

Translated from Spanish

Ministry of Foreign Affairs and Cooperation

Office of the Undersecretary for
Foreign Affairs and Cooperation
International Legal Advisory Unit

Madrid, 15 January 2016

Contribution of Spain on the topic “Immunity of State officials from foreign criminal jurisdiction”

In response to the International Law Commission’s request to be “ provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction”, Spain wishes to make the following contribution.

(a) Spanish legislation related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction

Organic Law No. 16/2015 on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain was adopted on 27 October 2015 (State Official Gazette No. 258 of 28 October 2015).

Title II of that Law, which entered into force 20 days after its official publication, is entitled “Privileges and immunities of foreign Heads of State, Heads of Government and Ministers for Foreign Affairs (articles 21-29), and comprises three chapters: chapter I addresses the “inviolability and immunities of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs” (articles 21-22); chapter II deals with the immunities of former Heads of State, former Heads of Government and former Ministers for Foreign Affairs” (articles 23-25); and chapter III contains “common provisions” (articles 26-29).

Under the Law, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs of third countries enjoy absolute, immunity from jurisdiction of all kinds (not only criminal), without limits or exceptions. That immunity covers judicial proceedings

arising from both their official and their private acts; it also covers acts performed before their entry into office and not only those performed while they are in office.

After their term of office has ended, Heads of State, Heads of Government and Ministers for Foreign Affairs continue to enjoy criminal immunity only in regard to acts performed in an official capacity while in office, as determined by international law. The Law states that, in all cases, the crimes of genocide, enforced disappearance, war crimes and crimes against humanity are excluded from that immunity.

Conversely, those former holders of high-ranking office cannot invoke immunity in Spanish courts in proceedings arising from acts that were not performed in an official capacity while they were in office, or from acts performed prior to their entry into office. Former Heads of State, former Heads of Government and former Ministers for Foreign Affairs are not granted immunity in non-criminal cases falling under the exceptions set forth in articles 9 to 16 of the Law, related to immunity from jurisdiction of foreign States, in line with those provided for in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 (articles 10-17).

The common provisions of chapter III introduce the principle of reciprocity in the application of the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs. They also indicate that a foreign State might waive the immunity from jurisdiction of these holders of high-ranking office, a waiver that once made cannot be revoked, and that shall not be considered as constituting an implied waiver of immunity from execution, and which, in principle, must be express; nonetheless, if such persons should initiate legal action, they cannot subsequently invoke immunity from jurisdiction over any counterclaim directly linked to their claim. Lastly, the Law provides that its provisions shall not affect the international obligations assumed by Spain with regard to the prosecution of international crimes, nor its commitment related to the International Criminal Court.

Title II of Organic Law 16/2015 is reproduced below to enable the International Law Commission to examine it in detail.

“Title II

Privileges and immunities of Heads of State, Heads of Government and Ministers for Foreign Affairs of foreign States

Chapter I

Inviolability and immunities of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs

Article 21. Inviolability

1. The persons of foreign Heads of State, Heads of Government and Ministers for Foreign Affairs shall be inviolable when in the territory of Spain, during their entire term of office, irrespective of whether they are on official mission or visiting in a private capacity. They shall not be liable to any form of detention and they shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on their person, freedom or dignity.
2. The inviolability referred to in the previous paragraph extends to their residence in Spain, their correspondence and property and, where applicable, the means of transport they employ.

Article 22. Immunity from jurisdiction and execution

1. The persons referred to in this chapter shall enjoy immunity from jurisdiction and execution in all Spanish courts during their entire term of office, irrespective of whether they are in Spain or abroad. If they are in Spain, the immunity shall extend to both official and private visits, irrespective of whether the judicial actions are related to acts performed in an official or private capacity, and irrespective of whether they are related to acts performed before their entry into office or while they are in office.
2. They shall not be liable to give evidence in cases heard by Spanish courts.

Chapter II

Immunities of former Heads of State, former Heads of Government and former Ministers for Foreign Affairs

Article 23. Continuation of immunity in respect of official acts performed while in office

1. After their term of office has ended, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs shall continue to enjoy criminal

immunity only in regard to acts performed in an official capacity while in office, as determined by international law. In all cases, the crimes of genocide, enforced disappearance, war crimes and crimes against humanity shall be excluded from that immunity.

2. In addition, they shall continue to enjoy civil, labour, administrative, mercantile and tax immunity only in regard to acts performed in an official capacity while in office, subject to the exceptions provided for in articles 9 to 16.

Article 24. Jurisdiction over acts performed in a private capacity while in office

After their term of office has ended, the persons referred to in this chapter shall not be precluded from invoking immunity from jurisdiction and execution in Spanish courts for acts not performed in an official capacity while in office.

Article 25. Jurisdiction over acts performed prior to entry into office

After their term of office has ended, the persons referred to in this chapter shall not be precluded from invoking immunity from jurisdiction and execution in Spanish courts for acts performed before their entry into office.

Chapter III. Common provisions

Article 26. Reciprocity in the application of the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs

Unless precluded by international law, the immunity of current or former Heads of State, Heads of Government and Ministers for Foreign Affairs or of former holders of those offices may be denied or limited based on the principle of reciprocity.

Article 27. Waiver of the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs

1. A foreign State may waive the immunity from jurisdiction before Spanish courts of its current or former Head of State, Head of Government or Minister for Foreign Affairs.
2. The waiver shall be always express.

3. If persons who enjoy immunity, in accordance with the present title, should initiate proceedings, they cannot invoke immunity from jurisdiction over a counterclaim directly related to the principal claim.

4. A waiver of immunity from jurisdiction shall not imply a waiver of immunity from execution, which shall require a separate express waiver.

Article 28. The waiver of the foreign State referred to in the previous article shall not be revoked once proceedings have been initiated in a Spanish court.

Article 29. International crimes

The provisions of the present title shall not affect the international obligations assumed by Spain regarding the prosecution of international crimes, nor its commitments to the International Criminal Court.”

(b) Practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction

Spanish courts readily recognize the immunity from criminal jurisdiction of Heads of State, Heads of Government and Ministers for Foreign Affairs as a norm of general international law in cases revolving around universal jurisdiction and the jurisdiction of national courts. None of the claims against incumbent Heads of State for international crimes brought before Spanish courts, in exercise of universal jurisdiction as set forth in article 23.4 of Organic Law 6/1985, of 1 July concerning the judiciary, were successful. The claims, were rejected by the Audiencia Nacional (National High Court), which ruled that the Heads of State enjoyed absolute criminal immunity owing to their office (Central Court No. 5, decision of 23 December 1998, in the case against Teodoro Obiang Nguema, President of the Republic of Equatorial Guinea, and King Hassan II of Morocco; Central Court No. 2, Criminal Division, decisions of 19 November 1998, 4 March 1999, and decision of 4 November 2005, in the case against Fidel Castro, President of Cuba; Central Court No. 4, decision of 24 March 2003, in the case against Hugo Chávez, President of the Bolivarian Republic of Venezuela; Central Court No. 1, decision of 25 October 1999, in the case against Slobodan Milošević, President of Serbia; and Central Court No. 1, decision of 15 June 2001, in the case against Alberto Fujimori, President of Peru). Similarly, the National High Court dismissed the case against Paul Kagame, President of Rwanda, though it did admit the case against

40 Rwandan military officers for the crimes of genocide and crimes against humanity (Central Court No. 4, decision of 6 February 2008).

By all indications, Spanish courts would not grant immunity to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs for acts that amount to crimes under international law. Indeed, in cases involving the prosecution of any of these former State representatives accused of such conduct, Spanish courts have studied the question of extraterritorial jurisdiction, without even considering the possibility of immunity for the accused. References worth noting in this connection include the well-known Pinochet case and the matter of Guatemala, in which the Supreme Court granted Spanish courts limited extraterritorial jurisdiction to prosecute the torture committed during the dictatorship in those countries, despite the fact that the accused included former Heads of Government Efraín Ríos Mont and Óscar Humberto Mejías Vítores, and former President Lucas Garcu (Administrative Division, decision of 25 February 2003). Recently, the National High Court was more explicit in the matter of Tibet, in which it agreed to extend the claim for crimes of genocide to the former President of the People's Republic of China, Hu Jintao, considering that "the reports [submitted by the claimants] conclude that the Chinese President bore some responsibility for the repression perpetrated against Tibet from the time he came to power in 2003 until recently, because he was the highest-ranking person both in the party and in the Government and, before that, on the dates when there was repression in 1988 and subsequently, because he was the head of the party in the region of Tibet", and that the decision was being issued "after his diplomatic immunity had expired" (Central Court No. 2, decision of 9 October 2013). The case was ultimately dismissed and closed by the National High Court, not owing to considerations linked to immunity, but to the scope of the jurisdiction of Spanish courts (Criminal Division, decision of 2 July 2014, upheld by the Supreme Court, which dismissed the appeal – Criminal Division, decision of 6 May 2015).
