



UNIVERSAL JURISDICTION

Illari Aragón examines threats to universal jurisdiction within Spain and the effect upon the Tibet case against China in the Spanish National Court

For decades, the Spanish judiciary has been at the vanguard of the use of universal jurisdiction. Since being adopted in 1985, universal jurisdiction has allowed judges to reach across borders and investigate and prosecute human rights atrocities committed around the world. The conviction of an Argentine naval officer for crimes against humanity during the country's 'dirty war' (1976-1983); the prosecution of El Salvador officials for the murder of six Jesuit priests in 1989; and most notably, the detention in London of Chile's former head of state Augusto Pinochet in 1998 for human rights atrocities, demonstrate the Spanish judiciary's proactive role in bringing cases under universal jurisdiction.

Against this precedent, on 27 February 2014, Spain's ruling Popular Party (PP) fast-tracked a bill which severely restricts the scope of universal jurisdiction under Spanish law. With an absolute majority in Congress, the PP voted in favour of the reform bill which introduces a restrictive set of requirements that must be met before Spanish Courts can assert universal jurisdiction in respect to international crimes.

Under the reformed statute, judges will have jurisdiction to investigate and prosecute crimes such as genocide, crimes against humanity and war crimes as long as the suspect is a Spanish national or, in the case of a foreigner, they must be habitually resident in Spain. For cases of torture, victims have to be Spanish nationals or have been granted Spanish citizenship two years prior to the commission of the alleged acts.

For human rights supporters, the reform conflicts with the very essence of universal jurisdiction, which is to ensure accountability for human rights abuses irrespective of where the crime was committed, the nationality of the perpetrator and even of the victim. Most conspicuous is the fact that the reform applies not only to future cases but also to current ones, meaning that all universal jurisdiction cases will be closed until it can be proven that they meet the new requirements.

The bill was passed soon after the Spanish National Court issued an indictment and international arrest warrants for former Chinese president Jiang Zemin and other four senior Chinese officials. They were charged with genocide, crimes against humanity and torture against the Tibetan people during the period of 1971-2005.

Part of the team that brought about the lawsuit – lawyer Dr. José Esteve Moltó and Alan Cantos, director of the Tibet Support Committee (CAT), met with the Bar Human Rights Committee (BHRC) in March 2014 to discuss the case. They were visiting London, and previously visited other European countries, to build support against the reform that will drastically curtail universal jurisdiction in their country. While here, they were also keynote speakers alongside Stephen Kamlisch QC and Kirsty Brimelow QC, Chairwoman of BHRC, in a public meeting on universal jurisdiction co-hosted by the BHRC and Garden Court International, Garden Court Chambers.

In this short article we present a short summary of the case and include impressions shared by Dr. Esteve Moltó and Mr Cantos during their visit to London.

The genocide charges against Chinese leaders

On 10 February 2014, the Spanish court, Audiencia Nacional, issued international warrants against five former members of the Chinese Communist Party leadership, including former president of China Jiang Zemin (1993 to 2003) and former Prime Minister Li Peng (1987-1998) for charges of genocide.

The arrest order asserts that "Jiang Zemin exerted supervisory authority on people who committed the abuses directly, making him responsible for acts of torture and other major human rights abuses perpetrated by their subordinates against the Tibetan population". The order also makes the accusation that he promoted and



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implemented policies aimed at eliminating the specific characteristics and existence of the country of Tibet. Thousands of Tibetans were arrested for long periods of time and detainees were tortured. Forced family planning policies were also in place, which included abortions and mass sterilization campaigns (Juzgado Central de Instrucción N. 002. Audiencia Nacional, 10 February 2014).

By emphasising patterns of repression and elimination of this ethnic group, the Court was addressing the most critical aspect of a genocide case: proving intent. The imputation of genocide was supported by evidence of the systematic repression carried out by the Chinese leaders against the population of Tibet. As noted by Dr Esteve Moltó, "minutes from conversations among members of the Communist Party in Tibet and Beijing indicating a deliberate intention to eliminate the Tibetan people were obtained and included in the lawsuit. There were also substantive reports about the chain of command and other information that for many years was collected and submitted to substantiate such charges".

China considered the indictment as an interference with its domestic affairs. In response to the detention order, the spokesperson for the Chinese Ministry of International Affairs, Hua Chunying, urged the Spanish judiciary to "correct the error so to reverse the negative impact and not to overshadow China-Spain relations." "No country or organization has the right to intervene in domestic affairs of another nation, not to support separatist forces from other countries or undermine international standards", she added. (*El Mundo, China pide a la justicia Española 'que corrija su error' en el caso del Tibet, 12 February 2014*). Following the indictment, at no point was there collaboration with the investigation or a response to the charges through regular judicial channels. For Mr Cantos, what this attitude clearly showed was a firm reluctance to take this court case seriously.

The reform to universal jurisdiction of 28 February 2014

The recent amendment to article 23.4 (universal jurisdiction provision of the 1985 Organic Law of the Judicial Power) marks the second time modifications have been made to universal jurisdiction in Spain. In 2009 limitations were introduced for the first time, setting out that for universal jurisdiction to take place any of these three conditions should be met: i) victims must be Spanish nationals; ii) the alleged perpetrator must be on Spanish soil; and iii) the alleged events present 'a relevant connection with Spain'. While this was considered a setback and a contradiction with a long standing stance against impunity reflected by the scope of the previously 'unlimited' statute, it did not derail the Tibet case. Owing to the fact that one of the complainants, Thubten Wangchen, a Tibetan, is also a Spanish national, the case was able to remain open.

But this year's controversial reform and its retroactive effect will have devastating effects upon the twelve universal jurisdiction cases currently open in Spanish Courts. For many, the move undermines the very purpose, and future, of universal jurisdiction altogether. By requiring that not only the victims, but also the perpetrator, need to be Spanish citizens, or habitual residents in Spain, the amended

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Dr. José Esteve Moltó and Alan Cantos with Takna Jigme Sangpo (left) and monk Palden Gyatso (right), both witnesses in the case.

Dr. José Esteve Moltó and Alan Cantos at a Conference in the University of Westminster, London 28 de February 2014



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law sets out conditions that are impossible to meet. As described by Dr Esteve Moltó, “For the Tibet case, this is simply devastating. None of the Chinese leaders are Spanish nationals nor have they ever been residents in Spain. In fact, none of the other cases meet the new requirements set forth by the amended law, which will lead to their imminent closure. The 2009 reform still permitted cases when Spanish citizens were involved, that was an open window which permitted lawsuits to continue. The new conditions are far too difficult now and make it impossible to bring new cases. This might equate to the end of universal jurisdiction in Spain altogether.” Kirsty Brimelow QC described the new legislation as a deeply concerning backwards step. She said “Universal jurisdiction is an international system under which there is no safe haven for the international criminal who is alleged to have committed the most grievous of crimes. Does Spain want to assist the evasion of justice for such people?”

Furthermore, under the new reform, only public prosecutors will have full competence to bring cases forward, which means that *actione popolare* by interest groups, are no longer possible. Whilst this is similar to the position in England and Wales, for Dr Esteve Moltó, this is also problematic, as in practice all universal jurisdiction cases (and the Tibet case is no exception) have been lodged by victim’s associations and other civil society groups.

Of concern was also the summary procedure (*‘via de urgencia’*) used to pass the bill in the Spanish Congress which prevented a full congressional debate and further consultative procedures from taking place. The State’s Counsel and the General Counsel of the Judicial Power for example, were not able to comment on the legality of the bill, its compatibility with international law or other implications. For Mr Cantos, such a swift procedure clearly reflected the existence of diplomatic pressure, “we all witnessed a Chinese delegation coming to Congress in Spain to request the closure of the case. The authorities will never admit it, but the interference was obvious. Once



the reform passed the only explanation given by PP representatives who defended the reform was that the change was needed in order to avoid diplomatic incidents.”

A chance to overturn the reform

Plans to challenge the reform are underway. On 4 March, the Partido Socialista Obrero Espanol (PSOE) announced their decision to challenge the reform before the Constitutional Court. Referring to the norm as a ‘legislative outrage’ that violates the right to effective judicial protection, the PSOE agreed to present a motion of unconstitutionality against it.

International support

At the news of the PSOE appeal to challenge the reform before the Constitutional Court, the BHRC, Garden Court International (Garden Court Chambers), Red Lion Chambers and Doughty Street Chambers International Criminal Law Team released a public letter welcoming this positive step.

We consider that universal jurisdiction is there to bring justice where victims are not able to find it. While universal jurisdiction is generally available in other European jurisdictions, it is limited by distinct sets of conditions that restrict its reach and thus the ability of victims to access courts. The Spanish judiciary has been at the forefront of its use for a long time and its power to exert it should not be dismantled. ●

For information about how to join the BHRC visit www.barhumanrights.org.uk or e-mail us to coordination@barhumanrights.org.uk.



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