of the grave breaches regime? If we consider that universal jurisdiction should operate only as a measure of last resort to ensure there are no accountability gaps, what obligations do States have to comply with before universal jurisdiction can be invoked? What obligations do States have with regards to war crimes more generally?
3. Does customary international law establish a mandatory or a permissive universal jurisdiction regime over war crimes? (CIHL Rule 157)
4. Does the obligation to exercise universal jurisdiction over grave breaches established by the Geneva Conventions and Additional Protocol I imply the obligation to enact national law covering such breaches (legislative universal jurisdiction) or the obligation to investigate and try alleged offenders of the relevant acts (adjudicative universal jurisdiction)? Both? Absent a legal basis in its domestic legislation, could Spain exercise adjudicatory universal jurisdiction over grave breaches based directly on international law? Does this depend on the Spanish legal system?
5. (*Para. [2]*) Do you agree with the statement of the Court: “Universal jurisdiction [...] does not, however, mean that States are necessarily obliged to initiate an investigation *in absentia* into international crimes committed in any part of the world, even if the alleged perpetrators are not within their reach”? Why/Why not? Does the lack of jurisdiction by Spain imply that investigative authorities may not begin their investigations as long as the alleged perpetrator is not on Spanish territory, not even in view of arresting and trying him/her once he/she comes to Spain? (GC I-IV, Art. 1; GC I, Art. 49 (2); GC II, Art. 50 (2); GC III, Art. 129 (2); GC IV, Art. 146 (2); P I, Art. 85 (1))

6. (*Para. [5]*) Do you agree with the Court's argument that the imperative system of universal jurisdiction over grave breaches established by the Geneva Conventions does not create an obligation upon High Contracting Parties to search for alleged perpetrators outside of their territory, "to claim jurisdiction over them under any circumstances"? In your opinion, do the grave breaches provisions also imply that Spain should take action when it is in a position to investigate and collect evidence concerning possible grave breaches, even if an alleged perpetrator is not present on its territory or under its jurisdiction? (GC I-IV, Art. 1; GC I, Art. 49 (2); GC II, Art. 50 (2); GC III, Art. 129 (2); GC IV, Art. 146 (2); P I, Art. 85 (1); GC I, Art. 49, Commentary, 2016; GC II, Art. 50, Commentary, 2017)
7. In your opinion, does the limitation on the exercise of universal jurisdiction imposed by the law LO1/2014 unnecessarily restrict the possibility of prosecuting suspected offenders? Can this legislative limitation, if set forth in a clear and precise manner, increase instead the effectiveness and predictability of universal jurisdiction? Can, in your opinion, the condition of the presence of the suspect on the territory of the prosecuting State help overcome the possible challenge of concurrent universal jurisdiction by several States over grave breaches?

## **II. The obligation to prosecute or extradite**

8. (*Paras [4] – [5]*) Is the obligation to prosecute or extradite alleged suspects of grave breaches restricted to the parties on whose territory the suspects are found? Why/Why not? What analysis does the Court carry out to interpret GC IV, Art. 146? Do you agree with the Court's literal interpretation? And with the Court's systemic interpretation of the article? Are these considerations only valid for GC IV? (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; P I, Art. 85)